IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-DR-01072-SCT

ROGER LEE GILLETT

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	11/05/2007
TRIAL JUDGE:	HON. ROBERT B. HELFRICH
COURT FROM WHICH APPEALED:	FORREST COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF CAPITAL POST-CONVICTION COUNSEL BY: GLENN S. SWARTZFAGER SCOTT A. JOHNSON
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: JEFFREY A. KLINGFUSS
NATURE OF THE CASE:	CIVIL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	POST-CONVICTION COLLATERAL RELIEF IS GRANTED IN PART AND DENIED IN PART. THE SENTENCES OF DEATH ARE VACATED, AND THE CASE IS REMANDED TO THE CIRCUIT COURT OF FORREST COUNTY FOR A NEW SENTENCING HEARING - 06/12/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LAMAR, JUSTICE, FOR THE COURT:

¶1. Roger Gillett was convicted of two counts of capital murder and sentenced to death on each. This Court affirmed his convictions and sentences on direct appeal in ***Gillett v. State***, 56 So. 3d 469 (Miss. 2010), *cert. denied,* 132 S. Ct. 844, 181 L. Ed. 2d 552 (2011).

Gillett now petitions for post-conviction relief, seeking permission to proceed in the trial court. Gillett raises six issues, which we have organized as follows:

(1) The underlying capital-murder aggravator of robbery was improperly expanded;

(2) Conviction of capital murder under the "continuous-action doctrine" was unconstitutional, as Gillett was not given required fair notice;

(3) Gillett's trial counsel were ineffective in failing to investigate Gillett's background and to present an adequate mitigation case;

(4) Gillett's trial counsel were ineffective in failing to object to prosecutorial misconduct during the sentencing portion of his trial;

(5) Gillett's due-process rights were violated when the Mississippi Supreme Court reweighed the aggravating and mitigating factors; and,

(6) Cumulative error.

¶2. This Court requested supplemental briefing from the parties on various issues related to Gillett's sentencing and heard oral arguments. We find that issues one and two are without merit and will be addressed in Part I of this opinion; however, we find that, under issue five, Gillett's due-process rights were abridged in sentencing, which will be addressed in Part II of this opinion. Therefore, we grant Gillett's petition in part and deny in part, vacate his sentences of death, and remand this case to the circuit court for a new sentencing hearing. Because issue five is dispositive, requiring reversal of Gillett's sentences, we do not discuss his other claims raised in issues three, four, and six related to the sentencing phase of his trial.

¶3. Gillett, along with his codefendant Lisa Chamberlin, killed Vernon Hulett and Linda Heintzelman in Mississippi.[1] Gillett and Chamberlin then drove Heintzelman's truck to Kansas, with the dismembered bodies of their victims stuffed in a freezer in the back of the truck. Gillett was arrested in Kansas. While he was awaiting extradition to Mississippi, Gillett was convicted of aggravated escape.[2] After he was returned to Mississippi, Gillett was tried and convicted of two counts of capital murder. The capital-murder convictions were based on an underlying robbery. The jury found four aggravating factors,[3] including that Gillett previously had been convicted of a felony involving the use of threat or violence to the person, based on his conviction for aggravated escape in Kansas. The jury found that the mitigation evidence presented during the sentencing phase did not outweigh the aggravating factors and sentenced Gillett to death.

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[1]A detailed account of the crimes and procedural history is found at ***Gillett***, 56 So. 3d at 476.

[2]Gillett pleaded guilty to attempted escape from custody in the District Court of Ellis County, Kansas, under Kansas Statutes Section 21-3810, *repealed by* Laws 2010, Ch. 136, § 307(eff. July 1, 2011). ***Gillett,*** 56 So. 3d at 506. Section 21-3810 provided that "aggravated escape from custody is: (a) Escaping while held in lawful custody (1) upon a charge or conviction of a felony . . . or (b) Escaping effected or facilitated by the use of violence or the threat of violence against any person while held in lawful custody (1) on a charge or conviction of any crime . . . ." ***Id.***

[3]The four aggravators were as follows: (1) the capital offense was committed while the defendant was engaged in or was an accomplice in the commission of or an attempt or flight after committing or attempting to commit a robbery; (2) the capital offense was heinous, atrocious, or cruel; (3) the capital offense was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the defendant was previously convicted of a felony involving the use of or threat of violence to the person. ***Id.*** at 479 n.6.

STANDARD OF REVIEW

¶4. Post-conviction-relief proceedings have become "part of the death penalty appeal process."[4] "The standard of review for capital convictions and sentences is 'one of "heightened scrutiny" under which all bona fide doubts are resolved in favor of the accused.'"[5] "What may be harmless error in a case with less at stake becomes reversible error when the penalty is death."[6]

I.

¶5. Gillett argues that the trial court erred in giving Jury Instructions S-5 and S-6, because the instructions improperly expanded the underlying aggravating factor of robbery in that they did not define "intervening time" or "continuous chain of events," and that his trial counsel was ineffective for not raising this issue at trial or on direct appeal. Gillett further argues that the trial court erred in allowing Jury Instructions S-5 and S-6 because they violated the Due Process Clause of the Fourteenth Amendment by allowing the jury to find Gillett committed robbery at the time of the murders based on a "continuous chain of events" without giving him sufficient notice, and that his trial counsel was ineffective for not raising this issue at trial or on direct appeal.

¶6. On direct appeal, we addressed Gillett's claim that the trial court erred in allowing Jury Instructions S-5 and S-6 because they did not require the jury to find that Gillett had the

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[4] ***Chamberlin v. State***, 55 So. 3d 1046, 1049 (Miss. 2010) (citing ***Jackson v. State***, 732 So. 2d 187, 190 (Miss. 1999)).

[5] ***Chamberlin***, 55 So. 3d at 1049-50 (quoting ***Flowers v. State***, 773 So. 2d 309, 317 (Miss. 2000)) (citations omitted).

