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Buchanan v. Gilmore 139 F.3d 982 (4th Cir. 1998)

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Buchanan v. Gilmore

139 F.3d 982 (4th Cir. 1998)

I. Facts

On the afternoon of September 15, 1987, Douglas McArthur Buchanan, Jr. took a rifle to his father's house. Buchanan argued with his father about his natural mother's death from breast cancer. As the argument became more heated, Buchanan shot his father in the back of the head, killing him instantly. Following the shooting of his father, Buchanan remained at his father's house. When his two half-brothers returned from school, Buchanan shot them both. One died from the gunshot wound; Buchanan killed the other with a kitchen knife. Buchanan remained in his father's house, waiting for his stepmother to return from work. When she arrived, Buchanan stabbed her to death with a kitchen knife.¹

Buchanan was convicted in the Circuit Court of Amherst County of the capital murder of more than one person as part of the same act or transaction.² The jury returned with a unanimous verdict in favor of the death penalty and the trial court sentenced Buchanan to death.³ On direct appeal, the Supreme Court of Virginia affirmed Buchanan's conviction and sentence.⁴ Buchanan subsequently filed a petition for a writ of habeas corpus in the United States District Court of the Western District of Virginia. The district court denied the petition. The United States Court of Appeals for the Fourth Circuit affirmed.⁵ The Supreme Court of the United States granted Buchanan's petition for a writ of certiorari and ultimately affirmed the decision of the Fourth Circuit.⁶

Five days before his scheduled execution, Buchanan filed an action in the United States District Court for the Eastern District of Virginia pursuant to 42 U.S.C. § 1983 against Governor James S. Gilmore, III.⁷ In this action, Buchanan alleged that "inasmuch as the Governor served as Attorney General of Virginia in prior proceedings concerning his case, he is disqualified by a conflict of interest from considering his clemency application."⁸ The district court denied the Commonwealth's motion to dismiss and enjoined Buchanan's execution.

1. Buchanan v. Commonwealth, 384 S.E.2d 757, 760-61 (Va. 1989).

2. Buchanan v. Angelone, 118 S. Ct. 757, 759 (1998). See also VA. CODE § 18.2-31(7) (1996).

3. Buchanan, 118 S. Ct. at 760.

4. Buchanan v. Commonwealth, 384 S.E.2d 757 (1989), cert. denied sub nom., Buchanan v. Virginia, 493 U.S. 1063 (1990).

5. Buchanan v. Angelone, 103 F.3d 344 (4th Cir. 1996). See also Case Summary of Buchanan v. Angelone, CAP. DEF. J., vol. 9, no. 2, p. 29 (1997).

6. Buchanan v. Angelone, 118 S. Ct. 757 (1998). See also Case Summary of Buchanan v. Angelone, CAP. DEF. J., vol. 10, no. 2, p. 4 (1998).

7. Buchanan v. Gilmore, 139 F.3d 982, 983 (4th Cir. 1998).

8. Buchanan, 139 F.3d at 983.

II. Holding

The United States Court of Appeals for the Fourth Circuit vacated the stay of execution and reversed the preliminary injunction granted by the district court.

III. Analysis/Application in Virginia

Without any reasoning of its own or any explanation for its decision, the Fourth Circuit cited *Pickens v. Tucker*⁹ and dismissed Buchanan's §1983 action.¹⁰ The Fourth Circuit apparently cited *Pickens* for the proposition that the "Rule of Necessity" applies when the clemency authority is vested solely in the Governor.¹¹ Presumably, the court concluded that Governor Gilmore was not "unable to discharge the power [] and dut[y] of his office"¹² in considering Buchanan's clemency application because no due process protections attach to capital clemency proceedings under *Connecticut Board of Pardons v. Dumschat*.¹³ This conclusion is no longer valid.

