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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-5348

TITLE DAVID BUCHANAN, Petitioner V. KENTUCKY

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IN THE SUPREME COURT OF THE UNITED STATES

DAVID BUCHANAN,

Petitioner,

v. : No. 85-5348

KENTUCKY

Washington, D.C.

Monday, January 12, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

KEVIN McNALLY, ESQ., Frankfort, Kentucky; on behalf of the Petitioner.

DAVID A. SMITH, Assistant Attorney General of Kentucky, Frankfort, Kentucky; on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will first this afternoon in No. 85-5348, Buchanan versus Kentucky.

Mr. McNally, you may proceed whenever you're ready.

ORAL ARGUMENT OF KEVIN McNALLY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McNALLY: Mr. Chief Justice, and may it please the Court:

David Buchanan's jury had, among others, two important issues to decide. First, did David know, should he have known, did he intend, to assist Kevin Stanford in killing Ms. Poore?

And secondly, what punishment should they give him for his role in th crime?

Prior to trial, on at least two occasions, the Commonwealth conceded that they did not have any evidence that David intended to assist Mr. Stanford; in fact, that he knew Ms. Poore was going to be killed. And as a result of that, the trial judge excluded the death penalty.

Before the jury, the prosecutor in this case essentially conceded that same, and argued that his involved in the murder stemmed from a conspiracy to commit a robbery, implicitly conceding that Mr. Buchanan

was not guilty of intentional murder.

This jury went beyond what the prosecutor suggested to them and, in fact, convicted him of intentional murder, imposed the maximum sentence, and went a step beyond, and in fact recommended, in an unusual move, that the sentences all be served consecutively.

We bring these facts to the Court's attention because it simply demonstrates that we are not arguing about the practice called death qualification solely in the abstract, but in the context of this particular trial also.

Our position is, this jury was uncommonly punitive, if nothing else. And in support of that, we don't solely rely on the sociological evidence that has been adduced, part of which was in issue last year -- the other part that was not in issue was the number of studies that clearly indicate what I think commonsense tells us that a jury picked in this way is uncommonly punitive -- but also the actions of this particulary jury.

When we look at the composition of this jury, we see that seven individuals of 56 qualified were excused for cause, essentially because of religious, political, or philosophical beliefs about a punishment

which was irrelevant to David Buchanan.

We see an additional four jurors who arguably were excused, as the prosecution has a right to do, because their views on capital punishment were exposed during the so-called death qualification process.

We argue here today that 20 percent, perhaps 21 percent, if you can consider the peremptory challenges, of this panel were excused because of views on a punishment that was irrelevant to this particular defendant.

As a result of that, the jury that decided these critical issues, which required them to get inside the mind of this 16-year-old black inner city youth and decide whether he knew or should have known, as the prosecutor argued, as any reasonable man would have known what Stanford was up to, and then impose a punishment based on his degree of culpability, the jury ended up being less female than it would have been otherwise; it was dramatically older than it would have been otherwise; it was substantially less democratic than it would have been otherwise. And as it turns out, it ended up being an all-white jury when perhaps it would not have been otherwise.

QUESTION: Mr. McNally, did the defendant ask for a severance of the trial?

MR. McNALLY: He did not, Your Honor, although the codefendant did, and it was hotly litigated in the trial court, and is still being litigated in the Kentucky Supreme Court.

QUESTION: Well, since this defendant didn't, has he waived his right, do you think?

MR. McNALLY: No, he hasn't, Justice O'Connor, because we would prefer not to view this case as a separate trial case.

He, trial counsel, asked for other remedies that he preferred, for example, a separate sentencing jury, which actually would have been cheaper for the State to accommodate.

And he asked, and the trial judge suggested, some other remedies we very much would like to talk about before this argument is over.

In no way has he waived his request for some relief, because we would prefer not -- and one would think the State would prefer not -- to require separate trials.

We would prefer not to phrase this case as a separate trial case, a Bruton type of case, because there are other cheaper remedies that just have never been explored because the State has never had a reason to explore them.

QUESTION: In this case the codefendant was capitally charged and your client was not, is that right?

MR. McNALLY: That is correct, Mr. Chief Justice.

McCree and Buchanan are different cases, and they are for a number of reasons, first of all the point that the Chief Justice just made. Bottom line, that is the difference between the cases.

Secondly, because we rely on commonsense and sociological evidence regarding punitiveness of a jury picked in this manner.

Third, because we are not making some attack on a practice that's deemed essential to capital punishment, and the tremendous --

QUESTION: What do you mean by punitive?

MR. McNALLY: More inclined to give more severe sentences, based on the same facts, Mr. Justice White?

QUESTION: You mean give him more punishment than the facts warrant or what?

MR. McNALLY: In this case we contend that that happened. In general, we're contending that jurors who are picked in this manner are uncommonly punitive, that is, they are more punitive as a whole than a jury which is picked for an ordinary criminal case, based on

--

QUESTION: And your point goes to guilt or innocence?

MR. McNALLY: If pushed, we would talk about the whole question that was before the court last year on conviction proneness. Our position here is that we needn't go that far.

Because obviusly there -- McCree rejected or apparently expressed skepticism about some of those things.