[6] ***Chamberlin***, 55 So. 3d at 1050 (citation omitted).

intent to commit robbery before the murders occurred.[7] We also addressed whether the jury was instructed improperly on the theory of "one continuous chain of events."[8] We explained that intent to rob may be inferred from facts surrounding the crime and that "Mississippi follows the 'one-continuous-transaction rationale' in capital cases" such that "the crime of capital murder is sustained" where "the two crimes [e.g., murder and robbery] are connected in a chain of events and occur as part of the res gestae."[9] Therefore, we concluded that Jury Instructions S-5 and S-6 were properly given.[10]

¶7. Gillett's argument that the trial court erred in allowing the underlying felony of robbery to be expanded is barred by *res judicata*, as this claim was raised and addressed on direct appeal.[11] Additionally, Gillett cannot relitigate these claims under the guise of ineffective assistance of counsel.[12] Furthermore, this argument again challenges the propriety of Jury Instructions S-5 and S-6, already addressed on direct appeal. As we previously determined that these instructions were proper, any failure to raise this issue on direct appeal

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[7] ***Gillett***, 56 So. 3d at 491-93.

[8] ***Id.***

[9] ***Id.*** at 492 (citation omitted).

[10] ***Id.*** at 493.

[11] ***Rideout v. State***, 496 So. 2d 667, 668 (Miss. 1986).

[12] ***Jordan v. State***, 912 So. 2d 800, 813 (Miss. 2005).

does not constitute ineffective assistance of counsel.[13] These assignments of error are without merit.

II.

¶8. On direct appeal, Gillett argued that the trial court erred in allowing the jury to consider whether he was previously convicted of a felony involving the threat or use of violence. This Court unanimously determined that the "previous-violent-felony" aggravating factor based on Gillett's Kansas conviction for escape was an invalid aggravator and should not have been presented to the jury. Because not every escape can be considered a crime of violence under the Kansas statute and "[t]he facts surrounding and supporting the Kansas conviction for attempted aggravated escape are unknown," we found that the State failed to present "sufficient evidence to support the 'previous violent felony' jury instruction."[14] This Court then concluded that the mitigating evidence presented "[did] not outweigh the remaining three aggravating circumstances—'avoiding arrest,' 'especially heinous capital offense,' and 'felony murder'—all of which are supported by the evidence. Therefore, the inclusion of the invalid 'previous violent felony' aggravator was harmless error."[15] Gillett argued in his motion for rehearing and now argues in his post-conviction petition that this Court's reweighing violates his due-process rights under the United States and Mississippi

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[13] ***Jordan***, 912 So. 2d at 813 (holding that defendant could not demonstrate that counsel's performance caused prejudice to his defense for not objecting to jury instructions that this Court found to be proper).

[14] ***Gillett***, 56 So. 3d at 507-08.

[15] ***Gillett***, 56 So. 3d at 508.

Constitutions, citing ***Brown v. Sanders***, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

¶9. The State makes a compelling argument that this issue is procedurally barred as *res judicata,* claiming that this Court addressed it on direct appeal, and that Gillett unsuccessfully challenged the Court's "reweighing" in his motion for rehearing. We first address the State's argument.

Res Judicata

¶10. Specifically, the State argues that this issue is barred under Mississippi Code Section 99-39-21(3) (Rev. 2007), part of Mississippi's Uniform Post-Conviction Collateral Relief Act ("UPCCRA"), which provides that "the doctrine of *res judicata* shall apply to all issues, both factual and legal, decided at trial and on direct appeal." But, contrary to the State's argument, Gillett could not assign error to this Court's "reweighing" until this Court determined one aggravator to be invalid and engaged in the reweighing of aggravating and mitigating factors. Gillett could not have raised this assignment of error on direct appeal.

¶11. Furthermore, this Court has specifically "recognized [an] exception[] to procedural bars for claims asserting . . . denial of due process at sentencing."[16] Gillett argues that he was denied due process in sentencing, and, therefore, under ***Rowland II***, his claim is not time-barred nor barred by *res judicata*. As such, we will consider this issue.

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[16]***Rowland v. State ("Rowland II")***, 98 So. 3d 1032, 1036 (Miss. 2012) (citing ***Kennedy v. State***, 732 So. 2d 184, 186-87 (Miss. 1999)).

Gillett's argument

¶12. Gillett argues that his death sentences must be vacated because otherwise inadmissable evidence was put before his sentencing jury in support of the invalid aggravating factor, citing the U.S. Supreme Court's decision in ***Brown v. Sanders***, 546 U.S. 212. There is no dispute that Gillett's sentencing jury heard damaging evidence – not otherwise admissible – that he had been convicted of the felony crime of escape and, significantly, the jurors were instructed that it could be considered as a violent felony and weighed with other aggravating factors in sentencing. Gillett argues that this is a constitutional error that cannot be cured by harmless-error analysis or reweighing. Rather, he argues that ***Brown*** mandates reversal of his death sentence.

¶13. Indeed, in ***Brown***, the Supreme Court said that, in situations in which an invalidated aggravator "allowed the sentencer to consider evidence that would otherwise not have been before it, due process would mandate reversal . . . ."[17] Reversal is required because, when a jury weighs an invalid factor in its decision, "skewing will occur, and give rise to constitutional error" if the jury "could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor."[18] But, prior to ***Brown***, the Supreme Court also had held explicitly in ***Clemons v. Mississippi***, 494 U.S. 739, 754, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), that an appellate court could constitutionally cure an error caused by an invalidated aggravator *either* by reweighing the aggravating and

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[17] ***Brown***, 546 U.S. at 221.

[18] ***Stringer v. Black***, 503 U.S. 222, 232, 112 S.Ct 1130, 117 L. Ed. 2d 367 (1992).

mitigating evidence *or* by performing a constitutional harmless-error analysis.[19] We find nothing in ***Brown*** that would overrule ***Clemons***.

¶14. Admittedly ***Brown***'s language leaves ambiguity as to whether it applies to both "weighing" states, such as Mississippi, or only to the "nonweighing" states that ***Brown*** specifically addressed.[20] But, regardless of whether ***Brown*** has application to weighing states, we read ***Brown*** to hold nonweighing states to the same directives that previously had applied to weighing states – that is, when the invalidated aggravator introduces evidence to the jury that it otherwise would not have considered, the sentence is unconstitutional, and due process requires reversal ***unless*** the appellate court either reweighs the aggravating and mitigating factors or finds harmless error beyond a reasonable doubt. In other words, "***Brown*** . . . deals only with the threshold matter of deciding when constitutional error has resulted from reliance on invalid aggravators, not with how appellate courts can remedy the error short of resentencing."[21] We reject Gillett's argument that the introduction of evidence in support of the invalid aggravating factor *automatically* mandates reversal.

