

**STATE OF NEW JERSEY v.  
PATRICK J. BUCHANAN, DEFENDANT-RESPONDENT.  
(Office of the Public Defender, Appellant)**

A-96-3211-T4

Superior Court, Appellate Division

Submitted May 8, 1996 -- Decided May 15, 1996.

Before Judges GRIM, REAPER and MERCY.

*William Clinton*, Public Defender of New Jersey, attorney for appellant (*William Clinton*, of counsel and on the brief).

*Robert Dole*, attorneys for respondent (*Robert Dole*, of counsel and on the brief).

REAPER, J.A.D.

Defendant Patrick J. Buchanan was convicted of three counts of homicide in violation of N.J.S. 2C:11-3 on February 23, 1993. After a penalty phase hearing, the jury sentenced him to death pursuant to 2C:11-3c. Represented by the Public Defender, defendant filed an appeal to the Supreme Court of New Jersey which, on October 10, 1995, affirmed the conviction and the sentence of death in an unpublished opinion.

Thereafter, the public defender representing Buchanan notified the trial court that the Office of the Public Defender intended to file a demand for proportionality review of Buchanan's sentence even though defendant himself objected. Because defendant's wishes diverged from his counsel's announced intentions, separate counsel was appointed to represent defendant.

On February 13, 1996, Judge Perot of the Law Division heard testimony from a psychiatrist and two proportionality experts. On February 14, 1996, the defendant himself testified along with a second psychiatrist. At the conclusion of the hearing, Judge Perot ruled: (1) defendant was competent and had knowingly and intelligently indicated his desire to waive his right to file a petition for proportionality review; (2) the Public Defender had no standing to bring an application for such review despite defendant's desires; and (3) proportionality review was not an essential element of a constitutional application of the death penalty.

The facts of this case are simple and may be drawn from the unpublished opinion of the Supreme Court affirming Buchanan's conviction and death sentence:

Evidence obtained at the scene, in later searches of defendant's residence and from witnesses established that at approximately 1:20 a.m. on January 1, 1991, defendant Patrick J. Buchanan and his cousin Pat Robertson were in the process of burglarizing the offices of the Republican State Committee when he was interrupted by the chairman of the Committee, Malcolm "Steve" Hifinance, Forbes' wife Muffy, their 12-year-old son Biff and 10-year-old daughter Princess. The family was driving past the Committee office building on their way home from a New Year's Eve party when Hifinance had seen a light on in the building and had decided to stop and turn off any lights and equipment left on. They came across Buchanan stuffing cash from the Committee's safe into a bag and Hifinance ordered him to stop. Instead, Robertson attacked Hifinance with a baseball bat. When the wife and children tried to intervene, they too were struck with the bat. All four were rendered unconscious and tied up with telephone wires. On Robertson's orders, Buchanan then set the building on fire in an attempt to cover up the crime. The elder Hifinances died of smoke inhalation; Biff died of burns. The daughter survived serious and disfiguring burns and testified against Buchanan at trial and during the penalty phase. Robertson died in a jail fight before he could be brought to trial.

State v. Buchanan, A-96-10 (Supreme Court, slip op. filed October 10, 1995).

At trial, defendant vigorously contested his guilt. He was ably represented by attorneys from the Office of the Public Defender. On direct appeal, every aspect of the trial and sentencing proceeding was carefully reviewed to ensure against error. Again, defendant was ably represented by the Public Defender.

Once the appeal terminated with its affirmance, however, defendant made it clear that the matter was at an end. He specifically instructed his counsel to take no further steps of any kind to appeal the conviction or have execution of sentence further reviewed or delayed. Nonetheless, on October 30, 1995, the Public Defender advised Judge Perot, in open court, that they wanted to file a petition for proportionality review on Buchanan's behalf but that he was objecting. The Public Defender sought leave to file the proposed petition and separate counsel was appointed to represent Buchanan.

On February 13-14, 1996, Judge Perot heard testimony. The psychiatric testimony was inconsistent. Dr. S. Freud, a psychiatrist retained by the Public Defender, testified that he could not state with a reasonable degree of medical certainty that defendant was competent or incompetent:

Q. And the fact is, Dr. Freud, as you sit here today you would have to say that based upon your own observations of Mr. Buchanan that he's competent to waive his rights to have the Public Defender file any further appeals, isn't that correct?