We basically make the same argument that was made in Witherspoon. And in Witherspoon, there was fragmentary evidence, and the court said it is self-evident that a jury picked in this manner is uncommonly inclined to impose the maximum sentence, in that case the death penalty.

We're making the same argument, that this jury was uncommonly inclined to impose, as they did, the maximum sentence.

QUESTION: Mr. McNally, exactly what relief did the defendant ask for in a timely fashion at the trial?

MR. McNALLY: Separate juries, for example. I believe there was a discussion of -- and I'm not sure --

QUESTION: Do you know what it is the

defendant expressly asked for at trial?

MR. McNALLY: It's right in the appendix, and of course in the briefs we discuss it.

QUESTION: And what was that? A separate sentencing jury?

MR. McNALLY: Separate sentencing jury. In other words, in -- Mr. Hectus asked for that and said, we'll have the trial, and we'll decide guilt and innocence for both defendants, and we'll decide punishment for my client. And then a separate jury could be empanelled to decide the penalty for the capital defendant Kevin Stanford.

Now that would be cheaper than a separate trial. There were other remedies that were discussed. Death qualification, for example, after the guilt phase.

And of my own independent recollection, I'm not sure which of the seven remedies we talk about in our brief were actually discussed.

But the brief clearly indicates which ones were discussed by the trial judge. And I think they were three of the seven we suggest.

But the fact that all the remedies weren't discussed doesn't mean that those other remedies we suggest in the brief aren't properly before the Court, because really, it's the State's going to choose which

of the remedies that are possible they care to employ in a situation like this.

Much as the deck was stacked against Witherspoon, we contend that the deck was stacked against Buchanan. In fact, the Court -- if the Court does not choose to give great weight to the sociological evidence, and we don't mean to underestimate the significance we attach to the sociological evidence, the Court could reach the result we seek without even doing that, based on commonsense, the practical experience of prosecutors, defense attorneys, and judges.

The question of the State interest, which of course Witherspoon turned to, and ultimately McCree turned to in the end, the State interest, is an issue that we would like to address the Court's attention to.

We contend in our briefs that this happens approximately -- and I'm not exaggerating -- once in every decade in Kentucky. Now that may not be true. But we invited the Attorney General to cite some examples from Kentucky where this would be a major imposition on the State in terms of expenditure of their resources.

They've declined to do that, and that's fine. On the other hand, they have failed to cite a single case on point, to my knowledge, in other States, for

example, where this might suggest that it is a common situation.

As a practical matter, what happens in most of these situations is that the lesser culpable defendant pleads guilty in return for testimony, often, or a separate trial is granted for other reasons, as perhaps, arguably, it should have been in this case if -- as Stanford argues, and that is the main issue before the Kentucky Supreme Court in his appeal.

QUESTION: But your client didn't argue for a -- didn't move for a severance?

MR. McNALLY: No, he didn't. But although the judge indicated -- he certainly didn't oppose a severance. He particularly didn't care, frankly. The judge also ruled that any objections one party makes are considered made on behalf of the other party.

Mr. Buchanan focussed his attention on the death qualification issue with the judge, and proposed remedies.

He did not specifically propose severing the trials; that's correct, Mr. Chief Justice.

QUESTION: Mr. McNally, in your view, can a death qualified jury determine the noncapital charges that are also brought against the codefendant in connection with the capital charges?

MR. McNALLY: Can a death qualified jury determine the noncapital charges?

QUESTION: Against the codefendant?

MR. McNALLY: Against the capital defendant or the codefendant?

QUESTION: The capital defendant?

MR. McNALLY: Certainly.

QUESTION: And why is that?

MR. McNALLY: The State has -- because that person is a capital defendant, and because the State has a legitimate interest in trying one defendant before one jury of all the crimes that arise out of that situation. I absolutely have no quarrel with that.

QUESTION: And then why is it that the same jury couldn't hear the charges, the noncapital charges, against your client as well as a --

MR. McNALLY: Because of the -- because of the lesser State interest involved. In this case, as in many cases that come before the court, there's a balancing of interests here.

And I think that's what happened last year in the McCree case. When you balance the interests in the situation of a noncapital codefendant, it comes out on the side of the noncapital citizen accused, because of the prejudice that we talk about in theory and, if you

will give me the benefit of the doubt, in fact, as far as this particular jury went.

That's -- the whole question is what the State interest is. And in the situation of a capital defendant, with all due respect to that argument that's made by the Attorney General, we think it's far-fetched, and absolutely we urge no such doctrine to be adopted: one trial for one capital defendant.

QUESTION: How do you -- how do you manage to include in your challenge the use of the peremptories?

MR. McNALLY: It's only relevant, Justice White, because it wasn't -- but for death qualification at the beginning of trial --

QUESTION: The questions wouldn't have been asked, is that it?

MR. McNALLY: Yes, sir. Mr. Jasmin wouldn't have known. Now, he might have got at it another way because --

QUESTION: Of course he could have. So you really aren't serious about the peremptories in this case, are you?

MR. McNALLY: I'm serious about them in terms of the totality of the circumstances. I'm certainly not arguing a new Constitutional theory.

