OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WILLIE LEE RICHMOND, Petitioner v. SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.

CASE NO: 91-7094

PLACE: Washington, D.C.

DATE: October 13, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE LEE RICHMOND, :

Petitioner :

v. : No. 91-7094

SAMUEL A. LEWIS, DIRECTOR, :

ARIZONA DEPARTMENT OF :

CORRECTIONS, ET AL. :

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Washington, D.C.

Tuesday, October 13, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

TIMOTHY K. FORD, ESQ., Seattle, Washington; on behalf of the Petitioner.

PAUL JOSEPH MCMURDIE, ESQ., Chief Counsel, Office of Attorney General of Arizona; Phoenix, Arizona; on behalf of the Respondents.

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PROCEEDINGS

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear -- excuse me. We'll hear argument on 91-7094, Willie Lee Richmond v. Samuel A. Lewis.

Mr. Ford.

ORAL ARGUMENT OF TIMOTHY K. FORD

ON BEHALF OF THE PETITIONER

MR. FORD: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents two questions regarding the manner in which a State court must proceed in order to uphold a death sentence that has been based in part on an unconstitutionally vague, catchall kind of aggravating circumstance.

The particular aggravating circumstance here in issue is one that the Court has seen before in the Walton and Jeffers case, and it makes it sufficient and both includes as a factor to be weighed in the balance of death sentencing that the crime was "especially heinous, cruel, or depraved".

The Court held in the Walton case, I think a fortiori from Maynard v. Cartwright, that the language of that statute alone was constitutionally insufficient under Godfrey v. Georgia, but the Court also held that the

Arizona Supreme Court had provided a limiting construction that it had applied in those cases, the Walton and Jeffers cases, to narrow the application of that aggravating circumstance sufficiently to survive the tests of Godfrey and Maynard.

This case arose in the Arizona Supreme Court, actually the second time. The first time that the petitioner was sentenced to death, it was under a mandatory type of or a limiting type of a statute with regard to mitigating circumstances, and there was a resentencing. When it came up after that resentencing, the Arizona Supreme Court was at a point where it was divided over what Godfrey v. Georgia had actually required. That division is really what created the issues and the circumstances that presents the issues to this case -- in this case.

The Arizona Supreme Court decision in that case, which was a 1983 decision, consisted of two two-justice pluralities. One of them refers to itself within the opinion as the "majority," although it is only two of the five Arizona Supreme Court Justices who joined in that opinion. And those Justices, we would submit, did almost exactly what the Oklahoma Court of Criminal Appeals did in the Maynard case at really a very similar time in history and a very similar time in the evolution of the law in

this area.

They looked at what they had said previously about this aggravating circumstance, principally using some language from a case called Dixon v. State that was decided way back in 1974 in Florida, which was kind of the seminal source of a dictionary definition for these terms, and it looked at a case it had just recently decided where it had provided what ultimately the Court in Walton and Jeffers found was the limiting construction of this statute.

But then instead of saying --

QUESTION: That was the Gretzler case?

MR. FORD: That is the Gretzler case, Your Honor, and it does -- was, of course, argued very strongly by the Arizona Attorney General in Walton, that that was the limiting definition that was applied here.

And what happened in this case though was that there was really a difference of opinion, I think, among the Arizona Justices as to what they had to do with that Gretzler categorization, and the "majority" opinion, the lead opinion of Justices Hays and Holohan, treated it as, I think, a set of examples that could be compared to this case, almost really identically.

I looked back at Cartwright v. State, the decision from the Oklahoma Criminal Appeals that gave rise

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to Maynard v. Cartwright, and they -- a very, very similar thing was done there, where the Oklahoma Court of Criminal Appeals looked at the facts of a number of cases and said, well, there's a bunch of similarities to the facts of this case and those cases, and we think that this is also heinous, atrocious, and cruel, which was the language there. And Justice White's unanimous opinion for the Court said that was not sufficient, that you could not simply use the entire gestalt, the entire circumstances of a case and compare them on that kind of a gross basis, and that that would not satisfy Godfrey v. Georgia.

That I think is what essentially the majority justices did here, and, in fact, the two-justice concurrence. And actually the real majority of the Arizona Supreme Court held that that was what they were doing, and that what they were doing was a violation of Godfrey.

So, we have a very odd kind of a jurisprudential situation here where a majority of the Arizona Supreme Court, that is, the concurring opinion plus the dissenting justice, said that the "majority," the two-justice plurality, was in constitutional error for exactly the reason that we are submitting they are in constitutional error, and I think ultimately prevailed as a matter of Arizona law.

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What happened subsequently was that the position of those three justices, the two-justice concurrence and the one-justice dissent, who said we cannot use these categories this way, we cannot simply describe the facts of the case or expand these definitions to include anything that includes a gruesome scene. We cannot do that consistent with Godfrey. And I think that since that time, the Arizona Supreme Court has followed that and, as this Court held in Walton, has adhered to those limiting constructions in the Gretzler case as limiting constructions.

