



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. BRIAN DANN
CR-07-0153-AP**

PARTIES AND COUNSEL:

Defendant/Appellant: Brian Dann is represented by David Goldberg.

Plaintiff/Appellee: The State of Arizona is represented by Kent Cattani, Chief Counsel, and Jon G. Anderson, Assistant Attorney General, Capital Litigation Section of the Arizona Attorney General's Office.

FACTS:

On the evening of Saturday, April 3, 1999, Brian Dann stopped by the home of his former girlfriend, Tina Pace-Morrell, to borrow a gun. Initially he claimed that someone was trying to kill him, but then told Tina that Andrew Parks had fired a gun at him earlier in the day and he needed a gun for protection because he wanted to go to Andrew's apartment to pick up some of his belongings. Andrew Parks is the brother of Shelly Parks, Dann's girlfriend. Tina loaned Dann her father's .38 caliber revolver.

On that same night, Dann was seen at the Double K, a bar he frequented in Phoenix. Kim Tran Robinson, the bar owner, said that Dann remained at the Double K until shortly before 1:00 a.m. the following morning, Sunday, April 4. Dann's friend George was also at the Double K that evening. Just before closing time, George approached Dann to talk. Dann indicated he did not want to talk in the bar, so the two men went outside to the parking lot.

Dann told George that he and Shelly were having problems. He related that Shelly's brother, Andrew, had shot at him earlier that day. Dann showed George the revolver he had borrowed from Tina, stating that he intended to "straighten out the problem." When George asked Dann what he intended to do with the gun, Dann said he intended to use it to kill Andrew. Dann also asked George for an unlicensed, untraceable "throw-away" gun. George refused Dann's request and spent the next two hours attempting to talk Dann out of his plan. By the end of the conversation, Dann seemed calmer to George and Dann told George he was going home to go to bed. Kim Tran Robinson saw the men talking in the parking lot at 2:00 a.m. as she was locking up the bar.

Dann next spoke with Tina, who testified that Dann called between 2:00 a.m. and 3:00 a.m. on Sunday, April 4, and told her that he had just shot three people. He asked what he should do. Tina advised Dann to turn himself in, but he refused. About thirty minutes later, he showed up at Tina's home to return the gun. While there, he described how he had forced his way into Andrew's apartment, "leveled the gun," and shot Andrew, then Shelly, and then Eddie. Dann recounted that he

shot Andrew and Shelly because they laughed at him, and he shot Eddie because he witnessed the shootings of Andrew and Shelly. Dann asked Tina to tell the police he was with her throughout the night, thus providing him an alibi. During Dann's meeting with Tina, he gave her the gun and five spent rounds. Before leaving, Dann washed up and borrowed some clothes.

At approximately six o'clock Sunday morning, Dann returned to Andrew's apartment, where he called 911. He reported that he had just discovered three bodies in the apartment. During the next few days, police interviewed Tina and George and located the revolver Dann had borrowed from Tina. Ballistics analysis of the gun and the bullets recovered at the scene indicated that the bullets that killed Andrew, Shelly, and Eddie were fired from the revolver. The medical examiner testified that Andrew was shot twice, once in the chest and once in the right temple; that Shelly was shot once, in the top of her head above the right ear; and that Eddie was shot twice, once behind the left ear and once in his right forehead. The wounds on Shelly's temple and Eddie's forehead were soft contact wounds, indicating that the shooter took the time to place the weapon softly against their flesh before firing. On Wednesday, April 7, 1999, Dann was arrested for the triple homicide.

On October 1, 2001, the jury found Dann guilty of three counts of premeditated murder, three counts of felony murder, and one count of first degree burglary. A judge subsequently sentenced Dann to death on January 1, 2002. On appeal, this Court affirmed one conviction of premeditated first degree murder, three convictions of first degree felony murder, and the conviction and sentence for first degree burglary, but reversed Dann's convictions for the first degree premeditated murders of Shelly and Eddie. In light of *Ring v. Arizona (Ring II)*, this Court remanded for resentencing in front of a jury.¹

On remand, a new jury found one aggravating factor proven beyond a reasonable doubt: that two or more murders were committed during the commission of the offense, under Arizona Revised Statutes (A.R.S.) section 13-703.F.8. Dann argued the existence of the following mitigating circumstances: (1) residual doubt, (2) difficult childhood (abandonment, physical abuse, and overmedication leading to drug abuse), (3) new goals on death row, amenability to rehabilitation, and lack of future dangerousness, (4) drug and mental health issues impairing his judgment, (5) remorse, and (6) family support and impact of 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:

Dann raises twenty-nine issues on appeal. Additionally, the Court performs an

¹ In *Ring II*, the United States Supreme Court held that Arizona's capital sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. 536 U.S. 584, 609 (2002). On remand, this Court consolidated all death penalty cases in which this Court had not yet issued a direct appeal mandate, including Dann's case, to determine whether *Ring II* required reversal or the vacating of the death sentence. *State v. Ring (Ring III)*, 204 Ariz. 534, 544 ¶¶ 5-6, 65 P.3d 915, 925 (2003). This Court determined that the death sentence imposed on Dann, in light of *Ring II and Ring III*, should be vacated and remanded for a new jury sentencing hearing. *State v. Dann (Dann II)*, 206 Ariz. 371, 374 ¶ 14, 79 P.3d 58, 61 (2003).

