the defendant's future dangerousness, due process requires that the jury be informed if the alternative to a death sentence is a life sentence without possibility of parole.[121]

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." [122]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[123] or on a trial judge's consideration of improper aggravating circumstances.[124] In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in *Zant* evidence relating to the invalid factor was nonetheless admissible on another basis.[125] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the ab-

---

independently assess any mitigating factors before jury as a whole balanced the weight of mitigating evidence against each aggravating factor, with unanimity required before balance in favor of an aggravating factor may be found).

[121] Simmons v. South Carolina, 512 U.S. 154 (1994). *See also* Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of Simmons); Kelly v. South Carolina, 534 U.S. 246 (2002) (prosecutor need not express intent to rely on future dangerousness; logical inference may be drawn). *But see* Ramdass v. Angelone, 530 U.S. 156 (2000) (refusing to apply *Simmons* because the defendant was not technically parole ineligible at time of sentencing).

[122] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to Brown v. Sanders, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

[123] Zant v. Stephens, 462 U.S. 862 (1983).

[124] Barclay v. Florida, 463 U.S. 954 (1983).

[125] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal