No. 04-5293

In The

Supreme Court of the United States

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

AMENDMENTS TO THE UNITED STATES CONSTITUTION:

REPLY BRIEF FOR PETITIONER

I. The State's theory that the shackling of a convicted capital defendant is not inherently prejudicial because it communicates nothing more than a jury would expect ignores the inherent risk of prejudice that such measures carry and that has influenced many of the Eighth Amendment safeguards the Court has found necessary in capital sentencing proceedings.

The foundation of the State's argument, repeated throughout its brief and undergirding virtually every other point it makes, is that jurors could not be influenced negatively after observing a defendant restrained in legirons and handcuffed to a belly chain during his capital sentencing trial (Resp. Br. at 12, 17, 23-24, 28, 29, 32, 42). Its theory is that jurors would expect someone convicted of murder to be physically restrained (Resp. Br. at 12, 17, 23-24, 28, 29, 32, 42). The State argues that, because the jury would expect a dangerous person to be restrained, and the defendant is presumptively dangerous, the restraints do not change the jurors' attitudes toward the defendant. Under this theory, the restraints do not mislead the jury, the sentencing is reliable, and the Eighth and Fourteenth Amendments are satisfied.

The State argues that "restraints in penalty phase simply reflect what the jurors already know: that the defendant has been convicted" (Resp. Br. 23). The State contends: "That a person convicted of two vicious murders would be physically restrained in some way could hardly come as a shock. . . . [I]t would be the naïve juror indeed who thought that Deck was wandering the streets in the years intervening" (Resp. Br. 24). Because the jurors knew

that Deck was in custody, "[a]ny restraint . . . was nothing more than a predictable manifestation of what was already fairly obvious" (Resp. Br. 24). As a result, the State contends, the restraints could not have misled any juror (Resp. Br. 24).[1]

The State's argument proves too much. Under this theory, physically restraining a defendant in the guilt phase would be perfectly permissible too, as long as the jurors would expect the defendant to be in custody. Thus, defendants in the guilt phase facing murder charges or charges for other violent crimes could be visibly, physically restrained to any degree the trial court wished without the exercise of any discretion. After all, jurors would expect that those defendants would not be "wandering the streets" prior to trial, and the restraints would be a mere "manifestation of what was already fairly obvious," that the defendant was in custody (Resp. Br. 24). Under the State's argument, the defendants in *Holbrook v. Flynn*, 475 U.S. 560 (1986) – charged with a large-scale armed

[1] Maryland's highest court rejected this argument in *Lovell v. State*, 347 Md. 623, 647, 702 A.2d 261, 273 (Md. 1997), as did the Ninth Circuit in *Duckett v. Godinez*, 67 F.3d 734, 748, 749 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996). The Ninth Circuit held that there was no error in requiring the defendant to wear prison clothing in the penalty phase, because the jury would know that he was convicted. *Id.* at 747. In contrast, it was error for the defendant to be shackled in the penalty phase, since shackling was an inherently prejudicial practice that communicated that the defendant was dangerous and violent. *Id.* at 748.

Restraints do in fact mislead jurors in capital sentencing trials. *See* Pet. Br. at 30-34; *see also Marquez v. Collins*, 11 F.3d 1241, 1243-44 (5th Cir.), *cert. denied*, 513 U.S. 881 (1994) ("Shackling [in the penalty phase] carries the message that the state and the judge think the defendant is dangerous, even in the courtroom. . . . Restraint at trial may carry a message that a defendant continues to be dangerous.").

robbery and held without bail – could have been tried in handcuffs and legirons, since the jury would have expected them to be in custody. The State's argument thus conflicts sharply with this Court's instruction in *Holbrook* that shackling a defendant is an "inherently prejudicial practice . . . that . . . should be permitted only where justified by an essential state interest specific to each trial." *Id.* at 568-69.

Respondent argues that, unless restraints "inevitably and exclusively [lead] to the conclusion that the defendant is dangerous," they are not misleading to the jury and thus do not violate the Eighth and Fourteenth Amendments (Resp. Br. 24). This argument is in stark contrast to this Court's decisions. Traditionally, this Court has not forced defendants to show that a courtroom procedure did in fact produce his unwarranted death sentence, but rather, that the procedure created an undue risk of an unwarranted death sentence. In *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), the Court struck down a statute that prevented the sentencer from considering aspects of the defendant's background and character because the statute "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.* at 605.