QUESTION: Mr. Ford, I'm curious. Was Rebecca Corella ever prosecuted?

MR. FORD: Rebecca Corella was never prosecuted, either for this crime, Justice Blackmun, or for the other homicide in which she testified that Mr. Richmond committed and the defense said no, she had committed, and the jury acquitted Mr. Richmond, apparently at least having a doubt as to the facts there. Ms. Corella was never prosecuted for any crime, to my knowledge.

QUESTION: Do you know why?

MR. FORD: I -- well, we alleged at one point, Your Honor, that there was discrimination in this case on the basis of race and gender. We still feel that, although we have not been able to get a hearing on that

under McCleskey v. Kemp.

QUESTION: Maybe your opponent will comment on that question.

MR. FORD: Thank you, Your Honor.

QUESTION: Well, under Lewis and Jeffers, isn't the test whether or not, assuming Gretzler is a constitutional definition --

MR. FORD: Yes, Your Honor.

QUESTION: -- a rational fact finder could -- in this case it would be the Supreme Court on reweighing -- a rational fact finder determine that the standard was met?

MR. FORD: Well, I think --

QUESTION: Because in Maynard we were announcing what the standard would be, so the gross comparison of cases was inappropriate. Here Gretzler is the standard. The Supreme Court knows the standard. So, Lewis and Jeffers says the test is whether or not a rational fact finder, a rational reviewer, could reach this conclusion.

MR. FORD: Well, that's what the Ninth Circuit in the alternative said. But, you know, I looked back at Justice O'Connor's opinion in Jeffers the other night, and it is very explicit that the test is a three-part and not a two-part test. First, is there a limiting construction? Second, was it applied in this case? And third, if so, a deferential review under Jackson v. Virginia.

QUESTION: And you're focusing on prong two then.

MR. FORD: Prong two, that the plurality, the "majority," did not apply Gretzler as a limiting definition. They used it as a set of examples, but they did not find either -- well, they didn't even purport to find gratuitous violence. They talk about gratuitous violence at some point, but they never say, we find gratuitous violence. Nor do they ever say, we find what had been previously been described as "needless mutilation".

They, at the end of their description of the facts, say we find a ghastly mutilation, but the difference between "needless" and "ghastly" was critical to the purpose of Gretzler, what Gretzler was describing, which was the defendant doing something beyond the homicide that showed a more culpable mental state.

And here there was nothing. The mutilation, the horrible scene that was left at the end of this homicide, was, by both versions of the events, an accident. It was something that had not been planned by either Mr. Corella or Mr. Richmond when they were trying to flee from the scene, according to both Faith Erwin's testimony and Mr. Richmond's spontaneous statement to the police, which we think is by far the most credible version of the events

and which fits the circumstantial evidence and the other witnesses testimony in this case to a tee.

QUESTION: (Inaudible) reviewing the decision of the court of appeals, aren't we?

MR. FORD: Well, Justice White, I guess that's true. I'm a little puzzled by our posture now because --

QUESTION: Well, it's Federal habeas corpus, isn't it?

MR. FORD: Yes.

QUESTION: And the court of appeals affirmed the dismissal.

MR. FORD: Well, the court of appeals affirmed -- the district dourt dismissed on one ground on this issue. The court of --

QUESTION: All right. Now, the court of -- What was the ground the court of appeals affirmed on?

MR. FORD: It appears to me to be the second ground is their primary reliance. There is a discussion of this issue, but then they say that doesn't matter because Arizona is not a weighing State, and the States conceded they were in error on that.

QUESTION: Exactly. Now, they seem to say that it wouldn't make any difference how many aggravating circumstances there were.

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MR. FORD: They -- that's correct, Your Honor. They --

QUESTION: Well then, all this argument about -- if that's the issue we're deciding, we don't need to really talk much about that one aggravating circumstance.

MR. FORD: Well, I think that may be right, Justice White. There is a second -- The concurring opinion in the Arizona Supreme Court based its analysis on the idea that there was no --

QUESTION: Well, I know, but the court of appeals -- the judgment we're reviewing rests on a -- really rests on a different ground.

MR. FORD: I think it does, and of course, that --

QUESTION: Well, I -- why don't you talk about that for a while?

MR. FORD: Well, I would be glad to. The -- that, of course -- one of the reasons I don't start with that is that the State has conceded that the court of appeals was in error on that point. They --

QUESTION: Well, that doesn't make it wrong, does it?

MR. FORD: Well, no. What makes it wrong I guess is that the Arizona Supreme Court has also said since then that they were in error, that this was -- that

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Arizona --

QUESTION: A weighing State.

MR. FORD: It is a weighing State, and the Arizona Supreme Court has said that. The most recent cite we have is just April of this year, but I think they said it many, many times before.

QUESTION: Well, why should we decide any -- if that's the case -- if we agreed with that, why wouldn't we just remand and say to the court of appeals, this is not a weighing State?

MR. FORD: Well --

QUESTION: This is a weighing State. Now, decide it on that basis.

MR. FORD: Well, I think that that would be one possible disposition. We would still have a concern about the language in the court of appeals decision on the other point which seems to skip this second step, which seems to say as -- that if you do have a limiting construction, then you go directly to Jackson and determine whether -- and they actually use the language -- whether any rational fact finder could sentence this person to death, and they don't focus on that second step.

QUESTION: Yes, but that second step is wholly irrelevant to them in terms of their rationale in dismissing.

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MR. FORD: They give two grounds, and so if either ground is incorrect, we submit, and I think the State agrees, this case has to go back. And the question I guess for the Court is how much direction it should go back with. Since we believe that it is wrong on both grounds, we would submit the Court may want to give direction on both grounds.

QUESTION: Well, did the -- did the State court decide clearly that it was a weighing State after the court of appeals decision, or before?

MR. FORD: They had --

QUESTION: Or both?

MR. FORD: Both. Many times before, and in this case and after.

QUESTION: Well, how did the -- how did the court of appeals fall into this error?

MR. FORD: I frankly don't --

QUESTION: Did the Attorney General of the State concede it was a weighing State before the court of appeals?

MR. FORD: I cannot remember that occurring, Your Honor. The Attorney General did argue Zant v. Stephens for a number of -- on a number of occasions, and which would imply that there would be no difference out of a weighing State. And, of course, Your Honor's opinion in

the Clemons case and the subsequent decision in Stringer made it clear that that wasn't right. So, that may have been a shorthand version of the problem.

But the Ninth Circuit clearly I think was incorrect with regard to this, and the Arizona Supreme Court has adhered constantly to the position that they do consider the sufficiency of mitigation by weighing it against statutory aggravation and statutory aggravation only. And that has been the construction of the statute I think quite consistently, even since 1977 I guess, when the first decisions in this statute came down. So, I would agree that that is a sufficient, and the narrowest perhaps, ground for a reversal and sending this case back to the Ninth Circuit.

But we are also concerned about this other rationale which was argued and is still being argued, I think, in this -- in Arizona cases, that really cuts out the Jeffers analysis, and says once you have a construction announced in one case, then it's Federal hands off and we don't even look to see if the construction is being followed or applied in a given case. And I think the Jeffers decision was very explicit that that had to happen, and, of course, that was the essence of Godfrey v. Georgia.

In Godfrey v. Georgia, the Georgia Supreme Court

had adopted a limiting definition of its outrageously and (inaudible) vile aggravating circumstance prior to Mr. Godfrey's case, but simply did not apply it to the facts of Mr. Godfrey's case. And that is, I think, the same problem we have here.

Because of this disagreement about whether Gretzler was a limiting construction or simply a catalogue of examples, the -- it was not applied as a limiting construction, and we had a circumstance where -- and that's why we emphasize the question of who the driver was -- the "majority" was willing to extend heinousness, and, of course, everyone agreed, all five justices agreed there was no cruelty because there was no suffering. Either this person was knocked unconscious and then accidentally run over, according to both witnesses. The -- there was no -- but the heinousness they were willing to extend not only to a situation where the gruesome scene was inadvertently caused or not planned by the defendant, but also where -- or anyone else, but also where he had not even personally been responsible for it, or might not have been, which they acknowledged was quite possible from the evidence in this case, because this was a felony murder case.

QUESTION: He was accidentally run over twice, as I recall it. Isn't that right?

MR. FORD: He was --

QUESTION: Once in one direction, another time in the other direction.

MR. FORD: Well --

QUESTION: Very unlucky fellow.

MR. FORD: The -- it was -- obviously there was a horrible scene left there, Justice Scalia. But the important part of this argument is the second -- number one, the second runover, the evidence was quite mixed. It could have been from another vehicle later on. There was testimony about that.

It could have been -- actually, the most consistent explanation for it is Mr. Richmond's, where he says to the police, who surprise him with this charge and get a confession from him with no lawyer -- he says, well, Rebecca jumps in the car and she throws up in gear and she goes back over. And everybody testified that she didn't know how to work the clutch and she did not know how to drive, and he said, she's all over the road. And we think that the most consistent explanation is that that's exactly what happened, and she did pass over the body twice.

But the important point on this, though, is when we're talking about mutilation, we're talking about the gruesome leavings and remains of this event. Those

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occurred as a result of the first pass of the car. The second pass of the car broke ribs and caused some minor lacerations, but did not disfigure the body in any significant sense. The disfigurement, the horrible scene resulted from the first impact which killed the victim instantly. And again, both versions of the events -- Faith Erwin's version, which only includes one passage of the car over the body -- describe an accidental event, not something that was planned by anyone.

And that's what Justice Cameron pointed out, and I think that Justice Holohan and Hays did not dispute that really no one could say beyond a reasonable doubt, as the State is really saying for the first time in this Court in my knowledge anywhere in the history of this case, that there was some kind of an intent to mutilate, and that somehow some person sat back and thought, we're going to mutilate this person.

QUESTION: Wait. The jury found the defendant guilty of murder.

MR. FORD: Felony murder.

QUESTION: Not for accidentally running over somebody.

MR. FORD: It was specifically instructed that if the death was accidental, it was still a felony murder, first-degree murder.

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QUESTION: So, we have a jury finding that at least once the person was run over intentionally.

MR. FORD: No. Jury finding is explicit that even if it was accidental, it did not matter. The instruction -- I believe it's in our brief -- on felony murder in Arizona is if the person dies, even accidentally, as a result of -- in the course or furtherance of a robbery, that that is first-degree murder, and it's on page 8 of our brief. Whether the killing is intentional, unintentional, or accidental, it's still first-degree murder in the State of Arizona.

And really, this case was first charged as a premeditated murder, but then premeditation was stricken by the trial judge at the State's request. From the beginning of this case it was a felony murder, and I think that Justice Holohan's opinion on the Enmund issue, which was very much an issue in this case, reflects that.

But what Justice Holohan did, as the Ninth Circuit pointed out, was quite intuitively, I guess, or he forecast what this Court did in the Tison case, and really treat the major participation in a highly dangerous felony as equivalent to intent. But there's no finding of intent at the trial level or by the jury or by the judge, and I think really no finding of intent in this sense of intentional running over by the "majority."

In fact, they say even if he wasn't the driver, even if, I guess, everything that he says is true, which is Rebecca Corella got in, could not operate the car properly, drove over, he finally took over the wheel, and they drove off --

QUESTION: Mr. Ford, you say there was no finding of intent by the jury here. The jury returned a general verdict, didn't it?

MR. FORD: A general verdict, yes, Your Honor.

QUESTION: You wouldn't expect there to be special findings.

MR. FORD: That's correct, Your Honor.

It's an odd situation. The only reason I hesitate is Arizona is strange this way. They took premeditation out of the charge, but they still instructed the jury on premeditated murder. But they told the jury that it didn't have to agree as to any particular kind of murder, and felony murder was the emphasis of the arguments on both sides. But premeditation --

QUESTION: When you say out of the charge, do you mean out of the indictment?

MR. FORD: Out of the information, actually.

QUESTION: Out of the information.

MR. FORD: Well, maybe it was an indictment. I'm not sure.

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QUESTION: But the fact remains, they returned a general verdict.

MR. FORD: General verdict.

QUESTION: They didn't return interrogatories.

MR. FORD: That's correct.

But the case was prosecuted -- and the 1976 opinion I think makes it most clear -- as a felony murder from the beginning, and I think that that's what we have to focus on, and I think that's what the dissenting judges in the Ninth Circuit focused on in addressing the extraordinary and extreme nature of the expansion of the heinousness, aggravating circumstance. We don't know if anybody found that he was driving. We have no indication anybody found intent to mutilate. We have a question as to whether anybody found intent to kill in the real sense.

QUESTION: Are you saying that the evidence simply would not permit a rational fact finder to have made those findings?

MR. FORD: To have made a finding of intentional mutilation, no. No rational fact finder on this record.

QUESTION: How about the other elements you were just discussing?

MR. FORD: On intent to kill, defined as actual subjective intent to kill? Boy, it would be very close. I don't -- I can -- I think perhaps an actual intent to

kill, but they didn't -- they haven't done that, of course. And one of the steps of the Jackson test or 2254(d) test I think is that the fact finder has to make the finding, and then the determination is whether it could be supported.

QUESTION: You think that -- how does one review under Jackson then an ordinary criminal verdict, which traditionally is not a -- not interrogatories? It's just a verdict of guilty or not guilty.

MR. FORD: Well, that was a problem, of course, until the Griffin decision from this Court last year, where the Court said if there's two theories and the challenge to one of them is unsupported, it is not going to be accepted under Stromberg because we will assume that the jury took the more rational one.

But here the jury has no theory that is ever clearly ascribed to by anyone. So it's not a --

QUESTION: But you're never going to have any jury findings.

MR. FORD: Well, some -- now you do. Of course, in Arizona you have, I think, some unanimity requirements on felony versus premeditated murder, but -- and also specific findings by the trial judge on the intention of the defendant, and you have the Gretzler definitions in place which the trial judge has followed. So, you have a

lot of findings now.

But in the -- under a straight --

QUESTION: You certainly didn't at this time when we're talking about them.

MR. FORD: That's correct, Justice Rehnquist, and the -- Mr. Chief Justice. I'm sorry. And the problem is that here we have really something that is quite different from what not only the law of Arizona, but this Court's cases have required since. And the concern we have systemically -- and I guess perhaps answering Justice White's question -- to go beyond maybe the narrowest possible issue in the case, is that if this result is affirmed, then the body of law the Court has I think really quite clarified recently in Stringer, in Clemons, and those cases, is going to start to unravel as we say, well, these things that were not consistent with those cases are still permissible.

And -- but to answer your original question, in the ordinary felony versus premeditated murder, Schad v. Arizona kind of situation, Griffin says if either of those prongs is supported and there's a general verdict, that's okay. Here, though, we don't have any of those prongs adhered to, and that's why we can't, I think, apply Jackson because nobody ever says -- if the Arizona Supreme Court majority had ever said, we find needless mutilation

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of this body, then Jackson would click in, but they didn't.

They changed the Gretzler standard to fit this case, and that, I think, is fundamentally inconsistent with what the Court allowed in Walton and Jeffers, where they applied literally the exact categories of Gretzler as limiting definitions, established in advance, applied to this case, and in which they continued to apply those after those decisions as a consistent pattern of law designed to get the arbitrariness and irregularity out of capital sentencing.

Here we have a single event where not even a majority of the Arizona Supreme Court Justices agree that even in this one case the facts are met out -- are made out, and there's nothing that purports to ever be created as a category or limiting definition that can apply here and that would apply generally. It has not been done.

And so I think we have an unusual set of facts that arose on an unusual occasion, and as a result has created, I think, some great strains in which both the district court again and the court of appeals applied very different tests to affirm, and now the State itself has acknowledged that the court of appeals decision was incorrect as a matter of Arizona law.

QUESTION: Mr. Ford, I guess I don't know the

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answer to this. Do you concede that your first point on the heinous issue would no longer exist if we concluded that the majority opinion and the trial court concluded that your client was the driver of the car?

MR. FORD: No, I think not, Justice Scalia.

QUESTION: That wouldn't be enough to satisfy.

MR. FORD: Right. I mean, for instance, in the Maynard case, where it was clear that the person was the killer and had done horrible things, the Court said you still have to apply a limiting construction and not just look at all the facts of the case.

QUESTION: You require some different language in the opinion of the Court. Is that it?

MR. FORD: We require a statement that says, we have construed this in Gretzler and this fits this category we pointed to in Gretzler, and that's it. That's what Clemons requires, and it's all Clemons requires. And the reason it didn't get done in this case is because on the facts of this case you can't do it. That's what the concurring opinion in the --

QUESTION: It seems to me --

MR. FORD: -- and the dissenting opinion pointed out.

QUESTION: -- that your argument is really based on the insertion of the word "ghastly," and if the word

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"ghastly" were left out and it just said "a mutilation of the victim," having recited quite correctly the Gretzler standard three sentences before, that you'd have a much more difficult case.

MR. FORD: Well, if they took it out and didn't use -- I mean, "needless" is the key word in that phrase, because what they talk about in the cases that they use in Gretzler to create that standard is cases where people have actually gone and mutilated bodies afterwards and shown --

QUESTION: But they recite that.

MR. FORD: That's true.

QUESTION: If they had written the opinion and just left out the word "ghastly," we could have assumed, I think quite properly, that "mutilation" was referring to the standard that they'd set forth three sentences before.

MR. FORD: Perhaps so. But I think that they were -- I think that it was forthcoming. I don't think it's a dishonest opinion. I think it's an opinion that reflects a difference of opinion that Justice Cameron's decision points out and says what you're doing is expanding this to apply to every case that leaves a bloody scene, and we don't -- we shouldn't do that. And lo and behold, after this case, the Arizona Supreme Court never does it again. The majority --

QUESTION: Well, what's the counterpart of "needless mutilation," Mr. Ford?

MR. FORD: The counterpart in what sense, Your Honor?

QUESTION: Well, I mean you say that if they had said there was needless mutilation here, the standard would be satisfied. What's the opposite of -- what? Necessary mutilation?

MR. FORD: No. The point is, or the point of the Gretzler is that it's something beyond the killing. And here again, the mutilation, the horrible scene resulted instantaneously upon the instantaneous death of the victim, and was not intended by anyone.

QUESTION: So, even though there's -- the killing is accompanied by mutilation, it has -- that's not enough to satisfy what you think the Supreme Court of Arizona said?

MR. FORD: And they have never said that it is. And they have not said that -- they have not --

QUESTION: Well, they did in this case, didn't they?

MR. FORD: Well, two of them did, but the law of Arizona I think is the three, and that has been the law that has been followed since, that just because the scene that the police come upon is horrifying, that fact alone

is not enough. There has to be some indication of intent.

And it's not just an insertion of a word. If the word had been inserted, then we would have a Jackson problem because that cannot be supported on this record.

I would like to reserve some time for rebuttal. Thank you.

QUESTION: Very well.

Mr. McMurdie, we'll hear from you.