Amendment to Mississippi Code Section 99-19-105

¶15. In 1994, the Mississippi Legislature amended Section 99-19-105 to provide:

> Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining

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[19] ***Clemons***, 494 U.S. at 754. *See also* ***Stringer***, 503 U.S. at 232.

[20] In a "weighing" state, the only aggravating factors that the sentencer is permitted to consider are the specified eligibility factors. In a "nonweighing" state, the sentencer is permitted to consider aggravating factors different from or in addition to the eligibility factors. ***Brown***, 546 U.S. at 217.

[21] ***Jennings v. McDonough***, 490 F.3d 1230, 1256 (11th Cir. 2007)

> aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.[22]

¶16. This amendment followed pronouncements from this Court that it was without statutory authority to reweigh aggravating and mitigating circumstances or to perform a harmless-error analysis because "[f]inding aggravating and mitigating circumstances, weighing them, and ultimately imposing a death sentence are, by statute, left to a properly instructed jury."[23]

¶17. As a preliminary matter, we note that reweighing of aggravating and mitigating circumstances is a separate and distinct endeavor from determining whether the inclusion of an invalid aggravator was harmless error. Performing harmless-error review is commonplace in appellate courts, and when conducting a harmless-error review, the Court begins with the jury's verdict. The Court's analysis focuses on whether the jury's verdict can be upheld despite the error. The well-settled standard for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[24]

¶18. On the other hand, when reweighing aggravating and mitigating evidence, the Court does not begin with the jury's verdict. Rather, the Court takes the place of the sentencer and reaches its own independent conclusion based on the properly introduced evidence and the

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[22]Miss. Code Ann. § 99-19-105 (Rev. 2007).

[23]*See* ***Clemons v. State***, 593 So. 2d 1004, 1006 (Miss. 1992). *See also* ***Wilcher v. State***, 635 So. 2d 789, 791 (Miss. 1993) (finding that Court was prohibited from reweighing aggravating and mitigating circumstances by state statute).

[24]***Chapman v. California***, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

aggravating factors which have been found unanimously by the jury. In other words, harmless-error review involves deference to the jury's findings, an analysis of whether the error contributed to the jury's verdict, and ultimately whether the jury's verdict may be upheld despite the error. Conversely, reweighing involves an entirely new analysis in which the Court carefully considers the evidence supporting the aggravating and mitigating factors and substitutes its own judgment for that of the jury.[25]

Harmless-Error Analysis

¶19. On direct appeal, the State argued that the prior violent felony aggravator was properly before the jury. It did not argue that the Court should engage in harmless-error analysis or reweighing of aggravators. But even so, this Court affirmed the jury's sentences of death because we *sua sponte* found the inclusion of the invalid aggravator to be harmless error. In doing so, we relieved the State of its burden to prove harmlessness of the error beyond a reasonable doubt.[26] "Constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless."[27] However, on review, we acknowledge that we granted relief not sought and conclude that we did not apply the correct standard of review or sufficiently scrutinize the effect the invalid aggravator had on the sentencing process.

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[25]*See* ***Clemons v. Mississippi***, 494 U.S. 738, 762, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) (Brennan, J., concurring in part and dissenting in part).

[26]*See* ***Smith v. State***, 986 So. 2d 290, 300 (Miss. 2008) (citing ***Arizona v. Fulminante***, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

[27]***Chapman***, 386 U.S. at 24.

¶20. The Supreme Court has held that, in a "weighing" state such as Mississippi, in which the sentencing body is:

> told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless error analysis or re-weighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence [as required by the Eighth Amendment].[28]

¶21. The U.S. Supreme Court additionally requires "close appellate scrutiny of the import and effect of invalid aggravating factors" in order to meet the well-established constitutional requirement of "individualized sentencing determinations in death penalty cases."[29] The Supreme Court has made clear that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt."[30] In other words, we must be able to say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[31]

¶22. On direct appeal, this Court did not find that the error was harmless *beyond a reasonable doubt,* and, after carefully considering the record, we are unable to reach such a conclusion today. We have determined that the jury was erroneously instructed to consider an invalid aggravator, which allowed the introduction of evidence not otherwise admissible, *i.e.*, the conviction for aggravated escape in Kansas. Evidence of this prior conviction was

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[28] ***Stringer***, 503 U.S. at 232.

[29] ***Stringer***, 503 U.S. at 229.

[30] ***Chapman***, 386 U.S. at 23-24.

[31] ***Id***.

admitted only because of its relevance to the "previous-violent-felony" aggravator. Absent that aggravator, the evidence would not have been relevant or admissible before the sentencing jury. In fact, Gillett's conviction for escape in Kansas was the only additional proof presented by the State during the sentencing phase. And, in final summation before the jury, the State reviewed the aggravating factors, telling the jury "the one that bothers me the most is the fourth one, and that's the attempted aggravated escape from custody." Although three other aggravators were properly before the jury, it is impossible for us to say what weight the jury gave to the "previous-violent-felony" aggravator. Stated differently, we cannot say that the invalid aggravator did not contribute to the death sentence obtained. Certainly, we cannot say so beyond a reasonable doubt. Indeed, it is possible that "the jury's belief that petitioner had been convicted of [aggravated escape] would be 'decisive' in the 'choice between a life sentence and a death sentence.'"[32] Because we cannot definitively say "what the sentencer would have done absent"[33] the instruction that Gillett had been convicted of a previous violent felony, we simply are unable to say beyond a reasonable doubt that the introduction of evidence in support of the invalid aggravator was harmless error.

Reweighing

¶23. Furthermore, while we acknowledge that Mississippi Code Section 99-19-105(3)(d) gives us statutory authority to determine whether the remaining aggravators are outweighed

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[32] ***Johnson v. Mississippi***, 486 U.S. 578, 586, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) (citation omitted).

