



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**ARIZONA SUPREME COURT  
ADMINISTRATIVE OFFICE OF THE COURTS  
1501 West Washington - Phoenix Arizona 85007- 3231  
Public Information Office: (602) 542-9310**

***State v. Phillips, CR-99-0296-AP  
and State v. Finch, CR -99-0551-AP***

**PARTIES:**

Petitioner Finch: Represented by S. Jonathan Young, Law Offices of Williamson & Young

Petitioner Phillips: Represented by Nancy F. Jones, Rebecca A. McLean and John F. Palumbo, Pima County Public Defender's Office

State of Arizona: Represented by Kent E. Cattani, Chief Counsel, Capital Litigation Section and Jack Roberts, Assistant Attorney General, Criminal Appeals Section

**FACTS**

Around 1:15 a.m. on April 12, 1998, two men, one wearing a ski mask and the other with a bandana covering his nose and mouth, walked into the Famous Sam's restaurant at Silverbell and Grant in Tucson. There were only four people in the restaurant that night and they were all employees. The robbers, one carrying a sawed-off rifle and the other with a shotgun, ordered three of the employees into the cooler. The man with the rifle then confronted the fourth person, waitress Shelly Raab. When Ms. Raab saw the robber approach her, she fell to her knees. The robber pointed the sawed-off rifle at her, told her to get into the cooler and then, without warning, shot her in the chest. After Ms. Raab was shot, the robber dragged her into the cooler with the other three employees. The robbers then went to the cooler and demanded to know where the money was kept. Beverly Rochon, the acting manager, led the robber with the shotgun to the money while he pointed a gun at her head. After taking the money, the robbers put Ms. Rochon back in the cooler and left. Shelly Raab survived but the gunshot fragmented her liver, lung and stomach, caused her to lose her spleen, a kidney and part of her pancreas, and has left her with a permanent limp and frequent numbness in her legs. Witnesses from this robbery described the robber with the rifle as an African-American male and the robber with the shotgun as a taller white or Hispanic male.

At 10:30 p.m. on April 23, 1998, a tall white or Hispanic male, later identified as Keith Royal Phillips, walked into the Firelight Lounge at Wetmore in Tucson and asked what time the bar closed. Two hours later, an African-American man, later identified as Marcus LaSalle Finch, walked into the bar and asked for Killian's Red Beer. When the bartender, Jaime Ramirez Gilson, stepped into the cooler to get the beer, the man who had asked for the time earlier that night came through the front door with a sawed-off rifle and shouted for everyone to get on the floor.

The man who had ordered the beer was now holding a handgun. He grabbed Ms. Gilson, dragged her to the cash register and told her to give him all the money. After Ms. Gilson gave him the money, he took her to the men's restroom. Meanwhile, the other robber demanded money from patrons who were in the bar. After taking their money, the robber alleged to be Phillips ordered the patrons into the cooler. When they told him there was no cooler, he told them to walk into the women's restroom with their hands behind their heads. As Bill Gilson, a patron, was walking into the cooler, he was shot in the back twice without warning. The robbers left shortly thereafter. Bill Gilson did not die, but one of the bullets collapsed his right lung, he lost his spleen, part of his liver and was in a coma for three weeks.

Sometime around midnight on April 28, 1998, Finch allegedly walked into the Famous Sam's restaurant at Cardinal and Valencia in Tucson and asked the bartender, Margaret Damron, how much a Killian's Red Beer cost. He then left the restaurant stating he needed to go to his car to get money. When Finch returned, he sat down and ordered a beer. A few minutes later, Phillips allegedly walked into the restaurant with a sawed-off rifle and opened fire into the backs of patrons sitting at the bar. When Phillips began shooting, two men who were playing pool in the back of the restaurant fled through the back door of the restaurant. The man identified as Finch followed the two men and shot one of them, Kevin Hendricks, twice in the back. Meanwhile, the man identified as Phillips demanded money from Ms. Damron. After receiving the money, the robbers rounded up everyone who was still in the restaurant and herded them into the cooler. As the robbers fled from the restaurant in their car, they were pursued by a Pima County Sheriff's deputy who eventually pulled them over and arrested them. Kevin Hendricks' body was discovered a short time later in back of the Famous Sam's restaurant. He died of two gunshot wounds.