ORAL ARGUMENT OF PAUL JOSEPH MCMURDIE

ON BEHALF OF THE RESPONDENTS

MR. MCMURDIE: Mr. Chief Justice, and may it please the Court:

In Lewis v. Jeffers, this Court held that it was not the role of the Federal judiciary to peer majestically over the shoulders of the State courts and determine de novo if the State courts had applied a limiting construction to an admittedly vague aggravating circumstance.

This Court noted in Jeffers that even if the State court misapplied the State's limiting construction, that such error was merely an error of State law and was not cognizable in a habeas corpus proceeding. This Court found that in the -- for the limited role of habeas corpus review challenging the adequacy of a State's aggravating circumstance, the State merely had to have announced a

limiting construction, and then the Federal court was to review the record in the light most favorable to the State, and then determine if any rational fact finder could find that circumstance to exist.

Today Richmond asked this Court to go beyond the stated purpose of Jeffers, to look at the Arizona Supreme Court's opinion and second-guess precisely what they said and what they meant. The State of Arizona believes that such review is unwise and not necessary in this case.

The Ninth Circuit panel that reviewed this case found that the Arizona Supreme Court had properly applied the aggravating circumstance. And when I say the Arizona Supreme Court, I'm referring to those two justices. The panel opinion cites to the majority opinion, which was authored by Justice Holohan and Hays, wherein he specifically states that they are applying the Gretzler limiting test. And I am quoting at the joint appendix at page 86. He says, "In Gretzler, we discussed factors which lead to a finding of heinousness or depravity. One factor is the infliction of gratuitous violence on the victim; another related factor is the needless mutilation of the victim."

Then in the opinion Justice Holohan sets forth those facts that he believes the record contains which satisfy the Gretzler criteria. Justices Cameron, Gordon,

and Feldman disagreed with Justices Holohan and Hays on this point, but they did not believe the justices had not applied the Gretzler limiting test.

Justice Cameron, in his opinion, specifically states -- and I'm quoting from the joint appendix at 93 -- "The majority finds this crime to be especially heinous and depraved based on two of the criteria set out in Gretzler, the infliction of gratuitous violence on the victim, and the needless mutilation of the victim. I do not believe the facts of this case fit within the proper boundaries of these criteria."

QUESTION: So, it was just in the application that they disagreed.

MR. MCMURDIE: Absolutely, Your Honor. It was simply a disagreement on the facts that were presented. This is simply that all of the justices applied the same, test but reached different conclusions based on the record.

QUESTION: And those latter two, why did they affirm?

MR. MCMURDIE: The two that found the third aggravating circumstance weighed that circumstance in their decision, and found that there was insufficient mitigation to outweigh the aggravation. The two --

QUESTION: Didn't they just sort of agree with

the first two justices?

MR. MCMURDIE: If you're referring to Justices Gordon and Justice Cameron, they do not specifically state in their opinion that they have independently reviewed the record.

QUESTION: They just relied on somebody else's opinion?

MR. MCMURDIE: No. I would not -- under Arizona law, the Arizona Supreme Court has always maintained that it is their obligation under Arizona law to independently review the record. They have said this in all of their cases, that it is their obligation to independently determine the existence of aggravation and mitigation, and determine the propriety of the death sentence.

QUESTION: Well, did all -- there were four justices who voted to affirm?

MR. MCMURDIE: That is correct, Your Honor.

QUESTION: Did each of the four justices independently weigh?

MR. MCMURDIE: Under Arizona law, all four justices would have had to have independently weighed.

QUESTION: Did they?

MR. MCMURDIE: I believe they did in this case, specifically because Justice Cameron starts off his concurring opinion by stating he believed the death

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penalty was proper in this case.

QUESTION: Right.

MR. MCMURDIE: The only way you can construe that is that he had weighed --

QUESTION: They weighed.

MR. MCMURDIE: -- he had weighed those aggravating and mitigating circumstances and concluded that the mitigation was insufficient to warrant --

QUESTION: He just didn't do it in detail.

MR. MCMURDIE: He did not specifically disagree with how the majority had viewed the mitigation. He only disagreed with the majority on how they construed the aggravating factor of heinousness or depravity.

QUESTION: But he didn't explain it at all. He didn't really say whether he was considering the mitigating circumstances.

MR. MCMURDIE: No, he did not, Your Honor. He did not specifically go through the mitigation. But unless he disagreed with the majority point on this matter, there was no need really for him to explain it in further detail.

QUESTION: But the majority, as you call it, the plurality I suppose, the other opinion of two justices, was relying on an especially heinous factor that the other opinion did not rely on.

MR. MCMURDIE: That is correct. Justice Holohan and Justice Hays, in their balancing process in their independent review, did rely on three aggravating factors. Justice Cameron says in his --

QUESTION: Very curious situation.

Now, you concede that the Ninth Circuit got it wrong on saying in its opinion that we're reviewing that Arizona is not a weighing State.

