

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5023 & 85-5024

TITLE PATRICK GENE POLAND, Petitioner V. ARIZONA; and
MICHAEL KENT POLAND, Petitioner V. ARIZONA

PLACE Washington, D. C.

DATE February 24, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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PATRICK GENE POLAND, :
Petitioner, :
V. : No. 85-5023
ARIZONA; :
and :
MICHAEL KENT POLAND, :
Petitioner, :
V. : No. 85-5024
ARIZONA :

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Washington, D.C.
Monday, February 24, 1986

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:38 o'clock p.m.

APPEARANCES:

W.K. WILHELMSEN, ESQ., Prescott, Arizona; on behalf of
the petitioners, appointed by this Court.
GERALD R. GRANT, ESQ., Assistant Attorney General of
Arizona, Phoenix, Arizona; on behalf of the respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Poland against Arizona and the related case.

4 Mr. Wilhelmsen, I think you may proceed
5 whenever you are ready.

6 ORAL ARGUMENT OF W.K. WILHELMSSEN, ESQ.,

7 ON BEHALF OF THE PETITIONERS,

8 APPOINTED BY THIS COURT

9 MR. WILHELMSSEN: Mr. Chief Justice, and may it
10 please the Court, for a brief background of the case,
11 the two petitioners are charged and convicted and on
12 death row for murder resulting from the death of two
13 Purolator guards who were delivering some \$338,000 cash
14 in northern Arizona. They left Phoenix. They
15 disappeared. The next morning they find the van. The
16 two guards are gone. Some \$281,000 of the money is
17 gone.

18 The bodies are subsequently found a month
19 later apparently drowning and/or combination heart
20 attack in the case of Mr. Dempsey. The bodies are
21 recovered on the Nevada side of Lake Mead in Debbie's
22 Cove.

23 Those facts are not what we are really talking
24 about today. We are talking an issue of double
25 jeopardy. The Polands went to trial. They were

1 convicted. Pursuant to our procedure on aggravating and
2 mitigating circumstances, the trial court on the first
3 sentencing proceeding found one aggravating
4 circumstance, especially heinous, cruel and depraved.

5 He specifically found no on pecuniary gain,
6 but he qualified that answer, and I will get back to
7 that later. They were sentenced to death. The court
8 did find certain mitigating circumstances, that they had
9 good character, close family ties, model prisoners, and
10 the court did consider their age.

11 Automatic appeal under our procedure. The
12 case is appealed to the Arizona Supreme Court. They, in
13 handling the guilt phase of the trial, they find that
14 there has been jury impropriety that is not material
15 here, that they are granted a new trial on the guilt
16 phase.

17 The Court goes on to discuss the punishment
18 phase, and in discussing the punishment phase, they find
19 that it was not established beyond a reasonable doubt
20 that the evidence thus far shows it was especially
21 cruel. In addition, they also went on to find it has
22 not been established beyond a reasonable doubt that it
23 was especially heinous or depraved.

24 QUESTION: This is the Supreme Court of
25 Arizona, Mr. Wilhelmsen?

1 MR. WILHELMSEN: Yes, Justice Rehnquist. In
2 their first opinion, Poland I.

3 In remanding the case for a new trial, they do
4 admonish the trial judge or suggest to him that if the
5 Poland boys are found guilty next time, you may consider
6 pecuniary gain in that the offense was committed in the
7 expectation of or consideration for the receipt of
8 something of value.

9 QUESTION: Well, the trial court had said
10 something about that the first time around.

11 MR. WILHELMSEN: Yes. They found like in Mr.
12 Rumsey, Judge Coulter in Rumsey I found -- he didn't
13 agree with the law as then interpreted. Our trial
14 occurred and sentencing before State V. Clark which was,
15 I believe, July of 1980, and the opinion released in
16 September. The initial sentence on Poland was in
17 April. But he did find that this was not pecuniary
18 gain. He considered it limited to the contract type
19 killing, but if we were to consider pecuniary gain as
20 more broad, then they did receive something of value,
21 \$281,000.