Finch and Phillips were charged with 55 counts of armed robbery, kidnaping and aggravating assault. They were also charged with one count of first degree felony murder for the death of Kevin Hendricks during the April 28 robbery. All three incidents were consolidated for a dual-jury trial.

At trial, Finch, testifying to his jury only, admitted participating in the three robberies, shooting Shelly Raab and shooting Kevin Hendricks. Finch's jury found him guilty of first degree murder as well as most of the non-homicide counts. At trial, Phillips attorney argued that witnesses misidentified Phillips as the other robber. Phillips' jury, however, found him guilty of first degree murder as well as most of the non-homicide counts. The trial judge sentenced both Finch and Phillips to death for first degree murder after each defendants' Mitigation/Aggravation Hearing.

## ISSUES:

### *State v. Finch*

1. Did the trial court err in admitting Finch's taped confession?
2. If Finch's request for counsel is held to be ambiguous, should Arizona clarify the standard to be used for ambiguous requests for counsel?
3. Did the trial court err in giving its reasonable doubt instruction?
4. Did the trial court err in not giving an instruction on proximate cause?
5. Did the trial court err when it instructed the jury not to consider voluntary intoxication?
6. Did the trial court exclude jurors and did the state strike jurors for religious reasons?
7. Did the evidence at trial support Finch's felony murder conviction?
8. Did the trial court err in finding the (F)(5) aggravating factor (pecuniary gain)?
  
9. Does Finch's death sentence violate the cruel and unusual punishment clause of the Constitution?
10. Did the trial court err in finding the (F)(2) aggravating factor (previous conviction for a serious offense)?
11. Did the trial court err in relying on an undisclosed Army Field Manual in its Special Verdict?
12. Did the trial court err in finding that the (G)(1) mitigator (significantly impaired capacity to appreciate wrongfulness of conduct or to conform conduct to the requirements of the law) was not adequately supported?
13. Did the trial court err in rejecting the non-statutory mitigation (family support; effects of execution on children; remorse; rehabilitative potential; good behavior; cooperation with authorities; emotional distress; difficult childhood; impairment due to drugs and alcohol; lack of intent to kill)?
14. Is Arizona's capital sentencing scheme unconstitutional?

*State v. Phillips*

1. Did the trial court err in denying Phillips' Motion to Sever the counts arising from the three robberies?
2. Did the trial court err by denying Phillips' Motion to Suppress Identification?
3. Did the trial court exclude jurors in violation of Phillips' right to a fair trial and an impartial jury?
4. Did the trial court err when it failed to permit evidence of third-party culpability?
5. Did the trial court err in admitting into evidence a photograph of Phillips?
6. Did the evidence at trial support Phillips' premeditated murder conviction?
7. Did the trial court err in failing to dismiss Phillips' premeditated murder conviction?
8. Did the evidence at trial support Phillips' felony murder conviction?
9. Did the trial court err in denying Phillips' Motion for Mistrial based on prosecutorial misconduct?
10. Did the trial court err in giving its premeditated murder instruction?
11. Did the trial court err in imposing the death penalty?
12. Did the trial court err by improperly considering victim impact statements?
13. Did the trial court err in finding the (F)(5) aggravating factor (pecuniary gain)?
14. Did the trial court err in finding the (F)(2) aggravating factor (previous conviction for a serious offense)?
15. Did the trial court err in rejecting Phillips' statutory mitigation (significantly impaired capacity to appreciate wrongfulness of conduct or to conform conduct to the requirements of the law; relatively minor participation; Age)?
16. Did the trial court err by not considering all of Phillips' statutory mitigation as nonstatutory mitigation?
17. Did the trial court err in rejecting Phillips' nonstatutory mitigation? (familial responsibility; family support; remorse; lack of intent to kill)

18. Did the trial court err in considering Finch's confession when sentencing Phillips?
19. Did the trial court err in sentencing Phillips for the non-homicide convictions?
20. Did the trial court err in allowing the use of dual juries?