A. I didn't offer any testimony to the ultimate legal question earlier and I prefer to demur entirely on the ultimate question. I'll stand by whatever observations I made. I don't know if he's competent or not and I'm happy to leave that to the judge.

Q. But is it fair to say that you agree as you sit here today that you cannot state that Mr. Buchanan lacks the mental capacity to waive any further appeals, is that right, Dr. Freud?

A. That's right. I cannot state it within reasonable medical certainty. Nor can I say with any degree of medical certainty that he is competent.

Transcript of hearing, February 13, 1996, p. 5.

Dr. C. Jung, testifying on behalf of defendant, testified):

Q. Doctor, as you sit here today is it your opinion with a reasonable degree of medical certainty that Mr. Buchanan is competent to waive his right to have the Public Defender file any further appeals on his behalf?

A. That's my opinion sir.

Q. Do you see any evidence, Doctor, that depression is coloring Mr. Buchanan's thought processes as to whether he wants to terminate the appeals process?

A. I find no evidence of depression.

Q. Do you agree or disagree with Dr. Freud's assertion that Mr. Buchanan's medications may render him chemically incompetent?

A. No, I think without medication he'll be competent. The medication just makes his thought processes sharper, clearer, because he's calmer.

Q. In your opinion, based on your examination of Mr. Buchanan, does he suffer from any mental disease or defect?

A. Not that I was able to detect, no, sir.

Q. What was your psychiatric diagnosis of Mr. Buchanan, Doctor?

A. Life circumstance problem, purely because of his predicament.

Q. Is Mr. Buchanan fully aware, in your opinion, that he will die, be put to death by the state, if he does not pursue any further appeals?

A. I stressed to him even today, sir, it's final, and he's fully aware of it.

Q. Does Mr. Buchanan have the capacity to understand the difference between life and death?

A. In my opinion, yes.

Q. Does he have the capacity to make a reasonable choice among all his alternatives?

A. In my opinion, yes.

Q. Does he understand the nature of these proceedings?

A. In my opinion, yes.

Q. And does he understand that the Public Defender wishes to file a further appeal and that that appeal would have the effect of prolonging his life?

A. He does, and he does not wish to have it prolonged.

Q. Does he relate to you a rational reason for no longer wanting to have his life prolonged?

A. As far as I can tell his reasons are rational.

Transcript of hearing, February 14, 1996, p. 20-22.

Defendant's own testimony fully supported the court's ultimate conclusion of a competent, knowing and intelligent waiver of rights:

Q. Do you understand that if you take an appeal and it succeeds you may not be sentenced to death?

A. Yes.

Q. You understand that?

A. Yes, I do.

Q. You understand that your death penalty could very well be vacated by a court reviewing it?

A. I understand that.

Q. And you're willing to give up that right?

A. I do.

Q. Excuse me?

A. Yes, I do.

Q. You give it up and you want to give up that right?

A. Yes.

Q. And that is your decision?

A. Yes.

Q. It's nobody else's decision?

A. It's my own.

Q. It's a voluntary decision?

A. Yes.

Q. Has anybody pressured you in any way to make this decision?

A. No.

Q. Has anybody attempted to influence you in any way to make a decision to drop further appeals?

A. No.

\* \* \* \* \*

Q. Do you think the drugs you're taking now affect your ability to think clearly about your decision?

A. No, I don't.

Q. How long have you been thinking about this decision?

A. Ever since I was convicted.

Q. So it's been three years?

A. Yes.

Q. You've thought about it carefully?

A. Yes, I have.

Q. Do you know what will happen if an appeal is not filed on your behalf?

A. Death sentence.

Q. You will be put to death?

A. Yes.

Q. You know that?

A. I do.

Q. You're not making this decision because you're depressed?

A. No.

Q. Why do you want to be put to death and drop the appeals?

A. Jail is a bad place; the food is bad, extortion, stabbings, loud, noisy, dirty, rats and mice, absolution.

Q. Absolution?

A. Yes.

Q. You're talking about religious absolution?

A. Yes, and that I should be punished for what I did.

Q. You're ready to accept the punishment for what you did?

A. Yes.  
Q. What did you do?  
A. Killed them.  
Q. Killed who?  
A. Those people and kid.  
Q. How did you kill them?  
A. Burned them.  
Q. What do you mean by absolution for that?  
A. God will forgive me better if I die for what I did.  
\* \* \* \* \*

Transcript of hearing, February 14, 1996, pp. 1-17.

We conclude from the foregoing that defendant voluntarily and willingly waived his right to a proportionality review and that the Public Defender has no right to bring such an application for such review over his client's wishes. Because defendant is clearly competent to choose not to appeal further, the Public Defender is no different from the mother in *Gilmore v. Utah*, 429 U.S. 1012 (1976) or the priest in *Franz v. Arkansas*, 296 Ark. 181 (1988) and lacks standing to bring the petition. Indeed defendant's religious freedom may be interfered with if we allowed the Public Defender to compel him to appeal over his objections.

Moreover, a proportionality review is not required. The procedure is not mandated by the Constitution of the United States, *Pulley v. Harris*, 467 U.S. 37 (1984). The state statute providing for such review was originally mandatory but has been amended to make such review optional at the request of the defendant. See N.J.S. 2C:11-3e.

AFFIRMED.

MERCY, J.A.D., dissenting:

There can be no constitutional application of the death penalty where such application would be disproportionate to the crime and to the criminal. In this case, it is undisputed that putting this defendant to death would be disproportionate under any statistical or analytical framework. To permit the defendant's depressed mental state to dictate that the state must execute him despite that disproportionality would be nothing less than forcing the State to aid in his suicide, a crime under N.J.S. 2C:11-6. It would thus make a mockery of justice and I cannot accede to the reasoning of my colleagues in this matter.

It is true that under federal constitutional law, a proportionality review is no longer considered an essential element of a death sentence. Such is the teaching of *Pulley v. Harris*, 465 U.S. 37 (1984). However, New Jersey is not bound to follow *Pulley* and the mandates of its own Constitution dictate that it should not do so. The United States Supreme Court itself has recognized that the death penalty is a matter of peculiar state concern and that the states, without question, "are free to provide greater protections in their criminal justice system than the federal Constitution requires." *California v. Ramos*, 463 U.S. 992, 1013 (1983).

In this situation, I conclude that paragraphs 1, 5 and 12 of Article I of the New Jersey Constitution alone or in combination require a proportionality review. Paragraph 1 grants

to all citizens an inalienable right to enjoy life. Paragraph 5 secures civil rights against unfair discrimination. Paragraph 12 protects all citizens against cruel and unusual punishments. Any one of those concepts individually and most assuredly all considered together dictate that the State may not execute any citizen unless his or her death is an appropriate, proportionate response by society to both the nature of the offense and the nature of the offender. Time after time, the Supreme Court has emphasized the importance of such proportionality. See e.g. *State v. Ramseur*, 106 N.J. 123, 324-331 (1987).

In this case, not one but two separate experts in the field of proportionality testified that there is no doubt in their minds that Buchanan's death sentence would be set aside on grounds of disproportionality if it were to be reviewed by the Supreme Court. The facts made known by them, and so strikingly absent from the majority opinion, cry out for relief.

First, the author of many of the state's studies on proportionality, David A. Baldus, testified in part as follows:

Q. How would you classify this case for proportionality review?

A. In with the felony murders.

Q. Why is that?

A. Because the evidence at trial showed that this defendant was told to set the fire by the clearly more culpable participant in the crime, that he was told by the other man that the people were not tied so tightly that they could not get free in time to save themselves, and that he was in such a condition of inebriation at the time that his reliance on what he was told was completely reasonable.

Q. What do you mean, sir?

A. Look, the guy was clearly drunk. He'd had perhaps as much as a pint of high proof alcohol within two hours before the burglary. His IQ is marginal, compared to the 140 extremely high IQ of the other burglar. They had what was almost a father-son relationship, rather than what you'd expect between cousins. Buchanan relied on Robertson. He looked up to him. He trusted him. He was told the people would get free and get away before anyone could get hurt. He believed that. It's true that these people died and they died because of what this defendant did, but it's really nothing more than a felony murder situation and we have never put a felony murder defendant to death in this state and we're unlikely ever to do it.