22 QUESTION: And that was before the case went
23 to the Supreme Court of Arizona the first time?

24 MR. WILHELMSEN: No, that was the Supreme
25 Court's -- oh, yes, that was the trial judge's ruling.

1 Then it goes to the Supreme Court, and then that is when
2 they find that the one aggravating circumstance found by
3 the trial judge was not supported by the evidence, but
4 he made error on the other one or -- not error,
5 misinterpreted the law.

6 The case comes back to trial. They are again
7 convicted. Another aggravating, mitigating hearing, and
8 this time in the case of petitioner Patrick Poland there
9 are three aggravating circumstances found. In the
10 interim while his case was on appeal he was convicted of
11 another offense in Phoenix, Arizona, in Federal Court,
12 an armed robbery, and that was used as an aggravating
13 circumstance under E-2.

14 In addition, they found that both petitioners
15 had committed this crime for pecuniary gain, and in
16 spite of what the Arizona Supreme Court said the first
17 time around, the trial court also found it was
18 especially heinous, cruel, and depraved.

19 Mitigating circumstance, we lost one. They
20 had close family ties, but they did not have good
21 character. Their character was false, in that they were
22 deceptive and had committed a crime.

23 The appeal goes up the second time on Poland
24 II. One of the issues, and the only issue we are
25 concerned with, is the double jeopardy question. The

1 Arizona Supreme Court found that it did not offend
2 double jeopardy, and they did not agree, nor shall any
3 person be subject for a same offense to be twice put in
4 jeopardy for the same offense.

5 What is the purpose of double jeopardy? It
6 has got many concepts, and it depends on what direction
7 the case and the posture of it is coming out. One of
8 the fundamental principles of double jeopardy is, Mr.
9 Prosecutor, you get one fair, full chance to present
10 your evidence, and if you do, fine, and if you don't,
11 you want another second bite at the apple, then that is
12 when this veil of double jeopardy comes down upon the
13 petitioner.

14 Why does double jeopardy apply in this
15 particular case? It boils down to really maybe a hard
16 question to answer but a simple issue. What we have is
17 trial error detrimental to the state, prejudicial to the
18 state in that the judge should have found pecuniary gain
19 the first time around but he didn't. Then we have
20 another trial error, which would be detrimental to the
21 petitioners, insufficient evidence.

22 QUESTION: Didn't the trial court find
23 sufficient facts to meet the definition of pecuniary
24 gain in the Arizona statute the first time out? He just
25 didn't think those facts met the legal definition.

1 MR. WILHELMSSEN: It didn't apply to the law.
2 Just like in Rumsey, when Judge Coulter said, I don't
3 agree with the way the law is being interpreted. I
4 don't agree with that, and I don't -- it is stated in
5 Matson.

6 QUESTION: I didn't understand the trial court
7 the first time around to say I don't agree with the
8 Supreme Court of Arizona. There would have been no
9 decision from the Supreme Court.

10 MR. WILHELMSSEN: No. Right. At that time
11 State v. Clark had not come out, as cited by the trial
12 lawyers in their memorandum sentencing -- I believe it
13 is March the 25th of 1980. They cite several cases that
14 have been before the Supreme Court of Arizona that
15 involve pecuniary gain, just as Mr. Rumsey involved
16 pecuniary gain. He was convicted of robbery, which was
17 not set aside, but it was there.

18 The law as interpreted at the trial level was
19 one of reading special aggravating circumstance E4 and
20 E5 as a combination, E4 being the man who hires the
21 contract type killing, E5 the man who performs it or
22 maybe someone who would kill for inheritance or
23 something like that.

