ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

The State of Arizona v. Hon. Howard Fell and Edward John Sanders, Real Party in Interest, CV-04-0344-PR;
2 CA-CV 02-0123 (Opinion) (Cross-Petition)

PARTIES AND COUNSEL:

Petitioner: Edward John Sanders is represented by Harold Higgins.

Respondent/Cross-Petitioner: The State is represented by Kathleen Mayer, Deputy Pima County Attorney.

FACTS:

In 2004, a jury convicted Sanders of sexual assault, kidnapping, second-degree burglary, and first-degree murder. *State v. Fell,* 205 Ariz. 77, 97 P.3d 902, 903 (App. Div. 2 2004). Because the State did not seek the death penalty for Sander's first-degree murder conviction, the sentencing options for that charge were limited to a choice between natural life in prison or a life term without possibility of parole. *Id.* Prior to Sander's conviction for first-degree murder, but following his commission of the offense leading to that conviction, this Court issued *State v. Viramontes* II, 204 Ariz. 360, 64 P.3d 188 (2004)(vacating *State v. Viramonte*s, 200 Ariz. 452, 27 P.3d 809(App. 2000). *Viramontes II* held that a defendant convicted of non-death penalty eligible first-degree murder be sentenced in accordance with A.R.S. § 13-703, rather than A.R.S. § 13-702. *Viramontes II*, 204 Ariz. at 360, 64 P.3d at 188. Shortly thereafter, the Legislature amended A.R.S. §13-703.01, adding A.R.S. §13-703.01 (Q), effectively nullifying *Viramontes II*. Subsection Q now provides:

> "If the death penalty was not alleged or was alleged but not imposed, the court shall determine whether to impose a sentence of life or natural life. In determining whether to impose a sentence of life or natural life, the court:
>
> (1) May consider any evidence introduced before sentencing or at any other sentencing proceeding.
>
> (2) Shall consider the aggravating and mitigating circumstances listed in section 13-702 and any statement made by the victim. (Emphasis added).

Following Sander's first-degree murder conviction, but prior to his sentencing, the U.S. Supreme Court decided *Blakely*. *Blakely* declared Washington's non-capital sentencing scheme unconstitutional based primarily on the Court's earlier decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000)("other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt.) *See Blakely*, 542 U.S. ____, 124 S.Ct. at 2537.

Therefore, the court held that *Blakely* applies to Sander's case and that prior to the

imposition of a natural life prison term for first-degree murder, the State would be required to prove aggravating factors to a jury. The trial court also apparently held that the only sentencing factors that it could consider in deciding between the two remaining life sentences were those set forth in A.R.S. § 13-703, rather than those set forth in § 13-702. Under §13-703(A) (2000), a person convicted of first-degree murder may receive a sentence of death, natural life (life in prison without the possibility of release), or life with the possibility of release (life in prison without the possibility of release for twenty-five years). Here, after the State withdrew its death penalty allegation, the court considered the aggravating and mitigating factors in A.R.S. §13-703 and imposed a natural life sentence.

As the court of appeals notes in this case, "[n]either the respondent judge's order, nor the transcripts of the status conference make clear whether [the trial judge] believed he had to consider the aggravating factors listed in §13-703 or the factors listed in § 13-702, as directed by § 13-703.01 (Q)." *Fell*, 97 P.3d at 904. However, the parties seemed to agree that the trial court intended to consider only those factors listed in §13-703. *Fell*, 97 P.3d at 904.

In response to the trial court's ruling, the State filed a petition for special action in the court of appeals. The court of appeals accepted jurisdiction of the State's petition, holding that §13-703.01(Q) is a substantive change in the law that does not apply to Sander's case because it is not within the Legislature's power to "retroactively nullify *Viramontes [II]*." *Id.* at 906-07. The court of appeals followed *Viramontes II* and determined that the Legislature's enactment of A.R.S. §13-703.01(Q), even if in response to this Court's decision in *Viramontes II*, substantively changed the aggravating factors that a trial court may consider in imposing a sentencing penalty for first-degree murder. Therefore, the court of appeals held that Sanders "must be sentenced in accordance with §13-703 as it read in July 2000, when he committed the offenses. And, consistent with *Viramontes [II]*, the respondent judge must consider the aggravating factors in § 13-703, not those in § 13-702." This ruling is the subject of the State's cross-petition in this case.

The court also held that *Blakely* does not require that a jury find aggravating factors before a trial court imposes a sentence of natural life for a defendant convicted of first-degree murder that is not death eligible. The court held that *Blakely* does not apply because both life sentencing options are "indeterminate sentencing alternatives . . . variations as it were, on a life term of imprisonment. Either alternative may be imposed based solely on the jury's guilty verdict, without additional findings." The court noted that there is "no presumptive or aggravated prison term for first-degree murder." The court recognized that there was simply one option for defendants convicted of first-degree murder: a term of life imprisonment. "The legislature gave trial judges the discretion to choose the alternative conditions for that life term - - natural life or life with the possibility of parole in twenty-five or thirty-five years - - but neither alternative may be characterized as the presumptive term and both may be imposed "solely on the basis of facts reflected in the jury verdict or admitted by the defendant . . . without any additional findings." *See Blakely*, 542 U.S. ___, 124 S.Ct. at 2537.

ISSUES:

"1. Must factual findings be made before a defendant convicted of non-capital first-degree murder can be sentenced to natural life without possibility of parole?

2. If factual findings are required to sentence a non-capital first-degree defendant to natural life, must those findings be made by a jury?"

ISSUE IN STATE'S CROSS-PETITION

"1. Whether *Viramontes* II should be overruled in part by this Court because A.R.S. § 13-702 is the proper sentencing statute for a defendant convicted of first-degree murder and not eligible for death, as demonstrated by the Legislature's clarification of the law as espoused in A.R.S. § 13-703.01(Q).

2. Whether *Blakely* is applicable in cases in which a defendant convicted of first-degree murder is facing a life sentence, such that a jury must decide whether certain aggravating circumstances exist prior to a trial judge sentencing a defendant to natural life."