MR. MCMURDIE: That is correct. We -- the State of Arizona has maintained in this Court that we are a weighing State, and in our briefs filed -- the most recent briefs filed with the Ninth Circuit, we maintained we were a weighing State.

QUESTION: So, should we just send it back to the Ninth Circuit, as Justice White suggested?

MR. MCMURDIE: I don't believe it's necessary, Your Honor, for the reason that it was an alternative holding.

QUESTION: Right.

MR. MCMURDIE: Only if this Court were to disagree on the first holding, that it was improper for the two -- and -- Justice Holohan and Hays, to consider that aggravating circumstance when a majority of the court found it did not exist. Only if this Court disagrees with them on that point does it call into question the second

or the alternative --

QUESTION: The concurring justices agreed with the first two who wrote that the first two applied the right test.

MR. MCMURDIE: That is correct. They specifically state --

QUESTION: They just didn't do it -- they just disagreed with the application.

MR. MCMURDIE: Right. That is correct, Your Honor. They specifically state in their opinion that the majority -- the two, had found the circumstance based on two criteria, and they disagreed that the facts were present to have the circumstance exist.

QUESTION: Well, what about the dissenting judge?

MR. MCMURDIE: The dissenting judge again, in his independent review, simply weighed what he believed were the two aggravating factors, and he simply gave more weight to the mitigation. So, he --

QUESTION: What --

MR. MCMURDIE: He viewed -- he simply felt that death was not appropriate in this case.

QUESTION: Well, there were three justices then who said that the heinous aggravating circumstance was not satisfied.

MR. MCMURDIE: That is correct.

QUESTION: Well, how should the habeas court have treated that?

MR. MCMURDIE: The Ninth Circuit stated that so long as the minority justices on that point had, nonetheless, applied the limiting test, that they had satisfied the rational sentencer requirement of Lewis v. Jeffers.

QUESTION: Well, what if all of the -- what if the four justices had agreed on the -- what the test was? I mean, they applied the right definition, but they all agreed it wasn't satisfied.

MR. MCMURDIE: Then that circumstance would not have been found.

QUESTION: It would have had to be ignored.

MR. MCMURDIE: That's correct.

QUESTION: Well, why shouldn't it be ignored when three out of the five say it should be ignored?

MR. MCMURDIE: This Court has never held that a minority position on an aggravating circumstance cannot be weighed when that sentencer determines or is to balance the circumstance. This Court has not viewed them as elements of an offense that they must unanimously be found before they can be considered.

That is the whole purpose of our Teague argument

in the brief, because this Court has never directly told any of the State courts that they cannot do what was done in this case. We're allowing the two minority justices to, nonetheless, consider what they believe factually existed, and apply that aggravating circumstance.

QUESTION: May I ask if you think, not as a matter of State law, but as a matter of Federal law, that the evidence in the record would support that heinous factor if the defendant did not drive the car?

MR. MCMURDIE: If the -- if it was found that the defendant was not the driver?

QUESTION: If it was not found that he did drive the car. In other words, is a finding of his driving the car necessary as a matter of Federal law to support that circumstance in your judgment?

MR. MCMURDIE: I believe that as a matter of State law that he be the driver of the car, and I believe --

QUESTION: But my question is, if the record does not establish who drove the car, is the -- would the circumstance in your judgment be acceptable as a matter of Federal constitutional law?

MR. MCMURDIE: I believe this record does support the finding that he drove the car.

QUESTION: Well, there was no finding that he

drove the car.

MR. MCMURDIE: I would disagree.

QUESTION: Could you point me in the record, in the trial proceedings, where the trial courts made such a finding?

MR. MCMURDIE: There was not an explicit finding, but it was implicit. Richmond argued to the trial court judge that under Arizona law, he could only be found to be -- have committed this crime in a heinous and depraved manner if he was the actual killer and cited State v. Lujan, and it's on page 71 in the joint appendix.

QUESTION: I read that part of the joint appendix, and there is no such finding there. I understand the argument was made.

MR. MCMURDIE: Right.

QUESTION: And there was a lot of responses to that argument

MR. MCMURDIE: Well, he --

QUESTION: -- none of which was he drove the car.

MR. MCMURDIE: He rejected by finding that he had committed this crime in a heinous and depraved manner, thereby implicitly finding that he was the driver.

QUESTION: Well, would you answer my question, though? We can look at the record and decide on that. If

there is not a finding that he drove the car, do you think that the record would adequately support, as a matter of Federal law, the aggravating circumstance?

MR. MCMURDIE: Yes.

QUESTION: You do.

MR. MCMURDIE: Because the Federal court under Jeffers is to review the evidence in the light most favorable to supporting that factor.

QUESTION: Well, let me go one step further. Supposing there is a finding that he did not drive the car, then would you say that it was sufficient as a matter of Federal law?