24 The argument at the first sentencing hearing
25 before Judge Rosenblatt, petitioner's counsel were

1 exclusively directing their argument to the status of
2 the law and trying to understand what it was, and in
3 their memorandum they went to great length and cite
4 other jurisdictions on how they handled it. In fact,
5 even the state's memorandum thought maybe this might be
6 limited to the Mafia-type killing, but be that as it
7 may, and then he did argue they planned this job as the
8 evidence in the trial had shown, and the drivers did
9 die, therefore they received pecuniary gain.

10 Jeopardy. Petitioners' position is, jeopardy
11 attached. We had a sentence. We had a hearing. And we
12 had death pronounced. Petitioner now goes up to to the
13 Arizona Supreme Court and hit a hole in one.
14 Insufficient evidence, not showing beyond a reasonable
15 doubt, the only aggravating circumstance, especially
16 heinous, crule, and depraved, and each one of those
17 would constitute an aggravating circumstance in the
18 disjunctive to warrant death penalty was not proven.

19 Petitioners rely on Burkes as cited in the
20 brief. We rely upon Green v. Massey, which applied
21 Burkes to the state. And then we also rely on Hudson v.
22 Louisiana. The purpose there of Hudson was to show that
23 it didn't mean any evidence, but it has not been shown
24 beyond a reasonable doubt. Those cases would show that
25 the status of the petitioner's case when the Arizona

1 Supreme Court ruled in Poland I is what can be done from
2 here. There is insufficient evidence. The only way we
3 can cure this is send it back for a new trial on death
4 penalty. Enter Mr. Bullington. Mr. Bullington was
5 convicted, the only distinction being Bullington and
6 Rumsey didn't receive death.

7 The double jeopardy, we are not talking merits
8 of the case. We are talking whether that veil is there
9 or not and whether or not it requires a new trial.

10 Bullington tells us that there are two separate trials,
11 one on guilt and one on innocent, I mean, on punishment.
12 The one on punishment is independent of the one on
13 guilt. Because of the constitutional change Mr.
14 Bullington received a new guilt trial, entitled to a
15 different panel of the jury but they couldn't retry him
16 on punishment, and this Court so held.

17 Further, the Arizona Supreme Court,
18 interpreting its own law in Rumsey II has made it quite
19 clear that double jeopardy applies to Arizona's death
20 sentencing procedure.

21 QUESTION: May I interrupt you for a moment?

22 MR. WILHELMSSEN: Yes, Justice.

23 QUESTION: What is it that precluded a second
24 sentencing hearing in your submission?

25 MR. WILHELMSSEN: Based on insufficient

1 evidence to support one aggravating circumstance --

2 QUESTION: But not insufficient evidence to
3 support the death penalty.

4 MR. WILHELMSSEN: Trial error. Trial error
5 prejudicial to who? The state. The state had their
6 opportunity to present their evidence to convince that
7 Court that pecuniary gain did apply just as whoever the
8 trial lawyer was in state v. Park, which convinced that
9 court, and it came up in the Arizona Supreme Court did
10 find that pecuniary gain is not limited to the hired
11 gun.

12 QUESTION: But I am still not entirely clear
13 not entirely clear on your submission. Your submission
14 is that if there is insufficient evidence to support the
15 particular aggravating circumstance on which the trial
16 judge relied, there cannot be a second death penalty
17 hearing?

18 MR. WILHELMSSEN: It requires a new hearing.
19 Rumsey was the same problem.

20 QUESTION: Except in Rumsey there was a
21 decision not to impose the death penalty, which is
22 tantamount to an acquittal in the second hearing.

23 MR. WILHELMSSEN: That is the only
24 distinction.

25 QUESTION: You don't have that.

1 MR. WILHELMSSEN: We have the distinction that
2 both Rumsey and Bullington received life. The double
3 jeopardy is not defined in terms of the merits of the
4 issue or of the case. Does double jeopardy apply to
5 this factual situation? What is necessary after the
6 Supreme Court of Arizona entered its opinion in 1982,
7 Poland I, what is necessary now to impose the death
8 penalty?