[33] ***Stringer***, 503 U.S. at 230-31 ("in order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor").

by the mitigating circumstances, we decline to do so in this case. Although the U.S. Supreme Court in ***Clemons*** held that "the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review," the Court was careful to emphasize that its opinion should not be read to "convey the impression that state appellate courts are required to or necessarily should engage in reweighing . . . when errors have occurred in a capital sentencing proceeding."[34] Indeed, the Supreme Court recognized that in "some situations, a state appellate court may conclude that peculiarities in a case make an appellate re-weighing . . . extremely speculative or impossible."[35]

¶24. The Supreme Court further recognized that "appellate courts may face difficulties in determining sentencing questions in the first instance."[36] We reiterate that "our capacity [to be fact-finders] is limited in that we have only a cold, printed record to review."[37] In ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the Supreme Court recognized that the decision of whether death is an appropriate sentence often turns on "intangibles" not apparent from the written record:

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[34]***Clemons***, 494 U.S. at 741, 754.

[35]***Id.*** at 754.

[36]***Id.*** (citations omitted).

[37]***Gavin v. State***, 473 So. 2d 952, 955 (1985). *See also* ***Clemons***, 494 U. S. at 766-72 (Brennan, J., concurring in part and dissenting in part) (noting that the Mississippi Supreme Court has stated repeatedly that it lacks the institutional competence to sentence as an initial matter, and arguing that an appellate court is "ill suited to undertake the task of capital sentencing" and should not engage in reweighing).

> [A]n appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that the consideration would occur among the sentencers who were present to hear the evidence and arguments and see the witnesses.[38]

¶25. In addition to the difficulties we confront in giving appropriate weight and credibility to evidence and witnesses which we encounter only on the pages of a written record, we are struck by the glaring inconsistency between our longstanding sentencing scheme, which allows a death sentence to be imposed only by a unanimous jury, and the legislative directive that a mere majority of this Court can reweigh evidence and impose a death sentence. In ***Woodward v. State***, decided three years after the amendment to Section 99-19-105, this Court again reaffirmed its longstanding recognition that "[t]he right to a jury determination of the penalty of death is a substantial substantive right long held in this State."[39] For the foregoing reasons, we find that we are not in the best position to sentence Gillett as an initial matter, and we decline to do so.

¶26. Gillett's due-process rights were violated when the jury was allowed to consider an invalid aggravator supported by evidence that was not otherwise admissible, and this error was compounded when this Court affirmed his sentence. Because we do not find that the

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[38] ***Caldwell***, 472 U.S. at 330-31 (citations omitted).

[39] ***Woodward v. State***, 726 So. 2d 524, 542 (Miss. 1997) (quoting ***King v. State***, 656 So. 2d 1168, 1173 (Miss. 1995)).

constitutional error at the trial-court level was harmless beyond a reasonable doubt, and because we decline to reweigh the aggravators and mitigating evidence, we vacate Gillett's sentences of death and remand this case to the trial court for a new sentencing hearing. As this issue is dispositive on the issue of sentencing, we do not address Gillett's remaining claims.

CONCLUSION

¶27. For the foregoing reasons, Gillett's petition for leave to proceed in the trial court is denied in part and granted in part. Gillett's sentences are vacated, and this case is remanded to the Circuit Court of Forrest County for a new sentencing hearing on two counts of capital murder consistent with this opinion.

¶28. **POST-CONVICTION COLLATERAL RELIEF IS GRANTED IN PART AND DENIED IN PART. THE SENTENCES OF DEATH ARE VACATED, AND THE CASE IS REMANDED TO THE CIRCUIT COURT OF FORREST COUNTY FOR A NEW SENTENCING HEARING.**

PART I: WALLER, C.J., DICKINSON AND RANDOLPH, P.JJ., CHANDLER, PIERCE AND COLEMAN, JJ., CONCUR.

PART II: WALLER, C.J., AND COLEMAN, J., CONCUR. KITCHENS, J., CONCURS IN PART AND IN RESULT. KING, J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION.

DICKINSON, P.J., SPECIALLY CONCURS WITH PART II WITH SEPARATE WRITTEN OPINION JOINED IN PART BY KITCHENS, KING AND COLEMAN, JJ.

RANDOLPH, P.J., CONCURS WITH PART I AND DISSENTS WITH PART II WITH SEPARATE WRITTEN OPINION JOINED BY PIERCE AND CHANDLER, JJ.; WALLER, C.J., JOINS IN PART.

KITCHENS, J., CONCURS IN PART AND IN RESULT WITH PART II AND DISSENTS WITH PART I WITH SEPARATE WRITTEN OPINION JOINED BY KING, J.

PIERCE, J., CONCURS WITH PART I AND DISSENTS WITH PART II WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH, P.J., AND CHANDLER, J.; WALLER, C.J., JOINS IN PART.

DICKINSON, PRESIDING JUSTICE, SPECIALLY CONCURRING:

¶29. During the penalty phase of a death-penalty case, the jury makes its decision by considering evidence the trial judge allows it to hear. And when, as in this case, the jury imposes the death penalty after considering evidence this Court later determines to have been inadmissible, all agree this was error. We must then determine whether the trial court's decision to allow the jury to hear inadmissible evidence was – beyond a reasonable doubt – harmless error.

¶30. I agree that some minor point of evidence, improperly admitted, may be harmless. But the error of allowing a jury to hear evidence of a statutory aggravating factor can never be harmless beyond a reasonable doubt, which is the required standard.[40]

¶31. While I do not question the sincerity of those who hold a different view, I simply do not agree with them. Our Founders placed a special significance on the role of the jury. It is up to the Legislature, within constitutional limitations, to decide whether Mississippi shall have a death penalty and what conduct may justify its imposition. But it is the jury's prerogative, not ours, to impose it – or not.

¶32. At the time of Gillett's trial and conviction, there were eight – and only eight – aggravating factors that could lead to the death penalty.[41] Then, as it is now, the Legislature

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[40] *See* ***Stringer v. Black***, 503 U.S. 222, 232, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

[41] *See* Miss. Code Ann. § 99-19-101 (5) (Rev. 2007). The Legislature has recently added two additional aggravating factors, though not applicable in this case. *See* Miss. Code

required proof of at least one of those eight factors.[42] And when a jury imposes a sentence of death, it is our duty to decide whether the trial court erroneously allowed the State to introduce evidence of one or more of those eight aggravating factors that the jury should not have considered in making its decision. When we find that the jury did consider an inadmissible aggravating factor, we must – in my view – reverse and remand for a new sentencing trial.