QUESTION: Well, suppose all of the jurors

that were excluded that you would object to had been excluded on the peremptories? Suppose the only jurors that were excluded were peremptory exclusions? Would you be here?

MR. McNALLY: We'd have less force.

QUESTION: But you'd still be making the same argument?

MR. McNALLY: If the -- if no juror was excused by cause?

QUESTION: Yes.

MR. McNALLY: Perhaps not, because that's not -- there's quite a difference between excusal for cause --

QUESTION: Well, how many jurors were excluded for cause on grounds that you think were irrelevant to your client?

MR. McNALLY: Seven.

QUESTION: Seven. And -- total, that was the total. How many all -- how many were excluded for cause totally?

MR. McNALLY: For other issues, you mean?

QUESTION: How many jurors were excluded for cause?

MR. McNALLY: Seven, on this issue. I don't -- I can't tell you off the top of my head what other --

other challenges for cause there were, on publicity, for example; I'm not aware of it.

QUESTION: Mr. McNally, would you tell me again how you would have wanted the State to handle this matter, and how you had preserved your objection below, as far as handling it that way was concerned?

MR. McNALLY: How we -- those are two separate questions.

QUESTION: Well, I think they're releated.

MR. McNALLY: The specific remedies discussed below were separate trials, and on rebuttal if we have time, we'll look up the other one. There's at least two suggested by defense counsel; one by the trial judge.

Now the other possibilities --

QUESTION: I'm interested in what defense counsel asked for. Separate trials?

MR. McNALLY: And one other.

QUESTION: Now why is there -- why is there no State interest --

MR. McNALLY: Excuse me, separate juries. The codefendant asked for separate trials, Justice Scalia.

QUESTION: Separate juries.

MR. McNALLY: For sentencing.

QUESTION: Just a separate sentencing jury. So that both defendants would have been tried for the

substantive offense together before a death qualified jury?

MR. McNALLY: No, death qualification would occur after the disposition of the joint trial.

QUESTION: Okay.

MR. McNALLY: There was no need to death qualify if the -- if there was not going to be a death penalty issue until the separate sentencing jury was empanelled.

QUESTION: (Inaudible.)

MR. McNALLY: It's not barred by Kentucky law.

QUESTION: Well, is that the way it happened? When was the jury death qualified? Before the --

MR. McNALLY: In the beginning.

QUESTION: Of course. Isn't that the usual case.

MR. McNALLY: It is. And it is that practice that we objected to.

The remedies, separate trial being one of them; simultaneous juries, which was not suggested by --

QUESTION: Excuse me, when you're trying before a jury that isn't death qualified, does the jury know what the range of penalties for the offense that's being tried before them is?

MR. McNALLY: There's no penalty qualification

except in this particular area. It's unique.

QUESTION: No, I understand that. But can you empanel a jury that is not death qualified, telling them, bearing in mind, if you convict this individual, he may be put to death; but nonetheless, we don't think we have to death qualify.

MR. McNALLY: It's irrelevant to --

QUESTION: To that jury, to the convicting jury, as to whether they'd vote for a conviction if they know that --

MR. McNALLY: It's not necessary to tell them that, is our contention. It is not necessary to tell them that.

And we will even concede, for example -- I'll go even further -- if you want to -- if you want to make sure there's nobody on that jury that would balk at convicting someone, you could have a limited death qualification as to the so-called nullifiers, who are people who just can't find anybody guilty. But those are so few, it would not appreciably affect the interests that we complain about here.

QUESTION: I see. You wouldn't object to a limited death qualification for the convicting jury, that is, could you not vote to convict if you knew that the effect of that might be to cause this individual to

be put to death by another jury?

MR. McNALLY: With that remedy. But there are others that you don't have to do that. For example, simultaneous --

QUESTION: You think there are a lot of people who draw the line between the two, between convicting somebody when they know the effect of that conviction will be to expose them to being put to death, and individuals who simply, although they could do that, could not vote personally for the death penalties?

MR. McNALLY: Based on ten years of experience of picking these juries, absolutely. And the public opinion polls and studies indicate the same. And I doubt that the Attorney General would dispute that, Justice Scalia.

There is a huge difference in number between so-called nullifiers, and those who balk at actually voting for the penalty.

But there are other remedies we suggest in our brief that would not require that pretrial death qualification, like simultaneous juries.

QUESTION: What is the difference between a nullifier and someone who would not vote for the penalty?

MR. McNALLY: The difference is that some people -- many jurors, when you ask that question in

voir dire, will say, yes, I could sit, I could vote for guilt; yes I could. But I could never vote for the death penalty. That's the distinction people make in their minds.

QUESTION: So the nullifiers are ones who would hesitate on conviction?

MR. McNALLY: They won't even -- they'll do a jury nullification vote, is what they'll do. But that problem doesn't exist with simultaneous juries, or some other remedies we propose, a jury less than 12, or a nonunanimous jury, which by statute the States involved here, which are only -- if you accept our sentencing theory, are only six in the whole country. Which of course would require a legislative change, but it's quite possible.

We'd point out here that when you examine Kentucky State interests, it's important to keep in mind that in persistent felon proceedings, the statute specifially provides for a different jury for good cause.

Now, it so happens our capital statute doesn't contain that provision. But note the State interest at stake here.