9 Well, first of all, they have got to reconvict
10 the Polands. Then, second of all, they have got to have
11 an aggravating mitigating hearing, which they did have.
12 It calls for a new proceeding, a second proceeding. Why
13 are we having a second proceedings on the death penalty
14 on the Polands, whereas we don't have a second
15 proceedings on Mr. Bullington, because Bullington got
16 life the first time.

17 QUESTION: That is right, and therefore you
18 have something tantamount to an acquittal, which bars a
19 second hearing, but you don't have anything tantamount
20 to an acquittal of the death penalty in this case.

21 MR. WILHELMSSEN: We have what is tantamount to
22 an acquittal is by the ruling of the Arizona Supreme
23 Court in Poland I. That was not an explicit acquittal
24 as one would phrase Mr. Rumsey's --

25 QUESTION: Nor was it --

1 MR. WILHELMSSEN: -- but it was an --
2 acquittal.

3 QUESTION: Well, no, it wasn't the equivalent
4 of Burke either, because it was not a holding that there
5 was not enough evidence in the record to support a death
6 penalty .

7 MR. WILHELMSSEN: If I recall Burke correctly,
8 I believe there was not a sufficient prosecution of the
9 evidence to overcome the presumption of the insanity
10 type defense. They had presented a record on insanity,
11 and the government had come back in and overcome that
12 presumption, so not talking merits of the case or 100
13 percent free trial for the government. Do they get a
14 perfect trial, or is it under our system there are so
15 many protections granted to a defendant that we require
16 proof beyond a reasonable doubt in criminal cases, and
17 the same principle would apply here. Why should the
18 government get a second bite at the apple?

19 QUESTION: But in that case the second bite
20 enabled them to put in evidence to shore up the case
21 that was deficient. Here they use exactly the same
22 evidence which they claim is sufficient and was always
23 sufficient, if I understand the case. It is rather
24 complicated.

25 MR. WILHELMSSEN: Yes, Justice, but there is

1 one little problem. The trial lawyer for the Polands,
2 if you will read their memorandum and likewise the
3 sentencing hearing, they are arguing the law on this.
4 They are saying this doesn't apply because this is not a
5 contract killing. They didn't present or address the
6 issue like in consideration of or in the expectation of.

7 Now, what is the fine technical meaning of
8 those words? Our court has in Clark explained it. One
9 could feasibly argue that this is different from Clark.
10 The guards disappeared, and that van disappeared some
11 time early on May the 24th. The van was found the next
12 morning at about 6:30 in the morning, locked, in a
13 desolate area of Yavapai County about halfway between
14 Phoenix and the little village of Prescott, where their
15 first deliveries were to be made.

16 There is the van, locked. They could get into
17 it. There was some money there, but most of it is
18 gone. Where are the guards? A day passes. A week.
19 The guards' bodies surface approximately a month later
20 and a week apart. I say surface. They are found
21 floating in Lake Mead a month later. Was their killing
22 in consideration or in expectation of pecuniary gain, or
23 if you are in another -- like some other states have
24 statutes and aggravating circumstances where if you are
25 going to dispose of a witness to this crime, that

1 constitutes an aggravating circumstance. Do we take
2 every feasible situation and try to squeeze it into
3 pecuniary gain?

4 The trial lawyer argued strictly from the
5 standpoint of the law on the issue, that it is limited
6 to the hired gun. You have got to read four and five
7 together. So the misinterpretation of the law if one
8 wants to characterize it as such was really a common
9 interpretation made across the state of Arizona.

10 This death penalty was passed in 1973. Here
11 we are, July of 1980, before we get to the Clark case
12 for an interpretation that it is not limited. What is
13 necessary again is a multiple trial. You have got to
14 have another hearing on this, and as a result of that
15 second hearing, the Polands lost ground. They lost
16 their good character in the interim. The same
17 evidence. What new occurred?