The Court continued its emphasis on the *risk* of an impermissible result in *Beck v. Alabama*, 447 U.S. 625 (1980). Under Alabama law, the jury was unable to consider lesser included offenses to first degree murder. *Id.* at 628. The Court held that when the evidence shows that the defendant has committed a serious, violent crime, but not necessarily capital murder, "the failure to give the jury

the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake." *Id.* at 637.

In *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982), this Court remanded because the trial court had incorrectly believed that it could not consider certain mitigating evidence as a matter of law. In her concurring opinion, Justice O'Connor stressed that the Court "has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.* at 118. To this end, a remand for resentencing was warranted since "the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence." *Id.* at 117, n.*.

In *Lankford v. Idaho*, 500 U.S. 110, 125-27 (1991), this Court reversed, holding that the defendant's due process rights were violated because he did not receive adequate notice that his sentencing hearing could result in the death penalty. Writing for the Court, Justice Stevens emphasized that, without proper notice, there is "an increased *chance* of error . . . and with that, the *possibility* of an incorrect result." *Id.* at 127 (emphasis added). The lack of notice "created an impermissible *risk* that the adversary process may have malfunctioned in this case." *Id.* (emphasis added).

Furthermore, the State incorrectly limits this Court's cases when it argues that "[i]n considering the reliability of sentencing decisions under the Eighth Amendment, this Court has focused on whether the sentencer has been

given inaccurate or misleading information" (Resp. Br. 20). This Court has found other grounds of penalty-phase error under the Eighth Amendment, the common denominator being that the procedure created the risk of an unwarranted death sentence. For example, in *Sochor v. Florida*, 504 U.S. 527, 532 (1992), the Eighth Amendment violation had nothing to do with whether the sentencer was misled. There, the violation consisted of the trial court's finding of an aggravator that was unsupported by the evidence, among the four statutory aggravating circumstances cited in its decision to impose a death sentence. *Id.* at 539. Again, the emphasis was on the risk of an unwarranted death sentence. Writing for the Court, Justice Souter stressed that consideration of an invalid aggravating circumstance in the weighing process "'creates the possibility . . . of randomness' by placing a 'thumb [on] death's side of the scale,' thus 'creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty.'" *Id.* at 532, quoting *Stringer v. Black*, 503 U.S. 222, 232, 235-36 (1992).

In *Tuggle v. Netherland*, 516 U.S. 10, 13 (1995), the petitioner was prevented from developing his own psychiatric evidence to rebut the State's psychiatric testimony of the petitioner's future dangerousness. The jury found the two aggravating circumstances permitted under Virginia law: vileness and future dangerousness. *Id.* at 11. The Virginia Supreme Court invalidated the future dangerousness aggravator, but upheld the death sentence based on the vileness aggravator. *Id.* at 12. Even assuming that the petitioner's psychiatric evidence would not have influenced the jury regarding the vileness aggravator, "the absence of such evidence *may well* have affected the jury's

ultimate decision . . . to sentence petitioner to death." *Id.* at 14 (emphasis added).

The State misconstrues *Gardner v. Florida*, 430 U.S. 349 (1977), in arguing that the Court's focus was solely on whether the information considered by the sentencer was erroneous or inaccurate (Resp. Br. 22). The Court held that the death sentence violated the defendant's rights under the Fourteenth Amendment's Due Process Clause, because the death sentence "was imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain." *Id.* at 362. The information in the confidential material may or may not have changed the result – the Court explicitly refused to examine the confidential material, *id.* at 354, n.5, but knew that the trial court's findings did not indicate that this material contained anything of special importance. *Id.* at 354, 362. Even so, a new sentencing proceeding was warranted because of the "possibility" that full disclosure, followed by argument of counsel, would have changed the result at trial. *Id.* at 362.

The Court described the *Gardner* ruling in *California v. Ramos*, 463 U.S. 992, 1004 (1983), by saying: "Because of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny, the need for reliability in capital sentencing dictated that the death penalty be reversed." The State's brief unwarrantedly adds typographical emphasis to the words "erroneous or inaccurate" in this passage (Resp. Br. 22), for it is clear from any fair reading of *Gardner* that the apt emphasis should be on the words "potential" and "might have."

II. The State's proffered plan is grossly inefficient and fails to address all the problems caused by physical restraints.