Note also that in Kentucky the jury's sentence is a recommendation, that the judge makes the final

decision. So theoretically, the State interest is considerably less when you have a situation where the jury's sentencing decision on capital punishment is only a recommendation.

We would briefly like to mention the fair cross-section aspects of this before turning to the second issue as our time is dwindling.

We recognize of course what McCree said, that these people are not a distinctive class. That is not to say that one cannot consider the very strong fair cross-section overtones here.

If I could use a football analogy, and perhaps it's a bad day to do that, but it's almost like we get to the one-yard line on the fair cross-section issue, and we don't score.

And we get to the one yard line on the whole question of impartiality but don't score.

QUESTION: What makes you think you got to the one yard line?

(Laughter.)

MR. McNALLY: I'm glad you asked that question, Mr. Chief Justice.

(Laughter.)

MR. McNALLY: Because this group is so large. Because this group is identifiable as death

qualification presumes they are. And because, and most important, this group makes a difference.

The traditional fair cross-section cases involving women, for example: there's a dispute amongst the court about whether you have to demonstrate that women make a difference on juries. Does it make any difference?

In this case, we draw strength from both the impartial jury theory, the studies, the actions of this jury, and the fair cross-section ramifications.

All the people that were excluded here were either women, black or Democrats. Now, they are not, according to McCree, a distinctive group. But if you look at it, they are actually a collection of groups that are already held to be cognizable by this Court.

And while we don't necessarily urge as our primary theory --

QUESTION: What do you mean they're a collection of groups already held to be cognizable by this Court? Do you mean --

MR. McNALLY: Women, blacks, and -- well, not Democrats.

(Laughter.)

MR. McNALLY: Women and blacks.

I must turn to the second issue, but before I

do, I'd just like to mention the lopsided nature of this death qualification, that there was no questions to this panel about relevant punishments. And it's an aspect of the case the Court -- we would like the Court to consider.

Dr. Lange's report, it's absolutely crucial to understand the purpose of it. And frankly, it wasn't until the Attorney General uncovered the juvenile court tapes in this case that we understood exactly what Dr. Lange was doing.

First of all, it was a joint motion of the parties in juvenile court, that Dr. Lange's psychological report was directed at the issue of amenability to treatment in the context of an involuntary commitment examination.

He -- he volunteered competency. He also said, yes, and he's competent to. That was not requested by counsel or the court.

So what you have here is a collection of three purposes. Amenability to treatment under the Kentucky's juvenile court statute: can he be treated? Can he be rehabilitated as a juvenile? Is he competent? Volunteered by the psychiatrist. And can he be involutanrily committed? Which, quite frankly, had nothing to do with the legal case. It was an effort by

Mr. Hectus to get his client out of the jail and into a treatment facility in the long delay prior to trial.

That report was taken and used by the prosecution as evidence on the question of criminal responsibility.

On the tape, which has not been transcribed, but is in the record, because they rely on it, the judge says that, I made no request -- and I'm quoting -- for a full-blown psychiatric interview dealing with any character disorder or emotional disturbance.

Dr. Lange testified in juvenile court that, I do not feel as an expert witness I can give testimony on something I was not asked to evaluate.

If -- obviously there are considerations here whether a report of this type -- and I'm presuming, because I'm rushed for time, that Estelle v. Smith covers this situation, but presuming it does, can this type of report be used in rebuttal.

And we think there's a good argument that it can, but not in this case, and not under these facts. And the reason is because the interest that this Court talked about in Harris v. New York, which would be the genesis of this use of rebuttal, have to do with preventing perjury.

Harris itself says that the evidence has to be

relevant and meaningful on the topic. And those are the failures that we submit to this Court that occur in using Dr. Lange's report, because it was really misused by the prosecutor, who was not the prosecutor in juvenile court, and perhaps he didn't know what this report was about.

But using this report on irrelevant issues, we feel, takes it out from under the argument -- and a reasonable one in certain situations -- that the State has to have a fair opportunity to rebut a mental state --

QUESTION: You're saying that the report was used on irrelevant issues. I take it the trial judge admitted the test -- admitted it?

MR. McNALLY: The trial judge admitted the report.

QUESTION: Well, isn't that some indication that the trial judge, applying Kentucky law, thought that it was relevant?

MR. McNALLY: On the face of it. But the trial judge didn't know why this report was done. And because Dr. Lange wasn't there to testify, defense counsel couldn't demonstrate it on the spur of the moment.

This is very much a surprise, as in Estelle v. Smith, to defense counsel that this report was used.

QUESTION: Oh, so now you're asking us to take your word that the trial judge misapplied Kentucky law?

MR. McNALLY: I'm just saying the trial judge didn't know what we know now. That's what I'm saying. And that it was a surprise. And it was a surprise because the trial judge ruled that the two circuit court competency exams could not be used, exactly for that reason.

The trial judge -- the Attorney General -- the prosecutor did not request an independent psychological examination to rebut this evidence, as they could have, as they claim they could have in their brief.

Instead, they took a report from juvenile court and misused it.

So that brings us -- we argue the case out from under the ambit of Harris v. New York, because it's not proper rebuttal.

And unless there are questions, we'd like to reserve five minutes.

