



**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. Minnitt,  
CR-99-0243-AP

**PARTIES:** Andre Minnitt is represented by Carla Ryan.  
The State of Arizona is represented by Kent Cattani, Chief Counsel, Capital Litigation Section, and Dawn Northup, Assistant Attorney General, Capital Litigation Section.

**FACTS:**

Between 9:30 p.m. and 10:00 p.m. on June 24, 1992, Queen Ester Ray (Queenie) loaned her boyfriend's (David Durbin) 1977 Plymouth to Christopher McCrimmon. He told her that he was going to pick up some money and that he would be gone for an hour. McCrimmon left with Minnitt and a person known as Martinez. Queenie later identified Martinez as Soto-Fong. Queenie testified that all three men returned to McCrimmon's apartment about an hour later without her car because the car had stalled at 39<sup>th</sup> and Tyndall. Queenie testified that her boyfriend's car was parked near the El Grande Market, but she did not retrieve the car because it was surrounded by police.

At approximately 10:15 p.m., Tucson police were dispatched to the El Grande Market, located on 36<sup>th</sup> and Park Avenue, due to a 911 call. They found the bodies of Fred Gee (manager) located behind the liquor counter, Zewan Huang (Gee's uncle) located inside near the entrance, and Ray Arriola (an employee) also located near the entrance. Arriola was transported to a hospital where he subsequently died. All three died from multiple gunshot wounds. Shell casings from .25 caliber and .38 caliber handguns were found near the bodies.

Physical evidence at the scene indicated that a theft had occurred during closing. The register near the front of the store had been cleared. The cash register at the liquor counter had not been closed because it displayed a sale for \$1.69. On the counter were two plastic produce bags, one containing a cucumber and another containing lemons. Investigators also found crumpled un-stamped food stamps on the floor near Mr. Gee's body. Soto-Fong's fingerprints were found on both bags and on one of the food stamps. Three blocks from the market, at 36<sup>th</sup> and Tyndall, police found an abandoned Plymouth. The car was later identified as belonging to David Durbin, Queenie Ray's boyfriend. Christopher McCrimmon's fingerprint was found on the outside of the driver's side window.

In late August 1992, Keith Woods was released from prison. On the day of his

release, he was picked up by McCrimmon, who told him that he did the El Grande murders. Later that day, both men went to Minnitt's apartment, where Minnitt and McCrimmon provided Woods with details about the crime.

Shortly after his release, Woods was arrested on drug charges. Woods entered into an agreement with the state in which he agreed to become an informant in exchange for dismissal of the charges. On September 8, he told Detective Godoy of the Tucson Police Department that Minnitt, McCrimmon, and a third person, Cha-Chi, had committed the El Grande murders. Woods later identified Cha-Chi as Soto-Fong.

Minnitt, along with Martin Soto-Fong and Christopher McCrimmon, was charged with three counts of first degree murder and seven additional counts of armed robbery, aggravated robbery, and burglary for a robbery that occurred in Tucson on June 24, 1992. was tried and convicted separately in 1993. Minnitt and McCrimmon were tried and convicted of first degree murder and other non-homicide counts in 1993, but that death sentence was reversed and remanded due to jury error. In 1997, Minnitt and McCrimmon were tried separately. Minnitt was tried first, but that trial ended in a mistrial because the jury was unable to reach a verdict. On retrial in 1999, a jury found him guilty of all charges and the trial judge sentenced him to death on the murder counts.

During McCrimmon's 1997 trial, Detective Godoy revealed that he previously gave false testimony regarding when and from whom he received the names of Soto-Fong, McCrimmon and Minnitt. At that trial, Godoy admitted that he had previously testified that prior to his September 8, 1992 conversation with Keith Woods he was not aware of McCrimmon, Minnitt, or Soto-Fong. This was incorrect; he was aware of all three men prior to his meeting with Keith Woods.

## **ISSUES**

### ***I. Trial Issues***

- A. Did the trial court abuse its discretion by denying Minnitt's motion to dismiss?
- B. Whether sufficient evidence was presented at trial to support Minnitt's conviction?
- C. Whether the trial court abused its discretion when it denied Minnitt's motion for new counsel?
- D. Whether Yancey was bared from testifying in both trials under the principle of collateral estoppel?

E. Did the trial court err by removing prospective jurors, Ross, Wiley, and Molina?

F. Whether the mandates of *Brady v. Maryland* were violated?

G. Whether the trial court abused its discretion by denying certain pretrial motions?

H. Whether Minnitt preserved certain claims of prosecutorial misconduct, and if no, do they rise to the level of fundamental error?

## ***II. Sentencing Issues***

A. Is judge sentencing under. A.R.S. § 13-703 unconstitutional?

B. Did the trial court abuse its discretion by denying Minnitt's request for new counsel prior to sentencing?

C. Was A.R.S. § 13-703(F)(5) properly found by the trial court?

D. Did the trial court err by not weighing all of Minnitt's proffered mitigating circumstances?

E. Were the mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances?

***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.***

May 23, 2002



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**In re the Estate of JAMES I. FISHMAN  
No. CV-01-0351-PR**

**Parties and Counsel:**

*Petitioner:* Carol Lynn Fishman, represented by Robin C. Carter and William C. Smitherman.

*Respondent:* Mara Lee, as Personal Representative of the Estate of James I. Fishman ("the Estate"), represented by Marianne Poston of the Clifford G. Bleich Law Office.

