



**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. Lemuel Prion*
CR-99-0378-AP**

PARTIES

Petitioner Prion: Represented by the Pima County Public Defender, Frank Leto and Brian Metcalf

State of Arizona: Represented by Kent Cattani, Chief Counsel, Capital Litigation Section of the Attorney General's Office, and Bruce Ferg, Assistant Attorney General

FACTS

On Saturday, October 24, 1992, two human arms were found in a dumpster in Tucson. The condition of the arms was consistent with the victim having died and the arms being removed after death. The arms were later identified as belonging to Diana Vicari, a 19-year-old community college student who had been missing since around midnight the night of Thursday, October 22, 1992. The victim's car was found in a neighborhood where there was a party that Thursday night. The medical examiner testified that two sharp instruments may have been used to remove the arms from the body: a saw or heavy knife for the bones and a very sharp serrated instrument for the flesh. There was no physical evidence linking the defendant to the arms.

The defendant was working both at the Golden Years nursing home and as a carpenter around the time of the murder. He owned a machete at one point which he kept in his truck, and also owned some other knives. He had a habit of telling others about incidents where he had picked up a woman, threatened her with a knife or machete, and thought about killing the woman. These stories often involved prostitutes, knives and women "ripping off" the defendant. The defendant told his nursing home employer around Christmas of 1992 that he was afraid that he was going to kill someone. He told his sister-in-law about threatening a woman with a knife and that the woman pleaded with him. He also told her about an alleged incident where he had picked up a 17-year-old prostitute that he threatened to kill. He indicated that he had released this woman when she begged for her life. He told his brother a similar story.

The defendant also talked to cellmates when he was later incarcerated in Utah. Jeffrey Brown, a former cellmate, testified that the defendant told him about picking up a woman at a bar, threatening her with a machete, the woman begged for her life and he cut her arms off with a knife. Brown also testified that the defendant talked about the crime for which Brown was incarcerated. Jerry Wilson, another former cellmate, exchanged music and lyrics with the defendant. One song of the defendant's was about the slaying of a woman, and had to do with chopping up, raping and killing a woman. Both former cellmates had seen articles on the Vicari murder while in prison. There was evidence at trial questioning the credibility of these two former cellmates.

The defendant spoke to the police. He never admitted the murder of Diana Vicari. He did admit that he had been "ripped off" by a prostitute named Tabitha one time and that when she did it again, he called in a false 911 overdose call. The police went looking for and found a woman named Tabitha who had been a prostitute in late 1992.

The police showed a photo of the victim to the defendant. The defendant's comment on seeing the photo was: "I want to say the face looks familiar, but the tits don't. And I remember tits like that." The detective showing the defendant the photo indicated that one could not tell the size of the victim's breasts from that particular photo. The victim's mother testified that her daughter was a "very full" C cup bra size.

The defendant also mentioned his disgust at being shown "gross" photos after the police showed him a photo of the arms. The detective who showed the photo testified that the photo did not show any tissue where the arms had been removed from the body. During the autopsy on the arms, it was possible to see that flesh.

Tabitha Godfrey also testified at the trial. She stated that she had a drug problem, and was "working the streets" in 1992 around Grant and Miracle Mile. She would let men pick her up, take their money and run, or sell them drugs. In 1994, the police contacted her while she was in prison. When asked about a prior incident where she had been threatened, she indicated that something had happened to her. She was picked up by a man who complained about being ripped off. He said he would cut her up and leave or scatter her body. He forced her to perform oral sex on him. He pulled out a large hunting knife and rubbed it on her body. The man said that he enjoyed threatening women and that it excited him. She told the police that she eventually got mad and told the man to either just do it or let her go. He released her.

Raymond Scott Hall knew the victim and spoke with her around midnight on October 22, 1992, at the Tucson Community Center. Troy Olson also knew the victim from the bar where he worked, the New Orleans nightclub. Shortly after the disappearance of the victim, the police contacted employees of the New Orleans. They spoke with Troy Olson. The police testified that Troy recognized the victim's photo, but not the defendant's photo. Troy testified that while he knew the victim well, he did not realize that his friend Diana was the missing woman until late 1993.