***This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office and the Administrative Office of the Courts solely for educational purposes. It should not be considered official commentary by the court or any member thereof or part of any brief, memorandum or other pleading filed in this case.***

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**CV-01-0158-PR  
MICHAEL and CYNTHIA SAMSEL et al. v. ALLSTATE INS CO.,**

**Parties and Counsel:** The Petitioner is Allstate Ins. Co., represented by Floyd P. Bienstock and Bennett Evan Cooper of Steptoe & Johnson. The Respondents are Michael and Cynthia Samsel and Lisa Samsel, represented by Bruce A. Burke and Robert Q. Hoyt.

**Facts:** Lisa Samsel was injured in an automobile accident and taken to University Medical Center (UMC). The day after she was admitted, she signed a "Conditions of Admission" form agreeing "to pay all of patient's Hospital charges as and when billed." At the time, Lisa was enrolled in a Health Maintenance Organization (HMO). She also was an insured under her parents' Allstate automobile liability policy, which contained a \$10,000 med pay provision (costing an extra \$300 in annual premiums) that obligated Allstate to cover all reasonable medical expenses an insured "actually incurred."

The HMO covered all of Lisa's hospitalization and physician expenses except for \$313.55. Lisa submitted a claim to Allstate for med pay benefits in amounts that were both covered and not covered by her HMO, over \$19,000. Allstate paid only the \$313.55, asserting that, because Lisa's HMO was obligated to pay the other charges, and because, under A.R.S. § 20-1072, Lisa was not liable, as a matter of law, for the UMC charges covered by her HMO, the expenses were ones she did not "actually incur."

Lisa and her parents brought a class action lawsuit against Allstate, alleging breach of contract, bad faith, and other claims. The trial court granted them summary judgment on the contract claim, based primarily on *Coconino County v. Fund Administrators Ass'n, Inc.*, 149 Ariz. 427 (App. 1986). Allstate appealed, and the court of appeals affirmed. The Arizona Supreme Court granted Allstate's petition for review.

**Questions of Law Presented:**

1. Whether the Court of Appeals erred in affirming summary judgment for the plaintiff on the basis that, by signing a boilerplate hospital admissions form, she had effectively waived her statutory immunity against liability for the medical expenses covered by her HMO under A.R.S. § 20-1072(A)-(C).

2. Whether the Court of Appeals erred in holding that an insurer did not have standing to challenge the validity or enforceability of an alleged contractual liability of its insured for which the insured sought insurance benefits, where the insurer was not seeking to enforce or otherwise claim benefits under that contract, but was merely seeking to establish that it did not have any obligation to pay benefits under its own insurance contract with the plaintiff.

**Pertinent Authority:**

**A.R.S. § 20-1072 (A) through (E). Nonliability of enrollees for provider or hospital charges; penalty**

A. Every written contract between a health care services organization and a provider or hospital shall set forth that if the organization fails to pay for covered health care services as set forth in the enrollee's evidence of coverage or contract the enrollee is not liable to the provider or hospital for any amounts owed by the organization and the provider or hospital shall not bill or otherwise attempt to collect from the enrollee the amount owed by the organization.

B. If the written contract between the contracting provider or hospital and the organization fails to contain the required prohibition stated in subsection A, the enrollee is not liable to the contracting provider or hospital for any amounts owed by the organization.

C. No contracting provider or agent, trustee or assignee of the contracting provider or hospital may maintain an action at law against an enrollee to collect any amounts owed by the organization for which the enrollee is not liable to the contracting provider under subsection A.

D. Nothing in this section impairs the right of a provider or hospital to charge, collect from, attempt to collect from or maintain an action at law against an enrollee for any of the following:

1. Copayment or coinsurance amounts.
2. Health care services not covered by the organization, including out of area claims that are not paid by an organization on behalf of an enrollee.

3. Health care services rendered after the termination of the contract between the health care services organization and the provider or hospital, unless the health care services were rendered during confinement in an inpatient facility and the confinement began prior to the date of termination, or unless the provider has assumed post-termination treatment obligations under the contract.

E. Nothing in this section prohibits an enrollee from seeking health care services from a contracting or noncontracting provider or hospital and accepting financial responsibility for these services.

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