CHIEF JUSTICE REHNQUIST: Yes, thank you, Mr. McNally.

We'll hear now from you, Mr. Smith.

ORAL ARGUMENT OF DAVID A. SMITH, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SMITH: Mr. Chief Justice, and may it

please the Court:

When more than one person takes part in the same crime or in the same series of crimes, such as we have in this case, we think that the State has a legitimate interest in trying those defendants together before a single jury.

We think that this enhances the truth finding function of that jury, because it gives them a greater perspective on the entire case. And we think that this tends to ensure against there being inconsistent results, because it requires a forced consensus on the facts, as well as a forced consensus on the relative degree of culpability on the part of the defendants who have taken part in that crime.

We think that this is fair to the government, and it's fair to the defendants for the same reason.

We submit that this particular interest is manifested by the Kentucky rules of procedure concerning joinder of defendants for trial and consolidation of offenses for trial.

And we think that this interest is very similar to one that this Court has already recognized last year in the case of Lockhart v. McCree, when the Court discussed Arkansas' use of the unitary jury system such as we have in Kentucky, where the same jury that is

called upon to resolve all the questions of guilt in the case is also called upon to resolve all the questions of punishment as well.

So we think we have both of these valid interests implicated in this particular situation.

We submit that not only was the joinder in this case proper, but would emphasize the fact that Mr. Buchanan did not request severance of defendants for trial. We think it's because he could foresee that, if anything, he would derive a benefit from being compared with someone who faced a potentially stiffer punishment for having taken part in the same murder offense.

We think that the crux of this matter is that David Buchanan in this case has no countervailing interest at stake. While the government had these two others I've just alluded, he, David Buchanan, does not have a constitutional right to empanel particular jurors in the case.

What the Constitution guarantees to a criminal defendant is that the individual members of that jury be impartial. And that is exactly what we had here, those who expressly stated that they would comply with their oath and follow the law of the case.

So this was a capital proceeding in which a noncapital codefendant had been properly joined for

trial, and not only on the murder offense but also the sodomy and robbery charges, which would give rise to the aggravating circumstances here.

And so that is why the government in this case had an interest not only in trying the defendants before the same single jury, but also in excluding the Witherspoon excludables, because this was the only way to carry out the State's legitimate capital sentencing scheme.

We think that it was proper because the State tailored the exclusion of jurors in this case to the particuilar matter before them.

In the McCree case, the Court held that a death qualified jury is constitutionally valid. We submit that if the same jury is fair and impartial with respect to the capital defendant, then there's no reason why it would not be so with respect to his noncapital codefendant as well; certainly not because David Buchanan too did not face death as a possible punishment.

If it is fair to the one, we think that it is fair to the other.

Now, Mr. Buchanan has pointed out the infrequency with which this situation arises. But we don't think that, in and of itself, should give rise to

a finding by this Court that the process here resulted in constitutional error.

The question before this Court is not whether one procedure was better than the other, or whether one was more economical than the other.

The question, instead, is whether the procedure that was actually used in this case resulted in a constitutional error, which we submit that it did not.

This is not some kind of a freak occurrence. This is dictated by the circumstances of the crime. And we would point out that this situation could in other contexts as well.

Here, the reason that David Buchanan was exempted from candidacy for the death penalty was based on -- it was based on an interpretaton of what this Court has said in Inman v. Florida.

Right or wrong, the prosecutor conceded the point. We think the focus instead of being on who pulled the trigger should have been on whether or not Buchanan intended the victim's death, which the Kentucky Supreme Court found that there was sufficient evidence of intention.

But that situation would arise not only there but any time the -- more than one person takes part in a

murder, that there would be aggravating circumstances apply only to the one and not the other.

QUESTION: Mr. Smith, suppose -- suppose the noncapital defendant was tried alone, and the State said -- asked every juror the same kinds of questions that he would in a capital case, attitude about the death penalty. And every time a juror was opposed to the death penalty, he asked that the juror be excused for cause.

And the judge said, well, that's all right. You can ask the questions, and I'll follow the death case procedure. And he excuses jurors for cause who are inalterably opposed to the death penalty.

MR. SMITH: And you're talking about an entirely separate trial where Buchanan --

QUESTION: I am, I am.

MR. SMITH: -- does not face death as a possible punishment?

QUESTION: I am, I am.

MR. SMITH: Again, we think that while there would not be any particular reason for the government to do this, they would not have the interest in carrying out the capital sentencing scheme, on the other hand --

QUESTION: You don't think excusing jurors for cause, supposedly, in a ground that would be irrelevant

to the case would raise any questions about fair cross-section?

MR. SMITH: I don't believe so. I think, again, all that the defendant is entitled to in the way of an impartial jury is those who are willing and able -- as long as those who wind up on the jury panel are willing and able --

QUESTION: Well, it may be one thing to eliminate jurors about whom there's some question about their ability to follow the instructions, but -- that might meet any cross-section argument.

But what about eliminating jurors just because they have an attitude that's irrelevant to the case?

MR. SMITH: I think it would be a much closer questio there, and I think certainly it would result in a State procedure violation.

QUESTION: Well, why isn't that a much closer question in this case?