¶33. When a jury weighs aggravating and mitigating evidence, it is neither a mathematical exercise nor a legal calculation. Jurors who have attended the trial, heard the witnesses, and seen the evidence, must apply their combined sense of fairness, the need for mercy, and their sense of the law; and they must filter it all through their sense of justice. It is true that the United States Supreme Court has held that the United States Constitution does not ***prohibit*** state courts from reweighing the evidence in death-penalty cases.[43] But that holding does not pretend to establish this Court's responsibilities under state law.

¶34. Those who believe we may and should reweigh the aggravating factors seek refuge in Section 99-19-105,[44] a statute I believe to be unconstitutional. Deciding a case on appeal is purely a judicial function. So, in my view, the Legislature unconstitutionally trespassed on judicial territory when it passed Section 99-19-105, a procedural statute that, among other

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Ann. § 99-19-101(5) (Supp. 2013).

[42] *See* Miss. Code Ann. § 99-19-101(3).

[43] *See* ***Clemons v. Mississippi***, 494 U.S. 739, 754, 110 S. Ct. 1441, 108 l. Ed. 2d 725 (1990).

[44] *See* Miss Code Ann. § 99-19-105 (Rev. 2007).

things: (1) sets the formatting for pleadings to be filed, (2) sets a timetable for the circuit clerks, (3) sets the briefing schedules for the lawyers, and (4) sets the procedure for service of the pleadings and briefs on counsel.

¶35. But the particular constitutional problem with the statute as applied to today's case is that it directs what this Court "shall consider," and what we "shall include" in our opinions, and it purports to grant us "authority" to "reweigh" evidence and decide the case as if we were a jury, rather than a Court. We are an appellate court with appellate jurisdiction,[45] not a trial court. We have no jurisdiction to decide a defendant's guilt or punishment.

¶36. My firm belief – sincerely held – is that Section 99-19-105 violates the separation of powers established in Section 2 of our Constitution, which – in the strongest possible terms – prohibits one branch of government from exercising powers granted to one of the other branches.[46] I would just as strongly oppose any effort by this Court to dictate to the Legislature what it must consider in passing statutes.

KITCHENS, KING AND COLEMAN, JJ., JOIN THIS OPINION IN PART.

RANDOLPH, PRESIDING JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶37. I fully concur with Justice Lamar's majority opinion as to Part I and respectfully dissent as to Part II.

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[45] Miss. Const. art. 6, § 146.

[46] Miss. Const. art. 1 § 2.

¶38. Part II of today's decision reaffirms the Court's authority, upon the finding of an invalid aggravator, to conduct a harmless-error analysis and/or reweigh remaining aggravators and mitigators, yet reverses the ruling of the ***Gillett I***[47] Court by assuming the ***Gillett I*** Court applied an incorrect harmless-error standard. Today's majority then "declines" to reweigh. A clear majority of the ***Gillett I*** Court (as then composed) already reweighed the aggravators and mitigators on direct appeal. This specific issue was raised in Gillett's motion for rehearing and rejected by the ***Gillett I*** Court. *Res judicata* bars its consideration anew in a post-conviction proceeding. *See* Maj. Op. ¶ 10. The Supreme Court of this State should abide by its prior rulings when the very same issue, involving the very same parties, has been ruled upon. If we fail to do so, there shall never be finality of judgment. The issue has been acted upon and decided. The ***Gillett I*** final judgment was entered and is conclusive in all later proceedings on points and matters determined. A matter once judicially decided by the highest court is finally decided. Otherwise, the rule of law would be replaced by the rule of men and women, for as the composition of the Court changes, so shall its rulings.

Gillett I

¶39. On direct appeal, this Court (then-Presiding Justice Graves writing for the majority) reviewed Gillett's "conviction[] for capital murder and sentence[] of death with heightened scrutiny[,]" in which "all doubts are to be resolved in favor of the accused because what may be harmless error in a case with less at stake becomes reversible error when the penalty is death." ***Gillett I***, 56 So. 3d 469, 479-80 (Miss. 2010). ***Gillett I*** held that the State had "failed

[47] ***Gillett v. State*** ("***Gillett I***"), 56 So. 3d 469 (Miss. 2010), *cert. denied*, 132 S. Ct. 844, 181 L. Ed. 2d 552 (2011).

to provide sufficient evidence to support the inclusion of a 'previous violent felony'" aggravator. ***Id***. at 507 (quoting Miss. Code Ann. § 99-19-101(5)(b) (Rev. 2007)). "Therefore, the trial court erred in instructing the jury . . . to consider whether 'the defendant was previously convicted of . . . a felony involving the use or threat of violence to the person.'" ***Id***. (quoting Miss. Code Ann. § 99-19-101(5)(b) (Rev. 2007)).

¶40. Subsequently, this Court scrupulously followed its precedent[48] and turned to Mississippi Code Section 99-19-105(3)(d), which provides:

> (d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

Miss. Code Ann. § 99-19-105(3)(d) (Rev. 2007). After a thorough examination and recitation of the mitigating circumstances, a clear majority of the members of the ***Gillett I*** Court held that the mitigating evidence did not outweigh the remaining three aggravators, and, therefore, the inclusion of the invalid aggravator was harmless error. ***Gillett I***, 56 So. 3d at 308.

¶41. Justice Chandler concurred in part and result with the majority and issued a separate opinion which found error in the admission of certain DNA expert-witness testimony. Justice Chandler reviewed the error for harmlessness under "[t]he ***Chapman*** test[.]" ***Id***. at 528 (Chandler, J. concurring in part and result) (citing ***Chapman v. California***, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). He noted that, "[w]hile we may apply different standards for different questions – for example, a review of the admission of evidence – we always apply a heightened scrutiny[]" to capital murder and sentence of death. ***Id***. at 526

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[48] ***Howard v. State***, 945 So. 2d 326, 363 (Miss. 2006); ***McGilberry v. State***, 843 So. 2d 21, 29 (Miss. 2003); ***Davis v. State***, 897 So. 2d 960, 969 (Miss. 2004).