**Facts:** Decedent James Fishman died without a will. Prior to his death, he owned 10,000 shares of stock in Best Supply Co., a closely held corporation, as community property. On James Fishman's death, one half of the stock passed to his Estate. (James Fishman's adult children by a prior marriage are the heirs of his estate.) This suit concerns rights related to the Estate's half of the 10,000 shares of Best Supply stock.

Years ago, James Fishman and Best Supply entered into a Stock Repurchase Agreement, under which the corporation was required to buy back James' stock on his death. The agreement also provided that the corporation would keep in force a life insurance policy on James Fishman, with petitioner Carol Fishman as a beneficiary. After James died, Carol received \$250,000 directly from the insurance company. Petitioner later signed a document which purported to transfer 10,000 shares of stock back to the corporation. (She signed only on her own behalf, and declined to sign a draft prepared by corporate lawyers that would purportedly have transferred the Estate's interest in the stock.) Petitioner has testified that James told her that "in order for [a stockholder's] wife to have the [\$]250,000, [she] would have [to] sign over any of [her] interest in the stock" because "the stock reverted to the company." The document petitioner signed conveying stock to the corporation acknowledged that she had received \$250,000 for the stock, even though she had not received anything directly from Best Supply.

The Estate sued the corporation to enforce the stock repurchase agreement and to obtain payment for the Estate's share of the stock. The corporation became bankrupt. The Estate now seeks to impose a constructive trust on one-half of the insurance proceeds petitioner received, on the theory that the insurance proceeds were intended to pay for the stock, and petitioner owned only half of the stock.

The trial court granted petitioner's motion for summary judgment. The court of appeals reversed, finding that the Estate had presented a prima facie case for imposing a constructive trust, but had not yet proven its case by "clear and convincing evidence." The court of appeals remanded the matter to the trial court for further proceedings.

**Issues:**

1. Whether the Court of Appeals was correct in reversing a grant of summary judgment on the basis that a material question of fact exists when all of the facts were undisputed; and
2. Whether the Court of Appeals was correct in holding that the Estate could take an interest in the life insurance proceeds of which Carol Fishman was the named beneficiary.

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CV-01-0408-PR  
AMPARO HERNANDEZ-GOMEZ v. VOLKSWAGEN  
OF AMERICA, INC. *et. al.*  
2 CA-CV 98-0188 (Opinion)

Petition for review filed by Dale Haralson and Gregory G. Wasley, attorneys for plaintiff/appellee Hernandez-Gomez. Response filed by William T. Burghart and Stephanie L. Chilton of Peshkin Kotalik & Burghart, representing defendant/appellant Volkswagen.

**I. ISSUES**

“1. Whether the Court of Appeals incorrectly interpreted Greier v. American Honda Motor Co., 529 U.S. 861 (2000) and erroneously overruled this Court’s opinion in Hernandez-Gomez v. Leonardo, 185 Ariz. 509, 917 P.2d 258 (1996) (Hernandez-Gomez II) which holds that Plaintiff’s lack of rollover protection claims are not impliedly preempted by Federal Motor Vehicle Safety Standard 208.

“2. Whether the Court of Appeals’ decision improperly finds Plaintiff’s claims are impliedly preempted where no actual conflict exists with federal law and abrogates the right of Arizona citizens to recover damages from auto manufacturers for injuries caused by defective vehicles that fail to provide adequate safety.”

**II. SUMMARY**

This case will be *Hernandez-Gomez III*. The plaintiff was paralyzed in 1988 when the 1981 Volkswagen Rabbit in which she was a passenger left the road and rolled over. Although the front seat passenger was protected by an automatic shoulder belt, there was no manual lap belt. When the Rabbit rolled over, the restraint system allowed the plaintiff to be thrown out of her seat so that her shoulders slammed against the car roof, fracturing her T4 vertebrae and damaging her spinal cord. She sued Volkswagen, alleging that the Rabbit was negligently and defectively designed because of the failure to include a manual lap belt.

Volkswagen has defended from the beginning on the ground that federal safety regulations in FMVSS 208, with which the Rabbit complied, preempted this state law tort claim. The trial court agreed and granted Volkswagen's motion for partial summary judgment on the issue. The Arizona Supreme Court held that the case was not preempted. *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297 (1994) (*Hernandez-Gomez I*). Volkswagen took the case to the U.S. Supreme Court, which vacated the opinion and remanded for reconsideration in light of *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995). In *Hernandez-Gomez v. Leonardo*, 185 Ariz. 509 (1996) (*Hernandez-Gomez II*), the Court held that the state law claim was neither expressly nor impliedly preempted.

The case finally went to trial in 1998, ten years after the accident. The jury returned a verdict for Hernandez-Gomez against Volkswagen for \$3.1 million. Volkswagen appealed, raising several trial issues. While the case was pending before the Court of Appeals, the U.S. Supreme Court issued its opinion in *Geier v. American Honda Motor Co., Inc.*, 120 S.Ct. 1913 (2000), holding that a no-airbag state tort claim was impliedly preempted by Standard 208.

Division Two asked the parties for supplemental briefing regarding the effect of *Geier* and ultimately issued its opinion vacating the judgment for the plaintiff and holding that the claim was preempted. The court concluded that the rationale and holding of *Hernandez-Gomez II* "do not survive *Geier*." ¶ 16.

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