

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RICHMOND v. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

No. 91-7094. Argued October 13, 1992—Decided December 1,
1992

Following a sentencing hearing on petitioner Richmond's first degree murder conviction, the Arizona trial judge found three statutory aggravating factors, including, under Ariz. Rev. Stat. Ann. §13-703(F)(6), that the offense was committed in an "especially heinous, cruel or depraved manner" ((F)(6) factor). Concluding also that there were no mitigating circumstances sufficiently substantial to warrant leniency, the judge sentenced Richmond to death. The State Supreme Court affirmed, with each of the five justices joining one of three opinions. Among other things, the principal opinion for two of the justices found that the (F)(6) factor—which had been narrowed in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, subsequent to Richmond's sentencing—was applicable. The principal opinion also conducted an independent review of the sentence and concluded that Richmond's mitigation evidence did not outweigh the aggravating factors. In a special concurrence, two of the other justices disagreed that the offense came within the (F)(6) factor as narrowed by *Gretzler*, but agreed that a death sentence was appropriate even absent that factor. The fifth justice filed a dissenting opinion urging reversal. After this Court denied certiorari, the Federal District Court declined to grant Richmond habeas corpus relief, and the Court of Appeals affirmed.

Held: Richmond's death sentence violates the Eighth Amendment. The (F)(6) factor was unconstitutionally vague at the time the sentencing judge gave it weight. *Walton v. Arizona*, 497 U.S. 639, 654. The State Supreme Court did not cure this error, because the two specially concurring justices did not actually reweigh the aggravating and mitigating circumstances in

affirming the sentence. See, e. g., *Clemons v. Mississippi*, 494 U.S. 738. Those justices did not purport to perform a new sentencing calculus, or even mention the evidence in mitigation. Nor can such a reweighing be presumed, since language in the concurrence plainly indicates that Richmond's aggravated criminal background provided a *conclusive* justification for the death penalty, thereby evincing the sort of automatic affirmance rule proscribed in a ``weighing'' State such as Arizona. *Id.*, at 751. Because a majority of the State Supreme Court did not perform a curative reweighing in voting to affirm Richmond's death sentence, the question whether the principal opinion properly relied on the (F)(6) factor as narrowed in *Gretzler* need not be decided by this Court. Pp.6-12.

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Syllabus

948 F.2d 1473, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, KENNEDY, SOUTER, and THOMAS, JJ., joined. THOMAS, J., filed a concurring opinion. SCALIA, J., filed a dissenting opinion.