



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. PHILLIP ALAN BOCHARSKI  
CR-06-0295 AP**

**PARTIES AND COUNSEL:**

*Appellant:* Phillip Alan Bocharski is represented by David Goldberg

*Appellee:* The State of Arizona is represented by Kent Cattani, Chief Counsel, and Deborah A. Bigbee, Assistant Attorney General, Capital Litigation Section of the Arizona Attorney General's Office

**FACTS:**

In November 1994, Phillip Bocharski left Michigan where his family was living, and traveled to Arizona with an acquaintance named Frank Sukis. Initially, Bocharski and Sukis lived together, but after a period of months Bocharski moved to Congress and set up a tent where he lived alone. In April 1995, Freeda Brown parked her travel trailer about fifty yards from Bocharski's camp. Brown traveled to the desert during the winter and camped out with her animals. Soon after Brown arrived, she was introduced to Bocharski and paid him on numerous occasions to drive her to perform errands and to do odd jobs.

On May 10, 1995, Bocharski traveled with Sukis to Richard Towell's camp, where he consumed enough beer that he testified to being drunk upon leaving the camp at around four or five in the afternoon. On the way back from Towell's camp, Sukis and Bocharski stopped at the Arrowhead Bar where, Bocharski testified, he "had a couple bourbon and cokes and a beer or two." By the time Bocharski left the bar, he testified, he was "three sheets to the wind." Sukis drove Bocharski back to the area in which he was camped and dropped him off down the road from his camp site. On the way back to his site, Bocharski noticed that the light in Freeda Brown's trailer was on and that her dog was tangled up in the bushes outside the trailer. Bocharski testified that he continued to consume whisky and beer at his camp while he prepared dinner for himself. After ten or fifteen minutes, he decided to go to Brown's trailer to let her know her dog was tangled up again. Bocharski testified that around nine thirty at night he knocked on Brown's door and that, as she always did, she stepped back to let him inside.

Once inside, Bocharski testified that a discussion ensued about whether Brown wanted him to unhook her dog from the bushes. Bocharski testified that he was concerned with the way Brown treated her animals; he had observed her dog tangled on four or five previous occasions and this sometimes prevented the dog from reaching its food and water. Bocharski testified that he does not remember what Brown said, but that he just "snapped" and stabbed Brown twice in the head after

which she “sat back on her bed and leaned over to the side.”<sup>1</sup> He then lifted her feet onto the bed and covered her with a blanket. He further testified that he panicked and wanted to make the killing seem as if it was part of a robbery, so he stole money from Brown’s purse that was hanging on the door. Bocharski locked the door of the trailer and returned to his camp site down the road.

On several occasions during the days following the murder, Dwayne Stalley drove by Brown’s trailer and, on the third occasion, noticed that her dog was wound up around the tree. After he received no answer at the door of Brown’s trailer, he unwound the dog. Upon finding the dog wound up again the next morning, he became concerned. A few days later, on May 13, 1995, Stalley and Sukis went to investigate Brown’s whereabouts. Sukis popped open the door of Brown’s trailer and found her deceased in her bed. Stalley went back to his place and called the sheriff.

Raymond Belmore, a patrol deputy for Yavapai County, responded to the call. Belmore entered Brown’s trailer and noted no signs of foul play. Belmore removed the blanket covering Brown and, he testified, found the body in a state of decomposition and noticed what he thought were wounds to her face caused by her kittens. Mr. Belmore believed Brown had died of natural causes.

Because deputy Belmore concluded that the victim had died of natural causes, her trailer and property were not preserved, but instead turned over to her friends pursuant to a will found in the trailer. On May 14, 1995, the medical examiner of Yavapai County examined the body and quickly determined that it was unlikely to have been a natural death based on the injuries present.

On May 15, 1995, the autopsy was performed. The doctor testified that he found at least twenty-four overlapping knife injuries to Brown’s head; eight injuries resulted from deeper penetrating stab wounds. With the exception of one small wound on the right index finger, all the wounds were confined to the left side of Brown’s face. The doctor described one of the wounds as a fatal wound that would have rendered Brown unconscious within a matter of seconds. The doctor testified that he suspected all the wounds occurred fairly close together; there “could have been seconds, maybe minutes” between them. Bocharski testified to stabbing Brown only twice, but in the face of the evidence that Brown had actually been stabbed many more times, he said he did not remember causing the rest, but did not dispute the evidence.