18 The next point would be that the weight or the
19 sufficiency of the evidence to establish the one
20 pecuniary gain found by the cruel, heinous, and depraved
21 found by the Arizona court based on a reading of
22 Richmond and likewise in Watson. The Arizona court in
23 looking at an aggravating circumstance doesn't weigh the
24 evidence as perhaps the Florida court does, where they
25 have Zandt v. Green and their earlier cases, where if

1 the evidence was so tenuous it wouldn't support this
2 conviction. We have the right as a judge to send it
3 back to the trial court and have a new hearing.
4 Arizona, we looked to see whether or not there is
5 evidence to support this aggravating, and we look to see
6 whether or not there is evidence to support the
7 mitigating circumstance. Then the court would weigh
8 these in their independent reviews, one against another,
9 and then their, of course -- review.

10 Certainly as far as one of the statements --
11 the Arizona Supreme Court in relying upon their decision
12 in Poland II and saying we do not agree, they refer to a
13 case called Knapp v. Carwell, which is an unusual case.
14 Knapp v. Carwell results from an earlier case which was
15 called State v. Watson, where the constitutionality of
16 the Arizona death penalty that was involved here was
17 first brought to the attention of the Arizona Supreme
18 Court, and by judicial interpretation they found that
19 the statute wasn't unconstitutional. This was an answer
20 in regard to Lockett v. Ohio. They go through this case
21 and one thing they find is that double jeopardy doesn't
22 apply in the Watson case, because its resentencing is
23 ameliorating.

24 Who has been damaged by limiting mitigating
25 circumstances? Only the petitioner. Subsequently, when

1 this gets cleared up, and then we get a class action of
2 all the people down on death row, it goes into the
3 federal court. They in that time, in making their
4 decision to the Ninth Circuit, compare Arizona's
5 procedure to Missouri, and they find a big distinction
6 at that point, because it involved a judge in Bullington
7 -- I mean, excuse me -- yes, the judge in Bullington and
8 vice versa. In Bullington the jury determines it, but
9 in Arizona the judge does it. That was the distinction.

10 And in addition, they found that the
11 sentencing procedure is ameliorative, that these people
12 haven't started serving their death sentence, so double
13 jeopardy does not apply, and further, one case out of
14 that whole group presents an issue somewhat compatible
15 with the issue here, and that was Mr. Valencia. Mr.
16 Valencia had been convicted and sentenced to death on
17 murder, and then he had been resentenced pursuant to
18 Watson before the court heard Knapp v. Carwell.

19 Mr. Valencia, due to the publicity of his
20 first conviction, had a lady come into the Tucson port
21 and indicate she had been raped by that man, and so
22 there was a subsequent trial on that. He was convicted,
23 and then when he was resentenced per Lockett and
24 Arizona's Watson, they brought up this second new
25 aggravating circumstance, but in the Ninth Circuit, in

1 light of our finding that Watson changed in
2 interpretation his procedural and ameliorative, that
3 Bullington is distinguishable, and we hold double
4 jeopardy does not apply.

5 I would like to reserve the remainder of my
6 time for rebuttal.

7 CHIEF JUSTICE BURGER: Very well.

8 Mr. Grant?

9 ORAL ARGUMENT OF GERALD R. GRANT, ESQ.,
10 ON BEHALF OF THE RESPONDENT

11 MR. GRANT: Thank you, Mr. Chief Justice, and
12 may it please the Court, on May 24th, 1977, the
13 petitioners Michael and Patrick Poland, disguised as
14 police officers, stopped a Purolator armored van on an
15 interstate highway north of Phoenix. The van and its
16 guards, Cecil Newkirk and Russell Dempsey, were on their
17 way on a regularly scheduled run to deliver money to
18 banks in northern Arizona. The petitioners managed to
19 subdue the guards, and they removed something in excess
20 of \$280,000 in cash from the van and took it with them.