(Chandler, J. concurring in part and result) (quoting ***Brown v. State***, 890 So. 2d 901, 907 (Miss. 2004)). After a thorough analysis, Justice Chandler concluded that, "[g]iven the overwhelming evidence produced at trial, the admission of the DNA testimony was harmless." ***Id***. at 529 (Chandler, J. concurring in part and result).

¶42. Justice Kitchens dissented in ***Gillett I***. He dissents again today, arguing for reversal of the conviction and sentence. In part II of his dissent in ***Gillett I*** (joined by Justice Dickinson), Justice Kitchens dissented to the majority's finding of harmlessness regarding the invalid aggravator, but did not assert that the majority utilized an erroneous harmless-error standard. ***Id***. at 533 (Kitchens, J. dissenting). Instead, Justice Kitchens opined that "in the face of even a single invalid aggravating circumstance, this Court does not have the authority to determine that the penalty of death is appropriate." ***Id***. at 533 (Kitchens, J. dissenting).

¶43. Justice Lamar, author of today's decision, concurred in part and dissented in part in ***Gillett I***. She wrote a separate opinion joined by Justice Dickinson and joined in part by Justice Kitchens. Justice Lamar dissented to the majority's finding that the inclusion of the invalid aggravator was harmless, but did not assert that the majority had failed to find the error "harmless beyond a reasonable doubt." ***Id***. at 534-35 (Lamar, J. concurring in part and dissenting in part). Her dissent argued that ***Brown v. Sanders*** "mandate[d] reversal" of Gillett's sentence, which the majority in ***Gillett I*** rejected. ***Id***. at 535 (Lamar, J. concurring in part and dissenting in part) (citing ***Brown v. Sanders***, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006)).

¶44. Following this Court's decision in ***Gillett I***, Gillett filed a twenty-five-page "Motion for Rehearing[.]" In that motion, Gillett squarely placed today's issue before the Court. Gillett argued that reweighing by an appellate court was unconstitutional. Procedurally, the ***Gillett I*** Court, *sua sponte*, found that Gillett's motion for rehearing required a response from the State and so ordered. The ***Gillett I*** Court granted Gillett leave to reply to the State's response. It cannot be fairly said that Gillett did not receive the highest level of scrutiny by this Court. The motion for rehearing was denied by a vote of 5-3.[49] [50]

Res Judicata

¶45. Gillett's claim of error was raised in the direct-appeal proceedings and in his fully-briefed motion for rehearing and reply to the State's response. He is now again before this Court on a petition for post-conviction relief, rearguing "that this Court's reweighing violates his due-process rights under the United States and Mississippi Constitutions, citing ***Brown v. Sanders***[.]" Maj. Op. ¶ 8. Post-conviction relief on the very same issue is precluded.

¶46. Today's decision opines that the United States Supreme Court's decision in ***Brown v. Sanders*** did not overrule its prior decision in ***Clemons***, which permits appellate courts to cure the error of invalid aggravators "either by reweighing the aggravating and mitigating evidence or by performing a constitutional harmless-error analysis." Maj. Op. ¶ 13 (citing ***Clemons v. Mississippi***, 494 U. S. 739, 754, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990)). Despite clearly rejecting Gillett's other claims on PCR and reaffirming this Court's authority

[49]Justice Graves, the majority author on direct appeal, had been appointed to the United States Court of Appeals for the Fifth Circuit. Justice King, appointed to fill Justice Graves's seat, did not participate in the rehearing.

[50]Gillett also was granted oral argument on this motion for post-conviction relief.

to follow Section 99-19-105(3)(d), the majority now offers that the ***Gillett I*** Court "did not find the error harmless beyond a reasonable doubt."

¶47. Today's decision rests upon a *faux* premise, *i.e.*, that the entire ***Gillett I*** Court failed to apply the ***Chapman*** harmless-error standard because "beyond a reasonable doubt" was not stated in the ***Gillett I*** opinion. Are we to assume that every justice (majority and dissenters) either did not know or knew and failed to apply the correct standard, save for Justice Chandler, who specifically cited ***Chapman*** and the "harmless beyond a reasonable doubt" standard? ***Gillett I***, 56 So. 3d at 525-29 (Chandler, J., concurring in part and result).

¶48. The law has not changed. The issue and parties are the same. The only new component is the constituency of the present Court. I would uphold the ***Gillett I*** Court's decision, which today's majority holds was within both its constitutional and statutory authority to decide.[51] I would affirm Gillett's convictions and sentences.

CHANDLER AND PIERCE, JJ., JOIN THIS OPINION. WALLER, C.J., JOINS THIS OPINION IN PART.

KITCHENS, JUSTICE, CONCURRING IN PART AND IN RESULT WITH PART II OF THE MAJORITY OPINION AND DISSENTING IN PART:

¶49. I continue to believe that murder with the underlying felony of robbery becomes a capital crime only where the intent to rob had formed in the perpetrator's mind before the homicide occurred. *See* ***Batiste v. State***, 121 So. 3d 808, 874 (¶ 187) (Miss. 2013) (Kitchens, J., dissenting); ***Gillett v. State***, 56 So. 3d 469, 529 (¶ 193) (Miss. 2010) (Kitchens, J., dissenting). The applicable statute provides that the murder must occur when the killer is

[51]*See* Maj. Op. ¶ 23 ("[W]e acknowledge that Mississippi Code Section 99-19-105(3)(d) gives us statutory authority to determine whether the remaining aggravators are outweighed by the mitigating circumstances . . . .")

"engaged in the commission of the crime of . . . robbery. . . ." Miss. Code Ann. § 97-3-19(2)(e) (Supp. 2013). One must intend robbery to commit it. *See* ***Lima v. State***, 7 So. 3d 903, 909 (¶ 27) (Miss. 2009). One cannot be engaged in the commission of the crime of robbery if he or she has not formed the intent to rob. Accordingly, if a person kills another before he or she has formed the intent to commit a robbery, that person cannot be guilty of capital murder with the underlying felony of robbery, because he or she was not engaged in robbery when the killing occurred. The purpose of Mississippi's capital murder statute is to punish with extreme severity those who are willing to kill while committing certain specified crimes, not those who kill and then commit an additional crime as an afterthought. *See* ***Batiste***, 121 So. 3d at 874-75 (¶¶ 188-89) (Kitchens, J., dissenting). As I wrote in the direct appeal of this case, the State failed to prove that Gillett intended to rob the victims before he murdered them.[52] His conviction for capital murder should therefore be reversed.