The State urges this Court to scrap the familiar procedure established in *Illinois v. Allen*, 397 U.S. 337 (1970), *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), when it comes to the penalty phase. It urges, instead, that the Court adopt the following procedure:

> The now-convicted defendant should be required to not just object, but to follow up by creating a record, including presenting evidence if necessary, of what the jurors could and could not see, hear, or otherwise perceive regarding the defendant's restraints; the defendant would then have the opportunity to contest the need for the restraints by disputing the basis for that decision.

(Resp. Br. 34).

Under the State's plan, the defendant would presumptively begin the penalty phase of the trial shackled, because of his conviction for first-degree murder, regardless of whether shackling was necessary in the individual case. Defense counsel would then need to prove to the court that at some time during the proceedings the shackles could be seen or heard by the jury. Only then would defense counsel be entitled to inquire into the justifications (if any, other than the defendant's conviction) for the restraints, and to challenge their sufficiency.

The State's proposal defies belief. Trials would have to be interrupted for evidentiary hearings into shackling issues at any point during evidence-taking or argument when defense attorneys – who have other things to attend

to in the courtroom as well – believe that they have observed something which suggests to them that jurors may have seen or heard the defendant's restraints. In most cases, presumably, the jurors themselves would then have to be questioned, individually or as a group. Group questioning would risk that jurors who had not initially perceived the restraints now would know of them. Individual questioning would be time-consuming and would raise speculation among other jurors. Jurors, attempting to figure out what was unusual or troublesome in the courtroom, would be distracted from the testimony coming from the stand. To make matters worse, this scenario could occur repeatedly throughout the trial, whenever a new occasion arises on which jurors may have caught a glimpse of what is going on behind or under the defense table. And whenever it was found that a juror had seen or heard the defendant's restraints, to the defendant's prejudice, the judge would be obliged to take remedial measures after the fact, surely including a mistrial in at least some cases. Under this scenario, a trial could be almost completed when a juror happens to observe the defendant's restraints; prejudice to the defendant could appear when the juror is questioned; and at this point, when the justification for the restraints is finally examined, it may turn out that there never was any (other than the defendant's conviction) in the first place. Whether a mistrial is consequently granted or not, the result is bound to be equally unfortunate and unnecessary.

Manifestly, this makes far less sense than simply applying the familiar *Allen*, *Estelle* and *Holbrook* standard to the penalty phase. That standard has been utilized for decades in both guilt and penalty phases; it is workable and effective. It is a prophylactic standard, ensuring that

the defendant will not be exposed to prejudicial practices and that trials will not be set at risk of mistrials unless necessary. Before physical restraints may be imposed, the State must demonstrate that there is a need to shackle the defendant to further an essential state interest specific to the case at bar, and that lesser measures would not suffice to meet that interest. *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. This standard allows the court discretion while balancing the defendant's right to a fair trial with the State's competing interests in courtroom security.

Furthermore, the State's proposal is faulty because it rests entirely on the proposition that the sole detriment arising from the use of restraints is that the jury will notice them. It fails to deal with the limitations that restraints impose on the defendant's ability to communicate with counsel and participate in his defense, or how restraints can degrade the dignity of the courtroom.

III. The State, having remained silent in the face of defense counsel's repeated assertions that the jury could view the restraints, now cannot seek refuge behind a claim that the record is too slim.

The State faults defense counsel for failing to make a fuller record regarding the visibility of the physical restraints (Resp. Br. 34-37). It argues that there was no evidence in the record that the jurors noticed the restraints until defense counsel mentioned them to the jury (Resp. Br. 34-35). The record does not support the State's argument.

The trial commenced when the court read instructions to the 150-member venire panel and questioned them regarding publicity and whether any of them had a hardship that would excuse them from jury service (Tr. 1-12; L.F. 195-98). Deck was present during this questioning (Tr. 1). The court then declared a recess and convened to chambers with the parties to question individual venire persons (Tr. 12-74). Defense counsel objected to the physical restraints, noting that they "prejudice[ ] [Deck] towards the jury and make[] him look dangerous" (J.A. 57-58). Neither the prosecutor nor the court denied that the restraints were visible to the jury. Instead, the court summarily responded, "[t]he objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (J.A. 58). The court and parties returned to the courtroom, where the court again instructed the venirepanel, and noon recess was taken (Tr. 75). After lunch, the prosecutor questioned the panel, followed by another recess (Tr. 75-140). Defense counsel, far into his questioning in *voir dire*, stated, "[t]he other thing about Carman that you all either do or will know is that there's chains on him" (J.A. 58).