MR. SMITH: Well, because there, the government does not have an interest in doing this. And I think there is a certain balancing process involved here.

QUESTION: Well, to the extent in that other -- in my example, there might be a fair cross-section argument that wouldn't be present in a capital case, why

isn't that question here with respect to the noncapital defendant?

MR. SMITH: Your Honor, I didn't mean to say that this would be a fair cross-section requirement. I think you only get into --

QUESTION: But you do think it might be a closer question about --

MR. SMITH: Your only -- I think you only get into that realm where there is a wholesale exclusion of the jurors in every case for reasons unrelated to their ability to decide the particular matter before them.

Again, this has to be a recognizable group.

QUESTION: You think the death qualified -- or the people who are opposed to the death penalty just aren't an identifiable group?

MR. SMITH: No, because as this Court held in the McCree case, that we don't define groups simply by their shared attitudes. It has to be something much more distinctive than this.

And I think the importance there is the fact that there's a difference between wholesale exclusion in every case, and one where it's tailored to the particular matter that's being tried.

QUESTION: So a judge could excuse all jurors in the venire who were born on Friday, if he felt like

it, and there would be no fair cross-section violation? Something that had absolutely nothing to do with the case.

MR. SMITH: There I think we would get into a possible fair cross-section.

QUESTION: I don't see how that's much different than Justice White's question.

MR. SMITH: Well, perhaps I wasn't focussing on his question as much as I should. I was looking more in terms of juror impartiality instead of the fair cross-section requirement.

Yes, I think that could pose a problem with regard to the fair cross-section requirement of the Sixth Amendment.

But I kept emphasizing --

QUESTION: You say the State has an interest in having -- in conducting a joint trial. That's your answer as to why this was not an irrelevant inquiry.

MR. SMITH: Well, yes, exactly. The jurors in this case were tailored to the entire matter before them. We had the interest in joining the defendants for trial. We had the interest in the unitary jury system, such as we use in Kentucky.

And here, as well --

QUESTION: General Smith, I'm not sure I

understand your answer to Justice White, then.

If you rely entirely on the joint trial aspect of it, then your answer to him must be -- the case he hypothesized would be decided differently; that would be an unconstitutional procedure, if there were no capital defendant in the trial. It would be unconstitutional to death qualify the jury.

I think you've conceded that.

MR. SMITH: Very well.

We respectfully submit that the principles of the McCree holding should dictate the same result here. We think that if, indeed, as it is, the jury is constitutionally valid with respect to the capital defendant, then it would be so with respect to the noncapital defendant.

QUESTION: Don't you empanel separate juries in recidivist cases?

MR. SMITH: No, I'm not aware of any case in which that has been done. The Kentucky statute provides it for good cause shown that a different jury could be used.

But I'm not aware of any situation in which --

QUESTION: Could be used to try out whether the recidivism aspect of the trial?

MR. SMITH: Yes. And again, we'd have a

problem there, because that second jury would not -- would not have the perspective that the first jury did with regard to the principal charge. And also there would be an occasion for there to be inconsistency.

The second jury might disagree as to the facts or the culpability as opposed to what the first jury has determined.

There's a second question involved in this case, and that deals with the introduction of psychological evidence in rebuttal of David Buchanan's claim that he had suffered from an extreme emotional disturbance at the time of the murder.

What we had here was a series of, first, three psychological examinations that had taken place before the murder, one as long as six or seven months beforehand. And Mr. Buchanan relied on the results of those exams to support his claim that he had suffered from the emotional disturbance.

What he complains about is that the prosecutor in this case used a fourth examination that had been conducted some seven months after the murder spree to rebut his claim.

He argues that this violated his Fifth Amendment privilege against self-incrimination, as well as his Sixth Amendment right to counsel. And he bases

these claims squarely upon this Court's holding in Estelle v. Smith.

Now, in that case, the Court held that where the defendant does not initiate a psychiatric examination, and he does not attempt to introduce the results of that exam into evidence, that the government cannot then compel him to undergo further testing if the result could be used against him at trial.

We think that the present situation is entirely different from what the Court encountered in the Estelle case. First of all, Mr. Buchanan and his attorney at the time, Mr. Hectus, requested this examination by joining in a motion to that effect.

Later on at the trial, they injected the issue of extreme emotional disturbance into the case. This was not an element of the crime for which the government bore the burden of production or persuasion. It was an affirmative defense, one that would mitigate the crime down from murder to manslaughter.

But the burden was clearly on Mr. Buchanan to raise this defense if he thought the evidence warranted it.

And finally, the examiner in this case we think was neutral, while the one in Estelle clearly was not. The examiner in Estelle took on an adversarial

role at the trial when he testified as to an element that the government had to prove in its case.

And perhaps here I should point out that the Lange report that Mr. Buchanan is complaining about in this case, there was indeed a section at the very end of that report where Dr. Lange volunteered his opinion as to competency to stand trial.

That was not introduced into evidence in this case. The witness read from the report, and the trial judge in this case ruled that the opinion as to competency to stand trial would have been irrelevant, and so the jury did not hear about that.

What we are --

QUESTION: Mr. Smith, is emotional disturbance a defense to the offense under Kentucky law?