¶50. This Court erred when it reweighed an invalid aggravator, and Gillett's death sentence should be vacated. However, as before, I find that "nothing in the record supports a finding that Gillett . . . committed the murders 'for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.'" ***Gillett***, 56 So. 3d at 533 (¶ 212) (Kitchens, J., dissenting) (quoting Miss. Code Ann. § 99-19-101(5)(e) (Rev. 2007)). Two invalid aggravators were considered by the jury, in addition to the fact that no proof was adduced to show that Gillett intended to rob the victims prior to the murders. Accordingly, I concur

[52]Had Gillett committed these terrible murders and then simply walked away, he would not be facing the death penalty. Apparently, it is the stealing of personalty after the killings were accomplished which renders his behavior so despicable as to be deserving of our highest punishment. This example shows why it is so vital to prove the existence of an intent to rob before the killing is accomplished.

in part with the majority and in result as to Part II of its opinion, because I agree that the sentence of death should be vacated.

¶51. Finally, while I agree with the majority that the inclusion of evidence to support an invalid statutory aggravator was not harmless beyond a reasonable doubt, I join Justice Dickinson's argument that this Court should hold that, in all cases, "allowing a jury to hear evidence of a statutory aggravating factor can never be harmless beyond a reasonable doubt. . . ." I also agree with his conclusion that it is for this Court, not the Legislature, to determine whether it is permissible for an appellate court to reweigh aggravating and mitigating factors, and that Section 99-19-105 is an unconstitutional legislative foray into the judicial prerogative. However, Justice Dickinson concurs with the affirmance of Gillett's conviction in Part I of the majority opinion, which I cannot do. Therefore I join Justice Dickinson's opinion in part. Because the majority vacates only the sentence of death in Part II, without reversing Gillett's conviction of capital murder in Part I, I join that opinion in part and in result. I would reverse the sentence of death and reverse Gillett's conviction for capital murder.

KING, J., JOINS THIS OPINION.

PIERCE, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶52. I fully concur with Justice Lamar's majority opinion as to Part I and respectfully dissent as to Part II. I agree with the majority in rejecting Gillett's argument that the introduction of evidence in support of the invalid aggravating factor mandates reversal. However, I disagree with the majority in its failure to follow: (1) the United States Supreme Court's holding in ***Clemons v. Mississippi***, 494 U.S. 739, 754, 110 S. Ct. 1441, 108 L. Ed.

2d 725 (1990), which allows appellate courts to cure the error of an invalid aggravator by reweighing or conducting a harmless-error analysis, if state law authorizes the appellate court to do so; (2) our Legislature's subsequent amendments of Mississippi Code Section 99-19-105 to include subsections 3(d) and 5(b); and (3) the precedent of this Court in which it has acknowledged and performed its duty to consider Section 99-19-105 as part of its responsibility to review death sentences.

¶53. Following the United States Supreme Court's decision in ***Clemons***, 494 U.S. at 754, in which the Supreme Court held that the U.S. Constitution does not prohibit appellate courts from curing the error of an invalid aggravator by reweighing or conducting a harmless-error analysis, if state law authorizes the appellate court to do so, this Court (in a six-to-two decision on remand) held as follows:

> Because we have no authority as a matter of state law to engage in a reweighing analysis, and because under the facts of this case we eschew harmless error analysis, we hold that it is for a jury, rather than this Court, to decide under the facts of this case and with proper and properly defined aggravating circumstances, weighed against mitigating circumstances, whether Clemons shall be sentenced to death or life imprisonment.

Clemons v. State, 593 So. 2d 1004, 1007 (Miss. 1992) (***Clemons II***) (*superseded by statute*). In direct response to that holding, the Legislature, in an August 1994 special session, made substantial changes in Mississippi Code Section 99-19-105 granting this Court statutory authority to reweigh *and/or* conduct harmless-error analysis with regard to death sentences. (Emphasis added). This Court complied with that authority in ***Howard v. State***, 945 So. 2d 326, 363 (Miss. 2006), in which we held: "There was sufficient evidence to support each of the remaining aggravating circumstances and there was no mitigating evidence[;]

[a]ccordingly, Howard is not entitled to a new sentencing hearing." *See also* ***McGilberry v. State***, 843 So. 2d 21, 29 (Miss. 2003) (holding that the "death sentence was warranted even absent a finding of the 'great risk of death' circumstance"); *and* ***Davis v. State***, 897 So. 2d 960, 969 (Miss. 2004) (authored by Chief Justice Waller and joined by Presiding Justices Dickinson and Randolph, who are still members of this Court, holding: "Even if the aggravating factor at issue were thrown out, after reweighing the remaining factors, the Court would affirm Davis's death penalty.")

¶54. Here, the issue before us was decided on direct appeal, where a majority of this Court concluded that the three aggravating factors, apart from the invalid aggravator, presented to Gillett's sentencing jury, were not outweighed by Gillett's mitigating evidence and that the introduction of the invalid aggravator constituted harmless error. Today, however, on post-conviction relief, a majority of this Court rejects that conclusion in similar attitude to this Court's holding in ***Clemons II*****,** and moves us precariously towards judicial legislation in the process. This troubles me. And I am beginning to share the same concerns that Presiding Justice Dan M. Lee conveyed in his dissent to ***Hill v. State***, 659 So. 2d 547 (Miss. 1994).