The police again spoke with Troy in August of 1993, where Troy was shown a photo of the defendant again. The police testified that Troy did not identify the defendant. In December of 1994, Troy spoke with a private detective several times about Ms. Vicari. In January of 1995, the front page article was on this homicide case. The victim's photo appears prominently on the cover, and also the defendant's photo. The defendant is identified by name, is obviously incarcerated, and he is identified as the prime suspect in Diana Vicari's homicide. Troy Olson saw this cover and contacted the police. Troy stated that he thought he recognized the individual in the photo as the man that had come in with the victim that last evening. Troy recounted seeing the victim with this man that Thursday night and that Diana introduced the man to Troy. Troy described the man as older than the usual crowd at the nightclub, not appropriately dressed, and looking as if he had no money. Troy testified that Diana intended to go to a party that Thursday night with this man and asked if Troy wanted to join them as she was uncomfortable going with this man alone. Diana was to get the address of the party and come back into the bar and give it to Troy. She left but never returned.

An expert in memory and eyewitness identification testified for the defense. This person stated that showing a single photo is very risky for obtaining a proper identification, and that showing a photo where the person is incarcerated should not be done. He indicated that showing a witness a photo several times can contaminate any later identification.

The defendant was convicted of the first degree murder of Diana Vicari and the kidnaping and aggravated assault of Tabitha Godfrey. He was acquitted of the sexual assault of Tabitha Godfrey. He was sentenced to 21 years for the kidnaping, a consecutive 15 years for the aggravated assault, and death for the murder.

TRIAL ISSUES

1. Preindictment delay and loss of evidence
2. Accuracy of Troy Olson's identification
3. Improper joinder of the Godfrey and Vicari counts
4. Denial of impartial jury as persons with scruples against the death penalty were excluded
5. Use of videotape deposition of Jerry Wilson instead of live testimony at trial
6. Failure to grant a directed verdict on the Godfrey counts
7. Third party culpability evidence precluded
8. Portion of voir dire done in defendant's absence
9. Error in evidentiary rulings on photographs and opinion testimony

10. Improper closing arguments
11. Improper jury instructions

SENTENCING ISSUES

1. Improper denial of request for substitution of counsel
2. Improper acceptance of late rebuttal exhibits
3. Use of Godfrey conviction to support the (F)(2) finding
4. Improper finding of (F)(6)
5. Admission of victim impact evidence
6. Residual doubt
7. Improper weighing and consideration of mitigating evidence

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Thursday March 21 2002



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1501 West Washington - Phoenix Arizona 85007- 3231

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**Evanchyk v. Stewart,
CV-01-0358-CQ**

Parties: Michael Evanchyk and Terry Stewart

Counsel: Deputy Pima County Public Defender Brian X. Metcalf representing Petitioner Michael Evanchyk.

Assistant Attorneys General Randall M. Howe and Diane M. Ramsey representing Respondent Terry Stewart, Director of ADOC

Facts/Issues:

The Arizona Supreme Court accepted jurisdiction of the following certified question from the U.S. District Court for the District of Arizona:

Whether, in Arizona, conspiracy to commit first degree murder may be based on felony murder?

Alternatively:

Under Arizona law, if the intended criminal conduct of an alleged conspiracy is first degree murder, must an alleged conspirator have possessed an intent to kill or is it sufficient for the conspirator merely to have had the requisite intent for the underlying felony?

Definitions: Pursuant to A.R.S. § 13-1105:

A. A person commits first degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another with premeditation.
2. Acting either alone or with one or more other persons the person commits or attempts to commit . . . [any of various enumerated felonies] and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

In addition, the statute provides that “[h]omicide, as prescribed in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.”

Pursuant to A.R.S. § 13-1003:

A. A person commits conspiracy if, with the intent to promote or aid the commission of an offense, such person agrees with one or more persons that at least one of them or another person will engage in conduct constituting the offense and one of the parties commits an overt act in furtherance of the offense, except that an overt act shall not be required if the object of the conspiracy was to commit any felony upon the person of another, or to commit an offense under § 13-1508 or 13-1704.

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Public Information Office: (602) 542-9310

**State v. Prince
CR-00-0328-AP**

Parties: Appellant Wayne Prince, defendant, represented by James L. Edgar and Charles R. Krull of the Maricopa County Public Defendant's Office.
Appellee: State of Arizona, represented by Janet Napolitano, Kent Cattani, and Robert Ellman of the Attorney General's Office.

