



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA V. EUGENE ROBERT TUCKER
CR-05-0162-AP**

PARTIES AND COUNSEL:

Petitioner: Defendant/Appellant Eugene Robert Tucker, represented by Christopher Johns, Deputy Public Defender, and Karen Noble, Deputy Public Defender, Maricopa County Public Defender's Office

Respondent: Plaintiff/Appellee State of Arizona, represented by Terry Goddard, Attorney General, Kent Cattani, Chief Counsel, and Jeffrey Alan Zick, Assistant Attorney General, Capital Litigation Section

FACTS:

On July 15, 1999, Eugene Tucker entered the apartment occupied by Ann Marie Merchant, a woman with whom he had a prior sexual relationship. Also living at the apartment were Ann Marie's brother, Roscoe Merchant; Roscoe's girlfriend, Cindy Richards; and Cindy's infant son, Anothy. Tucker bound, gagged, beat, sexually assaulted, and ultimately shot and killed Ann Marie. He shot and killed Cindy and Roscoe as they slept in their bed and left the infant in his crib in the same room.

At trial, testimony established that Tucker and Ann Marie had argued over the phone the two nights preceding the murders. Testimony further established that semen collected from Ann Marie's right thigh and t-shirt was a fourteen-point match with Tucker's DNA, and a single fingerprint belonging to Tucker was found on the inside handle of the kitchen refrigerator door. A jury convicted Tucker of sexual assault, kidnapping, burglary, and three counts of first degree murder. The trial court sentenced Tucker to twenty-five years to life for sexual assault, twenty-one years for kidnapping, twenty-one years for burglary, and death for each of the murders.

Following the United States Supreme Court's decision in *Ring v. Arizona (Ring II)*, 526 U.S. 584 (2002), the legislature amended Arizona's sentencing statutes to require jury determinations on aggravating and mitigating circumstances and jury sentencing. 2002 Ariz. Sess. Laws, 5th Spec. Sess., ch. 1, § 3 (codified at Ariz. Rev. Stat. ("A.R.S.") § 13-703.01 (Supp. 2003)). In *State v. Ring (Ring III)*, 204 Ariz. 534, 65 P.3d 915 (2003), the Court concluded that for those cases on direct appeal in which it had not issued a direct appeal mandate, including Tucker's, it would examine the death sentences for harmless error.

On appeal, the Court affirmed the convictions and sentences for sexual assault, kidnapping, and burglary and affirmed the first-degree murder convictions. Consistent with *Ring III*, the Court concluded that there was harmless error with respect to findings of the A.R.S. § 13-703(F)(6) (2001)

aggravator based on cruelty for the death of Ann Marie and the (F)(8) multiple homicides aggravator for each victim. Re-sentencing was required, however, because the Court concluded that a reasonable jury could reach different conclusions than had the trial court with regard to the (F)(6) aggravator for Roscoe and Cindy, which was based on a witness-elimination theory; the (F)(3) aggravator, which was based on the theory that Tucker had placed the infant in “grave risk of death” by leaving it in the apartment after killing the adult occupants; and the significance of the mitigating circumstances.

A newly-impaneled jury unanimously sentenced Tucker to death after finding four aggravating circumstances for each of the three victims: (1) conviction of another offense eligible for life imprisonment or death; (2) grave risk of death to another person; (3) especially heinous, cruel or depraved; and (4) conviction of one or more other homicides during the commission of the offense. The trial judge gave the jury a special interrogatory to determine whether it would still impose a death sentence without the grave risk of death aggravator; the jury unanimously found that a sentence of death was still warranted for each of the victims. This automatic appeal followed.

ISSUES:

Tucker raises ten aggravation phase issues and six penalty phase issues. In addition to these issues, this Court must independently review the aggravating and mitigating circumstances to determine if the death penalty is appropriate as required by A.R.S. § 13-703.04 (Supp. 2006).

Tucker raises the following issues on appeal:

1. Did the trial court improperly place the burden of proving that the evidence of mitigation was sufficiently substantial to call for leniency on Tucker? If so, was the error structural, fundamental, or harmless?
2. Did the trial court fail to advise Tucker whether his statements during allocution would be free from cross examination and thereby preclude a knowing and voluntary waiver?
3. Did the trial court impermissibly deter Tucker’s right to testify by advising him of the downsides of testifying and failing to secure a knowing and voluntary waiver?
4. Did the trial court impermissibly fail to determine whether an alternate juror deliberating for the first time during the penalty phase followed the admonition?
5. Did the trial court improperly exclude Juror 147 based upon her generalized opposition to the death penalty?

6. Did the trial court deprive Tucker of his due process and fair trial rights, resulting in cruel and unusual punishment, by failing to instruct the jury on the significance and application of a stipulation providing the sole evidence of proof for the A.R.S. § 13-703(F)(1) aggravating circumstance?
7. Is it impermissibly arbitrary and capricious to find Tucker death eligible based on the A.R.S. § 13-703(F)(3) grave risk of death aggravating circumstance?
8. Was there sufficient evidence to establish the A.R.S. § 13-703(F)(3) grave risk of death aggravating circumstance beyond a reasonable doubt?
9. Do the A.R.S. § 13-703(F)(3) grave risk of death and (F)(6) heinous, cruel, or depraved aggravating circumstances violate double jeopardy?
10. Was there sufficient evidence to establish the A.R.S. § 13-703(F)(6) heinous, cruel, or depraved aggravating circumstance beyond a reasonable doubt for Roscoe and Cindy's murders?
11. Is the A.R.S. § 13-703(F)(6) heinous, cruel, or depraved aggravating circumstance unconstitutionally vague and incapable of principled application?
12. Did the trial court abuse its discretion by admitting photographs found on Tucker's bedroom wall depicting deceased celebrities and historical figures?
13. Did the trial court admit unconstitutional hearsay when it permitted the State's criminalist to testify about statements made by another, non-testifying individual?
14. Did the trial court's failure to give the jury a verdict mitigation form prevent the jurors from meaningful review of the death penalty?
15. Did the prosecutor's statement during the penalty phase closing argument amount to prosecutorial misconduct?
16. Are hearsay victim impact statements inadmissible under *Blakely v. Washington*, 542 U.S. 296 (2004), and *Crawford v. Washington*, 541 U.S. 36 (2004)?

Tucker also identifies eleven issues to preserve for federal review.

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