MR. MCMURDIE: I think the presumptions change if there had been express finding by the Arizona Supreme Court that he did not drive the car, but that was not made in this case.

QUESTION: Well, I understand, but do you think the record would be sufficient if it were clear in a finding to that effect that he did not drive the car?

MR. MCMURDIE: I think the presumption would change, and therefore if there was a record that the Federal court could not go beyond what was specifically found by the State court.

QUESTION: But your position is that we should, in effect, in the ambiguities, resolve them in favor of

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the verdict and presume he did find --

MR. MCMURDIE: That is correct.

QUESTION: Well, didn't the Arizona Supreme Court say that the trial court found that he was the driver, but then said but even if he was not the driver, he was there directing the whole thing, and Enmund was not violated?

MR. MCMURDIE: That's right. In addressing the Enmund issue, they said it didn't matter, they didn't need to resolve it even though the evidence was more inclined to believe that he was the driver of the car.

QUESTION: Well, I thought they really meant to say that even if he wasn't, it didn't make any difference to the ultimate decision.

MR. MCMURDIE: For the Enmund/Tison issue, but not regarding heinousness or depravity. As the concurring justices point out that under State v. Lujan in a line of cases, it would require him to be the driver of the car.

QUESTION: Well, at least the Arizona Supreme Court seemed to agree with what you said, that the trial court did find that he was the driver, either explicitly or implicitly.

MR. MCMURDIE: That is correct. The Arizona Supreme Court, in their opinion when they were talking about the Enmund issue, did believe that the trial court

had implicitly found Richmond to be the driver of the car.

Regarding Richmond's argument today, that the evidence supports that it was an accident, that is clearly incorrect. The evidence was that Richmond drove the co-defendants and Mr. Crummett out into the desert, turned the car around, and proceeded to rob Crummett by knocking him down and rendering him unconscious. Richmond then secured boulders from the desert. They were six to eight inches across. He hurled them at Mr. Crummett's head, causing blood to come out. He then got in the car and backed the car over Mr. Crummett's head. He then waited approximately 30 seconds and ran over Crummett again.

There is nothing from this record which would indicate that this was an accidental killing. This record clearly supports the Justices Holohan and Hays' determination that this is gratuitous violence above that which was necessary to fulfill the object of the crime, the object in this case being the robbery. And as cited in the brief, that is a constant application of this factor by the Arizona Supreme Court before and after this case was decided.

Regarding Justice Blackmun's question about why Rebecca Corella was not prosecuted, the record is silent for the most part. The only reference was that the State believed her testimony was necessary originally, and so

they had made an immunity agreement with her. It came out that her testimony was not necessary at trial, but because of the immunity agreement she was never prosecuted.

The State of Arizona believes that this case has had sufficient review. The trial court has looked at this evidence twice and determined that the death penalty is appropriate. The Arizona Supreme Court, on independent review, has twice determined that this case warrants death. The State of -- given Richmond's background, he is in an elite class of death row inmates, not only in Arizona, but in the country as a whole. The State believes that further review is unwarranted and is not necessary.

Thank you.

QUESTION: Thank you, Mr. McMurdie.

Mr. Ford, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF TIMOTHY K. FORD

ON BEHALF OF THE PETITIONER

MR. FORD: This case was reviewed a number of times because it was clearly unconstitutional when the death sentence was imposed for at least two reasons having to do with restriction of mitigation and the vague circumstance without -- pre-Gretzler. The problem is that I think the courts have, I think, done what would be some damage to the law by trying to save something that was

done under a different era.

Now, there's a number of factual things I'd like to hope the Court will notice. One is there's no finding of gratuitous violence. It's never made. They specifically say, we find ghastly mutilation, not gratuitous violence. They also say the 30 seconds is -- the testimony was 15 seconds, and shading it for the defense on a different point, maybe 30 seconds. But 15 seconds is what Dr. Hulka says, and we cite that in our brief.

But the concern I have, I think the greatest concern, I think Mr. McMurdie misspoke himself because the State had agreed -- and I think it's clear logically -- that if either of these arguments is correct, that if either of our submissions is correct, this case has to be resentenced because without it, without both the "majority" and the concurrence, there are not three votes to uphold this death sentence.

And if the one dissenting Justice who says, number one, that the majority has not limited this properly under Godfrey, which the true majority agrees with, and also says, number two, that the concurrence has not independently considered the mitigation, that his vote would be crucial to this situation. So, I think that however one construes these differing opinions, that the

-- that unless -- if Stringer is to hold and Clemons is to hold and not be altered and we're not going to have one-time-only minority aggravating circumstances that come in and then disappear out of a case, that's --

QUESTION: Thank you, Mr. Ford.

MR. FORD: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 1:45 p.m., the case in the above-entitled matter was submitted.)

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Willie Lee Richmond, Petitioner v. Samuel A. Lewis, Director, Arizona

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Department of Corrections, et al.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lynn M. May

(REPORTER)