



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA V. FRANK DALE MCCRAY
CR-05-0508-AP**

PARTIES AND COUNSEL:

Petitioner: Frank Dale McCray is represented by Bruce Peterson and Kerri Chamberlin from the Office of the Legal Advocate

Respondent: The State of Arizona is represented by Terry Goddard, Kent Cattani, and Jon Anderson from the Attorney General's Office

FACTS:

Chestine Cummins's boyfriend arrived home on May 21, 1987 to discover Cummins's bruised and partially nude body on the floor of their Phoenix apartment. Her mouth was gagged and her body covered in bruises. A sweatpants drawstring was wrapped around her neck. She had died from strangulation.

At the autopsy the next day, the medical examiner swabbed her vagina, mouth, and anus for fluid. Although initial tests at the medical examiner's lab were negative for acid phosphatase, a chemical found in semen, later DPS crime lab tests showed blood and acid phosphatase on the vaginal and oral swabs. At the time, DPS lacked the technology to determine whose semen or blood it was.

The swab samples were frozen for storage in the DPS lab. They remained there for 13 years, until Phoenix police asked DPS to remove the samples and test the DNA using new technology. The DNA from the oral and vaginal swabs matched that of Frank McCray, a former cosmetologist who at the time was incarcerated for a 1992 sexual assault. McCray's DNA profile had been stored in a DPS database because he was a sex offender.

McCray was indicted for first-degree murder under felony and premeditated murder theories. He was also charged with three aggravators: (1) prior violent felony, (2) murder for pecuniary gain, and (3) especially cruel murder.

The trial took place in late 2005 before Maricopa County Superior Court Judge Douglas Rayes. At the guilt phase, McCray was convicted of first-degree felony murder, but the jury deadlocked on the premeditated murder theory. At the aggravation phase, he was convicted of the prior violent felony aggravator and the especially cruel aggravator. He was acquitted of the pecuniary gain aggravator.

At the penalty phase, McCray presented evidence of his troubled childhood and a history of

mental problems. The jury also heard evidence that he was using drugs near the time of the murder. It found that the evidence was not sufficiently substantial to justify leniency and sentenced him to death. The judge entered a sentence of death by lethal injection.

McCray's direct appeal to this court is mandatory under Arizona law.

ISSUES:

1. Did the trial court abuse its discretion by allowing the DNA evidence from the swab samples to be admitted?
2. Did the trial court err in subjecting McCray to the prior violent crime aggravator where his prior conviction was for sexual assault with a dangerousness enhancement?
3. Did the trial court improperly instruct the jury with respect to the "especially cruel" aggravator?
4. Did the trial court err by specifying that McCray should be put to death by lethal injection, rather than by his choice of lethal injection or lethal gas?
5. Did the trial court err by ruling that evidence of McCray's prior bad acts was inadmissible?
6. Did the trial court improperly restrict the rebuttal evidence the state could present at the penalty phase?

This Summary was prepared by the Arizona Supreme Court Staff Attorney's Office 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.