Facts:

Wayne Benoit Prince was charged with one count of first degree murder and one count of attempted first degree murder. He was found guilty of both counts. Prince was sentenced to death on the murder count and to 21 years imprisonment on the attempt count. The sentences are to run consecutively.

Wayne Benoit Prince and Christine Parker met in May 1996 and soon after began living together with Christine's two children, Cassandra and Andrew. The couple were married in February of 1997. Beginning shortly after they met and escalating until March 25, 1998, the appellant physically abused Christine. On March 25, 1998, Prince and Christine were involved in a domestic dispute. It began with yelling and screaming and quickly progressed to physical violence. The appellant began punching his wife and rammed her head into the closet wall. He picked up a gun that was kept in the couple's bedroom.

At her mother's request, Cassandra, Christine's thirteen year-old daughter, attempted to flee the apartment to summon help. Ten year-old Andrew, was asleep during the whole incident. The appellant locked the front door, grabbed Cassandra under the arm, and threw her down on the floor. Prince began yelling that he intended to kill the children, then his wife, and then turn the gun on himself. He pushed Christine into Cassandra's bedroom, where Cassandra was seated diagonally on the bed. Christine attempted to call the police and Prince yelled "Who is gonna help you now, bitch. Who is gonna save you!" Christine reasoned with the appellant and stepped in between him and her daughter. Then Prince punched her in the face. Holding a pillow in front of the gun, he fired one shot that struck Cassandra in the head. The medical examiner testified that the gun had been within inches of Cassandra's head when it was fired. Then Prince turned the gun on Christine and fired, hitting her in the lower jaw. At that point, the appellant fled the scene and hid nearby in a vacant apartment until police apprehended him.

It was Prince's contention at trial that the shooting was an accident. He claimed that he placed the gun in the pillow while he punched Christine and when he removed the gun from the pillow, it accidentally fired. He admitted to shooting his wife as well, but did not offer any explanation. The trial court found that the state had proven the existence of two aggravating factors:

1) The murder was committed in an especially heinous, cruel, or depraved manner (A.R.S. § 13-703(F)(6)) and

2) that the defendant was an adult at the time of the crime and the victim was under fifteen years of age (A.R.S. § 13-703(F)(9)).

Further, the court found that the defendant had not proven any statutory mitigators but had proven five non-statutory mitigators. Those mitigators were:

1) development of religious convictions,

2) genuine remorse,

3) good behavior while incarcerated,

4) family support, and

5) unusual or substantial stress from the domestic quarrel. The court found that these mitigators were not sufficient to call for leniency.

Issues:

I. Trial Issues

A. Did the court err when it admitted evidence of past physical abuse committed by the appellant against his wife?

B. Did the court err in denying the appellant's motion to sever counts one and two due to the admittance of the physical abuse evidence and the mention of inadmissible evidence by the prosecutor in his opening statement?

C. Did the court err in denying the appellant's motion for a mistrial because of the prosecutor's mention of inadmissible evidence in his opening statement?

D. Was it fundamental error for the prosecutor to comment in his closing concerning the prior physical abuse evidence?

E. Was it fundamental error to give the jury the reasonable doubt instruction approved of in *State v. Portillo*?

F. Did the court commit fundamental error when the jury was death qualified?

II. Sentencing Issues

A. Was the time duration of the victim's mental anguish insufficient to support the cruelty portion of the heinous, cruel, or depraved aggravating factor?

B. Should the heinous and depraved portion be set aside because the trial court failed to consider the defendant's stress level, suicidal thinking, learning disabilities, and dysfunctional background?

C. Was there reasonable doubt as to the heinous and depraved finding?

D. Did the appellant prove that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law significantly impaired at the time of the killing so as to fulfill the (G)(1) mitigator?

E. Did the appellant prove the following thirteen non-statutory mitigators:

- 1) his stepson's wishes,
- 2) his prior sexual victimization,
- 3) threats made by his wife to kill him,
- 4) good trial behavior,
- 5) undiagnosed and untreated learning disabilities,
- 6) placement in learning and emotionally handicapped education classes,
- 7) dysfunctional family background,
- 8) suicidal thinking,
- 9) history of substance abuse,
- 10) capacity to be rehabilitated,
- 11) his love for his stepchildren,
- 12) his stepchildren's love for him, and
- 13) the unplanned, unexpected reaction to stress.