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 Dann knowingly, intelligently, and voluntarily waive his right to counsel?
2. Did Dann's sentencing trial violate due process since his murder convictions are void because the trial court lacked jurisdiction?
3. Did Dann's sentencing trial violate due process because the indictment was based upon perjured testimony?
4. Did subjecting Dann to a sentencing by a jury that did not decide his guilt deprive him of his constitutional rights to a trial by a fair and impartial jury and a reliable sentencing proceeding?
5. Did subjecting Dann to a second trial seeking the death penalty violate the prohibition against double jeopardy?
6. Did the trial court's ruling during voir dire deny Dann's constitutional right to a fair and impartial jury?
7. Did the trial court abuse its discretion by permitting the State to offer evidence not presented during the first trial in support of the F.8 aggravating circumstance?
8. Did the trial court abuse its discretion and deny Dann his right to a fair trial when it admitted irrelevant, gruesome autopsy photographs?
9. Did the trial court abuse its discretion by denying Dann's motion for a mistrial after the court ruled inadmissible gruesome photographs showed to the jury during the State's opening statement?
10. Did the preliminary jury instruction advising that this sentencing trial was required only because Dann was previously sentenced to death following "an unconstitutional hearing" cause fundamental error?
11. Did the trial court abuse its discretion by refusing to accept the stipulations entered between the parties during the first trial and permit the introduction of additional evidence indicating Dann is innocent?
12. Did the jury instruction defining the F.8 aggravator comply with Arizona and federal constitutional law and is the F.8 aggravator facially vague?
13. Did Dann's sentencing trial violate his rights to the presumption of innocence, proof beyond a reasonable doubt, an impartial jury, and due process?

14. Did the jury instruction setting forth the burden of proof on aggravation violate Dann's rights to a fair trial before an impartial jury?
15. Did the trial court's refusal to provide the jury with separate special verdict forms regarding the *Edmund/Tison* finding violate Arizona law, Dann's right to a unanimous verdict, and due process?
16. Did the trial court abuse its discretion by answering a jury question without first consulting the parties?
17. Did the disjunctive form of verdict violate Dann's right to a unanimous verdict and due process?
18. Did the trial court's refusal to preclude the State from utilizing the mitigation evidence compiled against Dann's wishes and consent in the first trial proceedings violate Dann's constitutional rights?
19. Did the failure to advise the jury that only first degree murders that are "above the norm" may receive the death penalty structural error?
20. Is A.R.S. § 13-703.E unconstitutional since it does not require that, once a defendant proves mitigating circumstances exist, the State must prove that it is not sufficiently substantial to call for leniency?
21. Did admitting inflammatory victim impact testimony after the presentation of Dann's mitigation case violate Rule 19.1.d, Arizona Rules of Criminal Procedure and Dann's rights under the Eighth Amendment? Does A.R.S. § 13-703.01.R violate the Eighth Amendment?
22. Did the trial court's refusal to provide the jury a special verdict regarding each alleged mitigation circumstance violate due process and the prohibition against ex post facto laws?
23. Did the trial court err in conducting multiple unrecorded bench conferences?
24. Did the trial court abuse its discretion and violate Dann's right to a fair and impartial jury when it refused to conduct an evidentiary hearing or replace jurors who violated the admonition during trial?
25. Did the trial court's preclusion of evidence and argument regarding actual innocence violate Dann's rights to present a complete defense, to have his sentencer consider all relevant mitigation, and the prohibition against ex post facto laws?
26. Did the trial court abuse its discretion by refusing to admit evidence that, in the absence of a death sentence, Dann stipulated to being sentenced to life without parole?

27. Did the cumulative effect of the State's prosecutorial misconduct deprive Dann of his right to due process?
28. Should Dann's death sentences be reduced to life under this Courts obligation to conduct an independent review?
29. Does Arizona's death penalty scheme violate equal protection since, unlike Arizona's non-capital defendants and federal capital defendants, it fails to require that the jury make specific findings of fact and conclusions of law reviewable by an appellate court?

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