MR. SMITH: It is a mitigating, affirmative defense. The -- when the defendant suffers from an extreme emotional disturbance, first of all, that applies only to an intentional theory of murder.

The only effect this would have would be to reduce the charge down from murder to manslaughter, which is punishable by a lesser penalty range.

What we're asking the Court to do in this case is to expressly hold what we think was given tacit approval to in the Estelle opinion.

And the rule that we would urge, therefore, is that whereas here the defendant requests the examination, and then the defendant injects the issue into the case, that the government can then compel him to undergo further examination in order to test the validity of the claim that he is making.

And the rationale for the rule that we urge here is that in a very real sense the defendant in that situation is testifying through his expert witness about information that is known only to him.

And as this Court noted in Estelle, under that circumstance, his silence could deprive the government of the only effective means by which it could test and verify the validity of that claim.

We respectfully submit that the Fifth Amendment privilege against self-incrimination should not be used as a shield to distort the truth.

We think that this situation is analogous to where a criminal defendant takes the witness stand at trial, and then he does not care to undergo cross-examination. Clearly, he can be required to do so.

And so under the rule we're urging here, we submit that the prosecutor in this case could have asked that the trial be stopped after Mr. Buchanan had

introduced evidence from three earlier reports, and could have asked that he be required to undergo further testing.

Instead, what he did was simply employ a much less intrusive method. He used information that was already available to him.

And as far as his Sixth Amendment claim is concerned, he claims he was denied the right to counsel, we don't think there's any factual basis for that. The record shows that he did have an opportunity to consult with Mr. Hectus when the decision was made to join in the motion requesting the examination. And the same can be said about the legal decision to inject this issue of extreme emotional disturbance into the case.

Lastly, we would submit that if the Court does find a Fifth or Sixth Amendment constitutional violation here, that it would apply only to the murder charge, not the robbery or the sodomy conviction, because as I've stated before, extreme emotional disturbance is a defense that applies only to a theory of intentional murder.

And then last of all --

QUESTION: Well, now, Mr. Smith, you are satisfied that that extreme emotional disturbance defense was properly raised in this case?

MR. SMITH: We don't think that the case was practiced as well as it could have been.

QUESTION: Does it require provocation in Kentucky law before that can be a defense?

MR. SMITH: Yes, it does, so what he had --

QUESTION: Was there evidence of provocation here?

MR. SMITH: No, there was not, Your Honor. This --

QUESTION: So was it properly raised as a defense?

MR. SMITH: No, it was not. But what we were concerned about is the fact that as a result of the evidence that Mr. Buchanan was allowed, right or wrong, to introduce, the jury heard on five separate occasions that Buchanan was emotionally disturbed.

And we think under these circumstances the government was entitled to rebut that claim with Dr. Lange's report.

Last of all, we would submit that any constitutional error would be harmless, because as the Kentucky Supreme Court noted, the evidence of Mr. Buchanan's guilt was overwhelming, and the report that he is complaining about here was largely cumulative of what he had already introduced.

For that reason, we would ask the Court to --

QUESTION: Do you make the same harmless error argument with regard to the sentencing?

MR. SMITH: Excuse me?

QUESTION: Do you make the same harmless error argument with regard to the length of the sentence? Because I guess the jury decided both guilt and the sentence?

MR. SMITH: Yes, yes.

So we would ask the Court to affirm the judgment below.

That concludes my argument unless the Court has any further questions.

QUESTION: I have a further -- would you explain again, Mr. Smith, what the State interest is in -- not in having the same jury for both defendants on the guilt phase; I understand that -- but for having the same jury for the guilt and the sentencing phase?

MR. SMITH: It's the unitary jury system, just like we have in Kentucky, just like this Court dealt with the rule out of Arkansas in the McCree case.

Again, it's a concern for perspective, and a concern for consistency. We don't think there ought to be a situation where one jury would disagree with the other.

Any time you've got two different juries --

QUESTION: Well, this isn't a matter of diagreeing. How would one disagree with the other?

I mean, you have one jury -- they're passing upon different questions. There's no occasion for them to disagree with one another.

I'm talking about one jury for the guilt phase; another jury for the sentencing.

MR. SMITH: We simply that this would enable them to make a more informed decision, having heard all the evidence from the guilt phase. We think that they should also --

QUESTION: Well, you could have those jurors present during the guilt phase trial, it's just that you'd use --

MR. SMITH: But again, with two different juries, one may think that one sentence would be appropriate, while the other would not, based on having heard the same evidence side by side.

QUESTION: Well, that's so, but one of them wouldn't pass upon it. It wouldn't be the business of the two.

MR. SMITH: We think -- we think that in a real sense this would affect their determination of guilt, just knowing what the possible punishment, or

just speculating as to what the possible punishment would be.

Is there any further questions?

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith.

Mr. McNally, do you have something more? You have five minutes remaining.

REBUTTAL ARGUMENT OF KEVIN McNALLY, ESQ.,
ON BEHALF OF THE PETITIONER

MR. McNALLY: Thank you, Mr. Chief Justice.

Justice O'Connor, trial counsel requested separate juries. He recalls requesting --

QUESTION: Separate juries for guilt and innocence as well? Just separate juries throughout?

MR. McNALLY: No, just punishment. Just punishment.