F. Should the court have given more weight to the five non-statutory mitigators that the court found:

- 1) stress from domestic quarrel,
- 2) development of religious faith,
- 3) genuine remorse,
- 4) model inmate behavior, and

5) family support.

G. Was the victim's age improperly weighed twice?

H. Was it fundamental error for the prosecution to be able to argue twice for the imposition of the death penalty?

I.. Was it error to admit victim impact evidence?

J. Is it unconstitutional for the judge, rather than the jury, to impose the death sentence under *Apprendi*?

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Thursday, March 21, 1001



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CASE SUMMARY

**HARRY BROWNE, MARCENE CANDELARIA and PETER
SCHMERL v. BETSEY BAYLESS, CV-01-0383-PR**

Parties and Counsel:

Petitioner: Secretary of State Betsey Bayless, represented by Solicitor General Patrick Irvine and Assistant Attorney General Joseph Kanefield.

Respondents: Harry Browne, Marcene Candelaria and Peter Schmerl, represented by Christopher Raboin.

Facts:

Harry Browne was the national Libertarian candidate for president. He declared his candidacy for the Libertarian nomination in February 2000. He got 78% of the votes for Libertarian candidate for president in Arizona's Presidential Preference Election of February 22, 2000. His national party nominated him for president on July 2, 2000. He was to appear as the Libertarian candidate on the general election ballot in nearly every state and the District of Columbia, but not in Arizona.

In Arizona, an internal Libertarian Party struggle left his supporters without authority to act as presidential electors. On June 20, 2000, the Secretary of State's office informed Peter Schmerl that under the applicable election statute, he did not qualify as party chairman, so Schmerl's proposed set of presidential electors would not be accepted for placement on the ballot. Those electors supported Browne. The Arizona Libertarian Party's official slate of electors supported another candidate.

On July 16, 2000, Browne decided to campaign as an independent in Arizona. He began circulating nominating petitions one week later. On August 17, over two months after the June 14, 2000 deadline set forth in Arizona Revised Statutes ("A.R.S.") section ("§") 16-341, Browne tried to file his designation of presidential electors and nominating petitions as an independent candidate with the Secretary of State. She rejected them as untimely filed.

Respondents filed a complaint in Maricopa County Superior Court on August 18, 2000, seeking to have Browne's name placed on the general election ballot as

an independent presidential candidate, and seeking a declaratory judgment that A.R.S. § 16-341 is unconstitutional. The superior court found the statute constitutional, declined to place Browne's name on the ballot, and dismissed the complaint. The Court of Appeals reversed, finding § 16-341 unconstitutional because it violates the First Amendment rights of free expression and association under the landmark United States Supreme Court case of Anderson v. Celebrezze, which arose from the 1980 independent presidential campaign of John Anderson.

Issues:

“1. Did the court of appeals incorrectly hold that the deadline for independent candidates to file their nomination petitions in A.R.S. § 16-341 violates the First Amendment?”

review not granted on issue 2

“3. Did the court of appeals err by broadly holding that the petition filing deadline set forth in A.R.S. § 16-341 is unconstitutional as it applies to all independent candidates and not just to independent candidates running for President?”

Definitions and Statutes:

declaratory judgment: a ruling from the trial court that states the rights of the parties or expresses the court's view on a question of law, without ordering anything to be done

Prior to August 31, 2000, **A.R.S. § 16-341** read (in relevant part):

A. Any qualified elector who is not a registered member of a political party that is recognized pursuant to this title may be nominated as a candidate for public office otherwise than by primary election or by party committee pursuant to this section.

* * *

C. A nominating petition stating the name of the office to be filled, the name and residence of the candidate and other information required by this section shall be filed at the same time and with the same officer with whom primary nomination papers and petitions are required to be filed as prescribed in section 16-311.

* * *

H. A candidate who does not file a timely nomination petition that complies with this section is not eligible to have the candidate's name printed on the official ballot for that office.

A.R.S. § 16-311 requires filing of the nomination petitions for candidates for federal office be filed "no later than 5:00 p.m. on the last date for filing," which is ninety days before the primary election. In the year 2000, that deadline was June 14.

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