21 The following morning, petitioners rented a
22 boat at Lake Mead in northern Arizona. They put the
23 guards on the boat, took them out onto the lake, put
24 them in canvas bags, weighted the bags down with rocks,
25 and dropped them into the water, where they drowned. It

1 was based upon these facts --

2 QUESTION: Is it clear that they were still
3 living when they were dropped in the water?

4 MR. GRANT: Yes, Your Honor. The testimony of
5 the medical examiner at the trial indicated that the
6 cause of death of both men was drowning. He had a slight
7 qualification with respect to Mr. Dempsey in that he
8 found some evidence of heart disease, and he testified
9 that that could have been a possible cause of death.
10 However, his testimony was that the cause of death of
11 both men was drowning.

12 It was based upon these facts that petitioners
13 were convicted of first degree murder and sentenced to
14 death. Petitioners are now claiming that the double
15 jeopardy clause precludes their death sentences because
16 the Arizona Supreme Court acquitted them of the death
17 penalty on their first appeal.

18 Respondent submits that no court in the state
19 of Arizona has acquitted petitioners of the death
20 penalty, and that the state has never failed to prove
21 its case for imposition of the death penalty.
22 Petitioners admit that the trial court imposed the death
23 penalty at their first sentencing.

24 With respect to the trial court's findings at
25 that sentencing, however, the petitioners do not clearly

1 focus on all the findings that the trial court made.
2 According to petitioners, the trial court simply found
3 that one aggravating circumstance existed, that being
4 the cruel, heinous, or depraved nature of the killings.

5 Petitioners also maintain that the trial court
6 simply found that a second factor, that being that the
7 killings were committed for a pecuniary motive, did not
8 exist. The trial court's findings were not that simple,
9 especially with respect to the pecuniary gain factor.
10 Counsel in argument has likened the trial court's
11 handling of the pecuniary gain factor in this case to
12 the handling of that same factor by the trial court in
13 Rumsey.

14 They were not handled the same. In Rumsey,
15 the trial court specifically found that the pecuniary
16 gain factor did not exist, period. In this case, the
17 state's evidence in support of the factor was that the
18 killings were obviously committed for the obtaining of a
19 financial profit, that being the money taken from the
20 vans.

21 QUESTION: Would the death penalty have been
22 justified here only on the manner in which these people
23 were murdered, tying them in a sack and dropping them in
24 the water?

25 MR. GRANT: That was one of the --

1 QUESTION: Would that have been enough alone,
2 if there had been no mitigating -- showing of mitigating
3 circumstances?

4 MR. GRANT: Yes, if a -- yes, that would have
5 -- that amounted to an aggravating factor in this case.

6 QUESTION: So that in your view the fact that
7 they made \$281,000 out of it is irrelevant?

8 MR. GRANT: It is not irrelevant.

9 QUESTION: Or it is cumulative?

10 MR. GRANT: It is an additional reason to
11 impose the death penalty. The evidence regarding the
12 pecuniary gain factor was never disputed by petitioners
13 at the first sentencing. It has never been disputed at
14 any stage of this case. There is no claim that the
15 state failed to prove the pecuniary gain aggravating
16 factor. The only argument that petitioners made at
17 sentencing and even at resentencing was that the legal
18 meaning of the factor did not apply to that evidence.

19 The dispute was between whether the pecuniary
20 gain factor applied to contract killings only or whether
21 it went farther to embrace all killings where the
22 obtaining of money is a motivating factor in the
23 killing.

24 At the time of the first sentencing, as
25 counsel has pointed out, the trial court did not have

1 the benefit of later Arizona Supreme Court opinions
2 defining the pecuniary gain factor. It thus faced the
3 problem of determining for itself what the exact legal
4 meaning of the factor was. What the trial court did
5 was, it took note of the two conflicting theories. It
6 then made findings of fact regarding each of those
7 theories.

8 It stated that there was no evidence that this
9 was a contract killing. It went on to state that the
10 evidence clearly did show that the killings were
11 committed for a financial motive. It then made what
12 respondent refers to as a conditional finding. It
13 stated, if the pecuniary gain factor is limited to the
14 contract killing situation, it does not exist here. If,
15 however, it goes farther than the contract killing
16 situation, it does apply here.