> For all practical purposes, today's majority opinion declares Miss. Code Ann. § 99-19-105 (Supp.1994) as amended, unconstitutional. The majority opinion reaches this result by relying on two logically flawed premises. First, that a defendant convicted of capital murder in Mississippi has a "fundamental right" under the Constitution of Mississippi to be sentenced to death by a jury. Second, that if this Court were to apply harmless error analysis in the case sub judice, we, instead of the jury, would be sentencing the defendant to death. Both of these premises are devoid of merit.
>
> Today's majority opinion has another hidden effect on future death penalty legislation in this State. Primarily, I envision that today's majority opinion will be used at some later time to prevent the legislature from amending the death penalty laws of this State. Specifically, if the majority's

> erroneous contention that the Mississippi Constitution demands that convicted capital murderers be sentenced to death by a jury, then the Legislature will be foreclosed from amending the manner in which the death sentence is imposed, *i.e.*, the Mississippi Legislature will not be free to amend death penalty laws to allow the trial judge to sentence the convicted capital murderer to death. Whether the majority opinion intentionally sets out to achieve this result, I cannot say.

Id. at 553 (Dan Lee, P.J., dissenting).

¶55. I reiterate the United States Supreme Court's decision in ***Clemons***. In responding to Clemons's claim that "it is constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance[,]" the Supreme Court answered:

> Nothing 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. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Clemons, 494 U.S. at 745.

¶56. Rejecting Clemons's next argument that, because only a jury has the authority to impose a death sentence under Mississippi law, he therefore has a due-process interest in having a jury make all determinations relevant to his sentence, the Supreme Court first acknowledged that this Court properly had asserted its authority under Mississippi law to decide for itself whether Clemons's death sentence was to be affirmed, even though one of the two aggravating circumstances improperly was presented to the jury. ***Id***. at 747. The Supreme Court said:

> The court did not consider itself bound in such circumstances to vacate the death sentence and to remand for a new sentencing proceeding . . . . We have no basis for disputing this interpretation of state law, which was considered by the court below to be distinct from its asserted authority to affirm the sentence on the ground of harmless error, and which plainly means that we must reject Clemons'[s] assertion that he had an unqualified liberty interest under the Due Process Clause to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed. In this respect, the case is analogous to ***Cabana v. Bullock***, *supra*, where we specifically rejected a due process challenge based on ***Hicks*** [***v. Oklahoma,*** 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980)] because state law created no entitlement to have a jury make findings that an appellate court also could make.

Id.

¶57. To Clemons's assertion that appellate courts are unable to fully consider and give effect to the mitigating evidence presented by defendants at the sentencing phase in a capital case and that it therefore violates the Eighth Amendment for an appellate court to undertake to reweigh aggravating and mitigating circumstances in an attempt to salvage the death sentence imposed by a jury, the Supreme Court explained:

> The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime. *See, e.g.*, ***Spaziano v. Florida***, *supra*, 468 U.S. at 460, 104 S. Ct. at 3162; ***Zant v. Stephens***, 462 U.S. at 879, 103 S. Ct. at 2744; ***Eddings v. Oklahoma***, 455 U.S. 104, 110-112, 102 S. Ct. 869, 874-875, 71 L. Ed. 2d 1 (1982); ***Lockett v. Ohio***, 438 U.S. 586, 601-605, 98 S. Ct. 2954, 2963-2965, 57 L. Ed. 2d 973 (1978) (plurality opinion); ***Gregg v. Georgia***, 428 U.S. 153, 197, 96 S. Ct. 2909, 2936, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). In scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the "twin objectives" of "measured consistent application and fairness to the accused." ***Eddings***, *supra*, 455 U.S., at 110-111, 102 S. Ct., at 874-875. *See also* ***Lockett***, supra, 438 U.S. at 604, 98 S. Ct. at 2964 (emphasizing the importance of reliability). Nothing inherent in the process of appellate reweighing is inconsistent with the pursuit of the foregoing objectives.

> We see no reason to believe that careful appellate weighing of aggravating against mitigating circumstances in cases such as this would not produce "measured consistent application" of the death penalty or in any way be unfair to the defendant. *It is a routine task of appellate courts to decide whether the evidence supports a jury verdict* and in capital cases in "weighing" States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed. And, as the opinion below indicates, a similar process of weighing aggravating and mitigating evidence is involved in an appellate court's proportionality review. Furthermore, this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency. *See, e.g.*, ***Gregg v. Georgia***, *supra*, 428 U.S. at 204-206, 96 S. Ct. at 2939-2941 (joint opinion of Stewart, Powell, and Stevens, JJ.); ***Proffitt v. Florida***, 428 U.S. 242, 253, 96 S. Ct. 2960, 2967, 49 L. Ed. 2d 913 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); ***Dobbert v. Florida***, 432 U.S. 282, 295-296, 97 S. Ct. 2290, 2299-2300, 53 L. Ed. 2d 344 (1977); ***Jurek v. Texas***, 428 U.S. 262, 276, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

Id. at 748-49 (emphasis added). The Supreme Court further explained:

> This is surely the import of ***Cabana v. Bullock***, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), which held that a state appellate court could make the finding that ***Enmund v. Florida***, 458 U.S. 782, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982), required for the imposition of the death penalty, i.e. whether the defendant had killed, attempted to kill, or intended to kill. ***Wainwright v. Goode***, 464 U.S. 78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983) (per curiam), is likewise instructive. There, a Florida trial judge relied on an allegedly impermissible aggravating circumstance ("future dangerousness") in imposing a death sentence on Goode. The Florida Supreme Court conducted an independent review of the record, reweighed the mitigating and aggravating factors, and concluded that the death penalty was warranted. In a federal habeas proceeding, Goode then successfully challenged the trial court's reliance on the allegedly impermissible factor. We reversed the grant of the writ and concluded that even if the trial judge relied on a factor not available for his consideration under Florida law, the sentence could stand. "Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment." ***Id***. at 86-87, 104 S. Ct., at 383.

Id.

¶58. Having to consider evidence presented to a jury is one of the preeminent responsibilities of an appellate court. A majority of this Court undertook that obligation on direct appeal in this matter and found that the three remaining aggravating factors presented to Gillett's sentencing jury were not outweighed by the mitigating evidence presented. And we found that introduction of the invalid aggravator was harmless error–beyond a reasonable doubt. Accordingly, I would deny Gillett's petition for post-conviction relief.

RANDOLPH, P.J., AND CHANDLER, J., JOIN THIS OPINION. WALLER, C.J., JOINS THIS OPINION IN PART.