In *Ohio Adult Parole Authority v. Woodard*,¹⁴ decided one week after *Buchanan v. Gilmore*, a majority of the Supreme Court agreed¹⁵ that the Due Process Clause of the Fourteenth Amendment *does* apply to capital clemency proceedings.¹⁶ Now that the Court has stated that the Due Process Clause does apply, an impartial decision maker is required.¹⁷

In Virginia, the requirement of an impartial decision maker is especially important. The current governor, James S. Gilmore, III, has previously served as both Attorney General of Virginia and a Commonwealth's Attorney. As Attorney General, Governor Gilmore represented the Commonwealth in opposing the appeals and habeas petitions of many of the inmates who will be seeking

9. 851 F. Supp. 363 (E.D. Ark.), *aff'd*, 23 F.3d 1477 (8th Cir. 1994).

10. *Id.* at 984.

11. *Buchanan*, 139 F.3d at 984 (citing *Pickens v. Tucker*, 851 F. Supp. 363 (E.D. Ark.), *aff'd*, 23 F.3d 1477 (8th Cir. 1994)).

12. VA. CONST. art. V, § 16.

13. 452 U.S. 458 (1981).

14. 118 S. Ct. 1244 (1998).

15. Justice O'Connor wrote an opinion on the due process issue in which Justices Breyer, Ginsburg, and Souter joined. Justice Stevens wrote a separate opinion on the due process issue. Therefore, Justices O'Connor, Breyer, Souter, Ginsburg, and Stevens make up the majority of the Court on the due process issue. The Chief Justice's opinion on the due process issue was joined only by Justice Scalia, Justice Kennedy, and Justice Thomas. It does *not* constitute the opinion of the Court.

16. *Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244, 1253-54 (1998) (O'Connor, J., concurring in part & concurring in the judgment). *See also Woodard*, 118 S. Ct. at 1254-55 (Stevens, J., concurring in part & dissenting in part).

17. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970) (stating that "an impartial decisionmaker is essential" under the Due Process Clause); & *Mathews v. Eldridge*, 424 U.S. 319, 334 S. Ct. 893 (1976) (same). For an in depth examination of the requirements of due process and clemency proceedings *see* Brian S. Clarke, *In Search of Clemency Procedures We Can Live With: What Process is Due in Capital Clemency Proceedings After Ohio Adult Parole Authority v. Woodard?*, 11 CAP. DEF. J. 5 (1998).

clemency in the next two years. Additionally, Gilmore served as Commonwealth's Attorney for Henrico County from 1987 until 1993. During his tenure, at least one defendant, Kevin Cardwell, was sentenced to death.¹⁸ It may be possible for the Commonwealth to argue in rebuttal that there is no evidence that Governor Gilmore would not decide the application for clemency in a fair and impartial manner. Senior Judge Gibson of the Eighth Circuit countered this argument very effectively in his dissent in *Otey v. Stenberg*.¹⁹

The attorney general, having successfully obtained affirmance of Otey's death sentence in the Nebraska Supreme Court, and successfully represented the State in Otey's habeas case, can hardly be expected to oppose the execution of this sentence. As prosecutor, the attorney general determined that it served the public welfare to seek the death penalty as the appropriate punishment for Otey. It is unreasonable to assume that the attorney general would freely consider the same sentence inappropriate at a clemency hearing. . . .²⁰

Judge Gibson's analysis applies with equal force to situations such as the one in Virginia. Based on the due process requirement of an impartial decision maker, the Governor should be deemed unable to consider the clemency applications of those inmates whose trials or appeals were conducted during his term as Attorney General. The Lieutenant Governor should make these determinations in light of the Governor's inability to do so.²¹

Brian S. Clarke

18. In addition to Mr. Cardwell, there may be other death row inmates convicted during Gilmore's term as Commonwealth's Attorney for Henrico County. These inmates will have an even more compelling case for Gilmore's disqualification if their clemency petitions are up for review prior to the expiration of Gilmore's term as Governor in January of 2002.

19. 34 F.3d 635, 640 (8th Cir. 1994).

20. *Otey v. Stenberg*, 34 F.3d 635, 640 (8th Cir. 1994) (Gibson, S.J., dissenting).

21. VA. CONST. art. V, § 16.