17 Essentially, what the trial court did was make
18 evidentiary findings and left the legal question on the
19 meaning of the pecuniary gain back to the Arizona
20 Supreme Court.

21 QUESTION: If you are correct in it, why
22 didn't the Supreme Court of Arizona accept the trial
23 court's conditional finding of the pecuniary gain factor
24 the first time around?

25 MR. GRANT: I think reading Poland I and

1 Poland II together, I think it is clear that the Arizona
2 Supreme Court did. However, in Poland II, the Arizona
3 Supreme Court had already reversed the convictions. The
4 case was already going back. In the event of a
5 conviction or first degree murder, there was going to be
6 another sentencing hearing. For that reason, the
7 Arizona Supreme Court did not take the extra step and
8 say, yes, indeed, this exists here and it supports the
9 death penalty. There was no need to at that point,
10 because it had already reversed the convictions.

11 QUESTION: It reversed the convictions
12 themselves, not the penalties. Is that it?

13 MR. GRANT: Correct.

14 QUESTION: I see.

15 MR. GRANT: It reversed the convictions based
16 upon an allegation of misconduct by the jury. That is
17 what it did first, before discussing the findings by the
18 trial court with respect to the aggravating factors.

19 After the Arizona Supreme Court had reversed
20 the conviction, as counsel pointed out, it went on to
21 discuss the findings on the aggravating factors. It
22 stated with respect to the cruel, heinous, and depraved
23 factor that the evidence, in the court's words, "so far
24 produced" was not sufficient to support the trial
25 court's finding. On the pecuniary gain factor, it

1 quoted the exact findings that the trial court had
2 made. It then noted the trial court's confusion over
3 the legal meaning of the pecuniary gain factor. It
4 provided the trial court with the correct definition of
5 that factor, and then it in effect advised the trial
6 court that in the event of a conviction following a
7 retrial, that that factor could be found again.

8 Petitioner's contention is that an acquittal
9 occurred on the death penalty issue at the first
10 appeal. I believe the basis of the argument for an
11 acquittal is that when the Arizona Supreme Court found
12 the evidence insufficient with respect to the cruel,
13 heinous, or depraved factor, essentially there was
14 nothing left to support the death penalty.

15 This position fails to deal with the trial
16 court's finding on the pecuniary gain aggravating factor
17 and the Supreme Court's own discussion regarding that
18 same factor. There is admittedly no failure of proof
19 with respect to that factor. Even at resentencing,
20 there was no argument by the petitioners that the
21 state's evidence was exactly the same as it had been at
22 the first sentencing, did not show that these killings
23 were committed with a financial motive.

24 Even though the Arizona Supreme Court found
25 that one aggravating factor was not sufficient would

1 prove the trial court's findings with respect to the
2 aggravating factor were sufficient to prevent an
3 acquittal in Poland I.

4 One of the major factors in this Court's
5 decisions regarding double jeopardy cases, it involves
6 the special treatment that acquittals are given. The
7 double jeopardy clause is designed to protect defendants
8 from having to go through a second ordeal of a trial or
9 in death penalty cases that are sufficiently like a
10 trial, a second sentencing proceeding. A retrial after
11 an acquittal would force a defendant to undergo that
12 ordeal a second time.

13 Therefore, when the proceedings terminate in
14 favor of the defendant with an acquittal, double
15 jeopardy protection will apply, and that will be the end
16 of the matter. In this case, there simply no
17 acquittal. There was no point in this case when the
18 defendants could consider themselves free of the death
19 penalty.

20 The trial court's findings with respect to the
21 pecuniary gain factor kept that issue open, and
22 prevented the Arizona Supreme Court's decision in Poland
23 I from amounting to an acquittal on the issue of the
24 death penalty.

25 In the absence of such an acquittal, the

1 rationale that this Court discussed in Pierce would
2 apply here, but petitioners' appeal and obtaining of a
3 reversal of their convictions on appeal in effect wipes
4 the slate clean and allows not only for a second trial
5 but for a second sentencing.