On September 13, 1996, a jury found Bocharski guilty of burglary in the first degree and first degree felony murder. A judge subsequently sentenced Bocharski to death on July 29, 1997. On appeal, this Court affirmed Bocharski’s convictions, but reversed the death sentence, concluding that Bocharski received inadequate funding for a mitigation investigation. The Court remanded the case for resentencing.

On remand, a new jury found two aggravating factors proven beyond a reasonable doubt: the murder was committed in an especially heinous or depraved manner, under Arizona Revised Statutes (A.R.S.) section 13-703.F.6, and the defendant was an adult at the time of the offense and the victim

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1 A jury member formulated a question for Bocharkki that inquired as to what he meant when he said he “snapped.” Bocharski responded that when he snapped, he “lost control of what [he] was thinking.”

was over the age of seventy years, A.R.S. § 13-703.F.9. Bocharski argued the existence of the following mitigating circumstances: his state of mind at the time of the offense; dysfunctional family origin, including multi-generational violence, criminality, substance, sexual, emotional and physical abuse; abandonment, severe neglect, starvation, and foster care placement as a child; lack of normal psychosocial development as a child; history of mental, physical, and sexual abuse of Bocharski; history of alcoholism; and impact of the execution on his family. The jury determined that the mitigation was not sufficiently substantial to warrant leniency and that the death penalty was appropriate.

## **ISSUES:**

Bocharski raises twenty-two issues on appeal. Additionally, the Court performs an independent review of the aggravating and mitigating factors, as well as the propriety of the death sentence, pursuant to A.R.S. § 13-703.04 (Supp. 2007).

1. Did Bocharski fail to receive proper pretrial notice of the aggravating circumstances?
2. Did subjecting Bocharski to a second trial on the F.6 aggravator violate the double jeopardy clause and collateral estoppel?
3. Did the use of a death qualified jury violate Bocharski's constitutional rights?
4. Was Bocharski denied due process, his right to trial by jury, and to have his sentencer consider all relevant mitigating evidence because the jury that sentenced him was different than the jury that convicted him?
5. Did the court fail to comply with *Morgan v. Illinois*?
6. Was Bocharski deprived of his right to cross-examination, confrontation, a fair sentencing trial and due process when the court admitted excised portions of testimony from the original trial provided by a witness that died prior to resentencing?
7. Did the jury instructions fail to adequately define the terms "especially heinous or depraved" contained in the F.6 aggravator?
8. Did the court err by failing to provide the jury with a special verdict form for the F.6 aggravator?
9. Did the State present sufficient evidence to prove the F.6 aggravator beyond a reasonable doubt?
10. Did the court commit fundamental error by failing to give a lost or unpreserved evidence instruction pursuant to *State v. Willitis*?
11. Did the preliminary instructions fail to accurately advise the jury how it would determine the appropriate sentence?

12. Did the court err by failing to instruct the jury that only those first degree murders above the norm of all first degree murders qualify for the death penalty?
13. Did the jury instructions inaccurately set forth the State's burden of proof by not requiring that the State prove beyond a reasonable doubt that the mitigation is not sufficiently substantial to call for leniency?
14. Did the court err by admitting victim impact testimony because it lacked relevance to any mitigation and was unduly prejudicial?
15. Did the court abuse its discretion by admitting the Fields stipulated testimony as rebuttal evidence?
16. Did the court abuse its discretion by ruling that the admission of Bocharski's surrebuttal evidence opened the door to rebuttal evidence by the State?
17. Was Bocharski deprived of his right to due process as a result of the cumulative effect of the State's prosecutorial misconduct?
18. Did application of Arizona's amended death penalty statutes in this case violate the prohibition against ex post facto laws?
19. Does Bocharski's death sentence constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?
20. Does Arizona's death penalty scheme violate equal protection rights by providing less protection to Arizona capital defendants than non-capital state defendants and federal capital defendants?
21. Do Arizona's current protocols and procedures for execution by lethal injection constitute cruel and unusual punishment?

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