QUESTION: Just sentencing.

MR. McNALLY: Just sentencing.

QUESTION: Separate sentencing juries is all that was requested?

MR. McNALLY: Well, now, the trial judge -- there was a discussion which is in the Appendix, we included it all, says, well, what about substitute juries? Which is the alternate juror remedy referred to

by the dissenters in McCree.

The judge himself suggested that. And he also said, now this is real creative, Mr. Prosecutor. Did you read all these creative remedies here? They're very creative, but you have to go to a higher court.

And here we are. I think that quite confidently I could say that I think Judge Leibson would very much have been willing to use one of these remedies, had he had a green light.

And I think that --

QUESTION: Would you explain to me again, Mr. McNally, what exactly the two -- say you had had two juries -- what would each of the two juries been asked to decide, in your view?

MR. McNALLY: The first jury would decide everything but the question of punishment, if Stanford was convicted of intentional murder.

QUESTION: Everything for both defendants?

MR. McNALLY: Everything.

QUESTION: For both defendants, decide everything?

MR. McNALLY: Everything.

QUESTION: Except punishment?

MR. McNALLY: Except the punishment for -- if Stanford was convicted of intentional murder.

QUESTION: Let me put it this way. There are four issues: guilt or innocence as to each of two defendants; length of sentence as to the noncapital defendant; and sentence of the capital defendant.

Now, when you say everything, tell me again, which -- what would each of the juries --

MR. McNALLY: Three of the four. The only issue that they would not decide would be the death penalty, if I could put it that way.

QUESTION: I see. And you have a separate jury just for the death penalty question on the capital defendant?

MR. McNALLY: Which is the procedure used in the states --

QUESTION: Well, I just want to be sure I understand what you're proposing.

MR. McNALLY: Yes, sir.

QUESTION: Well, why couldn't you just reverse it? They decide three -- they decide every issue except the penalty for your client?

MR. McNALLY: They could do it that way?

QUESTION: Well, why do you --

MR. McNALLY: Well, no, wait, you couldn't do it that way, because you'd have to death -- I'm sorry, Justice White -- you'd have to death qualify the jury,

then.

QUESTION: Yes, but you get another jury.

MR. McNALLY: If there was a separate sentencing jury just for Buchanan, that first jury --

QUESTION: I know, I know, but you want -- what you want -- you want to avoid death qualification for your client at the guilt stage.

MR. McNALLY: Yes.

QUESTION: That's what you're really after.

MR. McNALLY: Yes, sir.

QUESTION: But if -- I don't know why it wouldn't be fair to you, in light of McCree, to death qualify the jury, and that jury trials guilt or innocence for both defendants. It also decides on the death penalty for the person charged with capital murder.

MR. McNALLY: I understand now.

QUESTION: Then there's a separate jury empanelled for your client.

MR. McNALLY: I think that would satisfy Buchanan's complaint --

QUESTION: Well, that has to be --

MR. McNALLY: -- as to punitiveness, yes, sir. I didn't understand.

But of course that wasn't -- I think the point with Justice O'Connor is that there was exploration of

alternatives. You know, each one of the seven was not discussed in the trial court.

Turning to the second issue --

QUESTION: What compulsion was there to testify? I mean, you know, that's -- that's what you're complaining about? Compulsion --

MR. McNALLY: The compulsion comes in the fact that a juvenile in juvenile court goes to the psychiatrist or psychologist when the juvenile judge says so, no matter what.

There is inherent compulsion, much like --

QUESTION: Well, he asked for the examination.

QUESTION: His lawyer asked for it.

MR. McNALLY: It was a joint motion.

QUESTION: Well, whatever. He asked for it. When was he compelled to testify?

MR. McNALLY: The same compulsion as existed in Estelle v. Smith on the issue of competency. A juvenile who is sent to determine amenability to treatment, competency, although it was volunteered by the doctor, that's not what the judge had in mind. Or whether he can be committed for treatment pending trial under the involuntary hospitalization procedure is compulsion.

Somebody who is sent to a doctor to be

involuntarily hospitalized is compelled. They have to -- they may not speak at the exam, but they have to go to the exam.

That's where the compulsion comes in.

QUESTION: That's not the situation here when he asks for the exam himself.

MR. McNALLY: Well, this was a joint motion, though. It's important to remember that. With the approval of the judge. On issues unrelated to responsibility, on the question of whether or not he can be involuntarily hospitalized.

Because his lawyer asked for it doesn't necessarily remove the compulsion. And all the cases from the Fifth and Eleventh Circuit indicate that because the defense lawyer may request --

QUESTION: I mean, you could say that, or you could say because the State -- just because the State asked for it, it doesn't necessarily remove the voluntariness.

I tend to think it's the latter rather than the former.

MR. McNALLY: We'd rely on all the Fifth and Eleventh Circuit cases that have interpreted Estelle. And all of them have said consistently that it does not matter that the defense attorney requested the exam.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McNally.

The case is submitted.

(Whereupon, at 1:49 p.m., the case in the above-entitled matter was submitted.)

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#85-5348 - DAVID BUCHANAN, Petitioner V. KENTUCKY

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BY Paul A. Richardson

(REPORTER)