6 There has been some argument in the brief
7 regarding a failure to appeal by the state with respect
8 to the trial court's finding at the first sentencing.
9 It is respondent's position that there was simply no
10 need for the state to appeal from that finding. There
11 had been nothing decided, to its detriment. The trial
12 court specifically found that the evidence the state
13 presented supported a finding that the killings were
14 committed for a financial motive.

15 Furthermore, the Arizona Supreme Court in all
16 cases in which the death penalty has been imposed does
17 conduct what it calls an independent review. That
18 review is not the usual review that an appellate court
19 does when it comes to reviewing evidence. With respect
20 to the aggravating and mitigating factors, the Arizona
21 Supreme Court conducts an independent review. It
22 independently weighs the evidence regarding each
23 aggravating factor and each mitigating factor and
24 determines the weight for itself they should be given.
25 Because of that independent review performed by the

1 Arizona Supreme Court, there was no need for the state
2 to appeal in this case.

3 QUESTION: General Grant, may I ask you if
4 there had not been a setting aside of the conviction and
5 the appeal was only on the death penalty, and they had
6 then done exactly what they did, under your view, as a
7 matter of Arizona law, I am curious, would the Arizona
8 Supreme Court have had the authority to affirm the death
9 penalty changing the rationale by saying that he made an
10 error of law on the pecuniary circumstance, aggravating
11 circumstance, even though the other one was not
12 supported by the evidence?

13 MR. GRANT: My opinion is that the Arizona
14 Supreme Court does have that power. In the exercise of
15 that power, however, the Arizona Supreme Court in other
16 cases has tended to exercise it carefully, and in that
17 type of situation they normally handled it by remanding
18 it to the trial court for a clarification and a
19 resentencing.

20 QUESTION: To be sure that he would have
21 opposed the death penalty --

22 MR. GRANT: Correct.

23 QUESTION: -- with this different mix of
24 aggravating circumstances?

25 MR. GRANT: Correct. That is generally the

1 way that they handled it, although I do submit that they
2 have the power to treat it differently and to make the
3 findings themselves.

4 In conclusion, the respondent's position is
5 simply that there has been no acquittal of the death
6 penalty in this case at any stage of the proceedings.
7 There has been no failure of proof on the part of the
8 state. Because of that, the double jeopardy clause does
9 not prohibit the death penalty in this case.
10 Respondents would ask this Court to affirm the judgment
11 of the Arizona Supreme Court.

12 Unless the Court has any additional questions,
13 I have no further comments. Thank you.

14 CHIEF JUSTICE BURGER: Thank you. Do you have
15 anything further, Mr. Wilhelmsen?

16 STATEMENT OF W.K. WILHELMSSEN, ESQ.,

17 ON BEHALF OF THE PETITIONERS,

18 APPOINTED BY THIS COURT -- REBUTTAL

19 MR. WILHELMSSEN: Mr. Chief Justice and the
20 Court, the issue has been clearly drawn. We have error
21 that was prejudicial to the government. Does that
22 guarantee the government a new trial? Are they entitled
23 to a perfect trial?

24 Burkes tells us that the case should be over,
25 and one of the cases cited by the petitioner -- excuse

1 me, the respondent, the issue of jeopardy attaches, and
2 that would be at the start of the trial. Does it ever
3 terminate? Or could it go back a third time and have a
4 third sentencing if we found a flaw prejudicial to the
5 government? It is submitted to this Court that the
6 error prejudicial to the government does not entitle
7 them to a second bite at the apple, and if there are no
8 questions, I am through.

9 CHIEF JUSTICE BURGER: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 2:17 o'clock p.m., the case in
12 the above-entitled action was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-5023 - PATRICK GENE POLAND, Petitioner V. ARIZONA; and

#85-5024 - MICHAEL KENT POLAND, Petitioner V. ARIZONA

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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