Q. Do you have an opinion with a reasonable degree of scientific certainty as to the outcome if this case were to receive a proportionality review?

A. I do.

Q. And what is that opinion, sir?

A. There is no way that the Buchanan death penalty would survive a proportionality review by the New Jersey Supreme Court.

Transcript of hearing, February 13, 1996, pp. 10-11.

Second, Dr. Herbert Weisberg, who has testified in the past for the Attorney General in support of extremely limited death penalty proportionality review, agreed that the penalty here was disproportionate:

Q. Do you agree with Mr. Baldus' conclusion that a death sentence in the Buchanan case would be found disproportionate?

A. I do.

Q. By what methodology?

A. By any methodology commonly accepted by scientists and social scientists involved in death sentence review.

Q. Even the most narrow criteria?

A. Even under the most narrow criteria, indeed, my own criteria are quite narrow.

Q. Why is it disproportionate, Doctor?

A. Because we are dealing here with a situation in which it appears clear that, though death resulted from this defendant's own acts, and he must answer for those acts, death was not the clear intent of this defendant. There has never been a death sentence imposed in this state where there has not been crystal clear evidence of intent to kill. It's simply unsupportable. The jury may have been within its rights to impose the sentence, but there is no doubt in my mind that it cannot withstand proportionality review.

Transcript of hearing, February 13, 1996, pp. 27-28.

Given that the odds of success on a proportionality review are so great, we must look to the reasons why this defendant does not wish to pursue his right to have such a review. It is clear to me that this defendant is extremely depressed and morose as the result of horrific conditions in prison, that his thought processes have been affected by those conditions and the medications he is taking and that he may well have psychiatric illnesses beyond mere depression. In the testimony of Dr. Freud not quoted by the majority, it was apparent that Buchanan is taking not only a powerful antidepressant merely to be able to function, but also two antipsychotic medications normally prescribed for such conditions as schizophrenia (hearing transcript, February 13 at p. 2), that he takes one of those for "paranoia and to stop voices" (id. at 3), and that he suffers tremors, apathy and other signs of chronic schizophrenia (id. at 3-4). The medications alone have the capacity to render him chemically incompetent. Id. at 6. His religious commitment to death for absolution appears to be based on little more than depressed thinking ("No priest ever said that, but maybe God will forgive me better; I can't forgive myself"; id., February 14, at p. 18) and the nature of his depression is clear: he has no visitors (id. at p.20), he is alone much of the time (id.) and he can find little joy in life (id. at p.22).

I would conclude, first, that defendant has not been shown by clear and convincing evidence to be capable of waiving his right to such a critical step in the appeals process.

Secondly, I would hold, consistent with our state Constitution, that a defendant may not waive this critical step and therefore the interests of society require that the Public Defender pursue the petition even if defendant objects, just as the Public Defender must directly appeal any conviction and death sentence even over a defendant's objection. See N.J.S. 2C:11-3e. Particularly in light of the chances for success on review, this case is more akin to *State v. Hightower*, 214 N.J. Super. 43 (App. Div. 1986) and *State v. Brewer*, 170 Ariz.486 (1992), than to *Gilmore v. Utah*, 429 U.S. 1012 (1976) or *Franz v. Arkansas*, 296 Ark. 181 (1988)

Finally, I would hold that this entire matter should be presented to the Supreme Court in any event, as all such death penalty issues are committed exclusively to the jurisdiction of that Court. See Rule 2:2-1(a) and 3:22.

I would vacate and commit to the jurisdiction of another court, or alternatively reverse with directions to permit the Public Defender to proceed with the proportionality petition.

**IN THE SUPREME COURT  
OF THE STATE OF NEW JERSEY**

A-96-522

STATE OF NEW JERSEY :

vs. :

ORDER

PATRICK J. BUCHANAN, :

Defendant :

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The appeal of this matter by the Public Defender of the State of New Jersey is on this 23rd day of May, 1996, docketed as to all issues. Simultaneous briefing is directed and both appellant and respondent are to file briefs with this Court on or before July 2, 1996.

STEPHEN W. TOWNSEND, Clerk  
For the Court