Defense counsel would not have mentioned the restraints unless they were, in fact, visible to the jurors. Defense counsel would not want the jurors to see Deck in restraints and would not bring them to the jury's attention unless it was clear that the jury had already noticed them or would inevitably notice them. The record shows that, by the time defense counsel mentioned the restraints, Deck had been in open court – in legirons and a belly chain – with the jurors for (1) opening instruction and questioning

of the large group; (2) when three recesses were declared;[2] and (3) during all of the prosecutor's questioning in *voir dire* and a large chunk of defense counsel's questioning.

The court itself acknowledged that the shackles were visible. When defense counsel moved to strike the panel due to the restraints, she argued that the restraints would put the jurors in fear of Deck and make them think that he would do something in court or to the jurors (J.A. 58-59). The court's response – that the shackles take any fear out of the jurors' minds – implicitly acknowledged that the restraints were visible to the jurors (J.A. 58). Certainly, if the restraints were not visible, the judge or the prosecutor would have taken that opportunity to so state. *See, by analogy*, *United States v. Hale*, 422 U.S. 171, 176 (1975) ("Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation.").

The State cannot now fault the defendant for failing to make more of a record when the State remained silent in the face of defense counsels' numerous assertions that the restraints prejudiced Deck, *i.e.*, were visible. An analogous situation arose in *Lee v. Kemna*, 534 U.S. 362 (2002). In *Lee*, defense counsel orally moved for a short continuance after he was unable to locate three crucial defense witnesses. *Id.* at 369. The judge denied the continuance because he had a personal commitment the next day and another trial starting the day after. *Id.* at 370. The defendant was convicted. *Id.* at 371. On appeal,

[2] It is common etiquette in Missouri courtrooms for everyone in the courtroom to stand when the jury and/or judge enter or leave the courtroom.

the State argued for the first time that the motion for continuance had a fatal procedural flaw. *Id*. The Missouri Court of Appeals affirmed, faulting the motion for not being in written form and for lacking a factual showing, neither of which were raised by the State at trial. *Id*. at 372-73.

This Court held that Lee's federal claim could be considered on the merits. *Id*. at 386. It stressed that neither the prosecutor nor the court brought the alleged defects to defense counsel's attention at the time the motion was made, and that defense counsel had given the court all the information it needed to make an intelligent ruling on the merits of the motion. *Id*. at 366.

As in *Lee,* the State cannot benefit from a defect that it in fact helped to create. Deck's attorneys adequately brought to the court's and the prosecutor's attention that the jury could see that Deck was shackled and handcuffed (J.A. 57-59). In response, the prosecutor said nothing. The court, too, did not deny that the restraints were visible. Instead, it declared that because Deck was convicted, he would remain in legirons and handcuffs (J.A. 58) and further opined that the restraints would make the jurors feel more secure (J.A. 59). By failing to refute counsel's assertions at trial – and as to the court, actually agreeing with them – the State has waived any alleged defect in the record.

IV. Trial courts must have discretion to employ courtroom security. The problem is that, here, the court did not exercise the discretion mandated by this Court in *Allen*, *Estelle,* and *Holbrook*.

The State repeatedly emphasizes that trial courts must have discretion to impose courtroom security procedures

(Resp. Br. 11, 13, 19). We agree – indisputably, trial courts must have discretion to maintain the security of the courtroom. This Court's *Allen*/*Estelle*/*Holbrook* standard was carefully tailored to provide that discretion while, at the same time, providing trial judges with a solid constitutional framework for its exercise. Recognizing the extreme danger that physical restraints pose to the defendant's constitutional rights, this Court has instructed that, before a trial court can impose restraints, it must assess (1) whether the State has established that the restraints further an essential state interest specific to the trial; and (2) whether there are less restrictive, less prejudicial alternatives that could meet that interest. *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. Deck's case is before this Court because the trial judge imposed restraints automatically for no other reason than his belief that Deck's status as a convicted capital offender called for them. He exercised no discretion, made no inquiry into any case-specific state interests justifying restraints, and *a fortiori* made no efforts to accommodate any state interest that might exist with Deck's interest in receiving a fair penalty trial, or to consider less restrictive alternatives to shackling. The State's purported reliance upon the need for judicial discretion is disingenuous when the State's position in this case is and must be to seek approval of the trial court's failure to exercise any discretion whatsoever.

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CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Brief of Petitioner, the Court should reverse the judgment of the Missouri Supreme Court and remand for a new sentencing trial.

Respectfully submitted,

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