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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Are the Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the State to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

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OPINIONS BELOW

The opinion of the Missouri Supreme Court at issue here is reported at 136 S.W.3d 481 (Mo.banc 2004) (J.A.70-84). The Missouri Supreme Court issued two other opinions relating to Petitioner's current convictions and sentences: *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999) (J.A.6-39), and *Deck v. State*, 68 S.W.3d 418, 422 (Mo.banc 2002).

JURISDICTION

The judgment of the Missouri Supreme Court was entered on May 25, 2004 (Cert.Pet.App.1-10). Petitioner's timely motion for rehearing (Cert.Pet.App.11-22) was denied on July 1, 2004 (Cert.Pet.App.23). The petition for certiorari was filed on July 15, 2004 and was granted on October 18, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment, Section I: " . . . Nor shall any state deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

I. Procedural History

On August 27, 1996, the State returned a felony information charging Carman Deck with two counts of first degree murder, two counts of armed criminal action, one count of first degree robbery, and one count of first degree burglary regarding events that took place on July 8, 1996 (1st L.F.43-44).[1] On the same day, it gave notice that it intended to seek a death sentence (1st L.F.45).

In his first months in jail, Deck was emotionally distraught, banging his head on the wall and removing caulking from a jail window (PCR Tr.153,224; Ex. 66, Surratt Depo.). Jailors placed him on suicide watch, and counsel obtained a competency evaluation (PCR Tr.153-54; Ex. 66, Surratt Depo.).

The case went to trial on February 17, 1998 (1st L.F.26). By order of the court, Deck was dressed in civilian

[1] The Joint Appendix is referenced "J.A." The legal file and transcript from the penalty phase retrial are referenced "L.F." and "Tr.," respectively. The record includes the transcript of the deposition of Michael Deck, referenced "M.D.Depo." The legal file and transcript from the first appeal, *State v. Deck*, 994 S.W.2d 527 (Mo.banc 1999), are referenced "1st L.F." and "1st Tr.," respectively. Counsel has requested permission to lodge with the Court relevant testimony and evidence admitted at the hearing on Deck's motion for postconviction relief. That transcript is referenced as "PCR Tr." and the depositions admitted into evidence are referenced by the deposed party's last name.

clothes and restrained in leg braces, not visible to the jury (J.A.5). After a three-day trial, the jury found Deck guilty on all counts (1st L.F.26-29). After a one-day penalty phase, the jury imposed a death sentence (1st Tr.951-52).

On appeal, the Missouri Supreme Court affirmed Deck's convictions and sentences. *State v. Deck*, 994 S.W.2d 527 (Mo.banc), *cert. denied*, 528 U.S. 1009 (1999) (J.A.6-39). Deck filed a motion for postconviction relief, alleging that his trial counsel was ineffective for failing to object that submitted instructions lacked required language regarding mitigating circumstances. *Deck v. State*, 68 S.W.3d 418, 422 (Mo.banc 2002). The Missouri Supreme Court agreed with Deck and reversed for a new penalty phase. *Id.* at 430-32.

The penalty phase retrial commenced on April 29, 2003, almost seven years after the crimes occurred (Tr.1).[2] About three weeks prior to trial, the court indicated in a pretrial conference that Deck would be required to wear leg braces under his clothing (J.A.68).[3] On the morning of trial, however, Deck was led into court wearing legirons and handcuffed to a belly chain (J.A.68-69).

In response, defense counsel immediately filed a motion objecting to any use of physical restraints at trial (J.A.41-56). Counsel argued that Deck had disrupted no court proceedings throughout the pendency of his case and was entitled to appear before the jury without restraints unless the use of restraints was supported by good cause

[2] The same judge presided over the initial trial, the postconviction motion proceedings, and the penalty phase retrial.

[3] The conference was held off the record but was referenced in defense counsel's motion for new trial (J.A.68).

(J.A.41-42). Counsel argued that shackling a defendant was an inherently prejudicial practice that should be permitted only when justified by an essential state interest specific to each trial (J.A.44).

Counsel's motion provided numerous alternatives to the use of visible, physical restraints. Using prior cases as examples, the motion suggested methods to avoid shackling altogether, such as adding extra guards in the courtroom or requiring all spectators to pass through a metal detector before entering the courtroom (J.A.46). Suggesting an alternative, intermediate approach, the motion also used as examples cases in which the courts took various measures to reduce the prejudicial effect of the restraints, such as concealing the defendant's shackled legs from the jury by placing boxes around the defense table; ensuring that the defendant was never paraded before the jury with the restraints; or using restraints that would not rattle or be seen easily (J.A.47-50). The Court summarily overruled counsel's motion (J.A.56).

During voir dire, defense counsel renewed their objection to the use of visible restraints (J.A.57-58). Counsel noted that Deck "is actually in legirons and handchains" and argued that the visible shackles prejudiced Deck by making him look dangerous (J.A.57-58). The court responded: "The objection that you're making will be overruled. He has been convicted and will remain in legirons and a belly chain" (J.A.58).

Defense counsel briefly questioned the jurors about the restraints, offering that the jurors "either do or will know" that there's "chains" on Deck and that "he's shackled, his hands" (J.A.58). Counsel suggested, "I guess that's what happens when you get convicted" and asked if that

would sway any of the jurors to render one sentence or another (J.A.58). By raising their hands, the jurors indicated that the chains would not affect them (J.A.58).

Toward the end of voir dire, defense counsel moved to strike the panel because Deck had been shackled before the jurors (J.A.58-59). Defense counsel argued that the restraints would make the jury think that Deck was currently violent and would do something in the courtroom or do something to the jurors (J.A.59). Counsel argued that the restraints put fear into the jurors' minds, something inappropriate for those who would be deciding punishment (J.A.59). The court overruled the motion, stating that the shackling "takes any fear out of [the jurors'] minds" (J.A.59).

II. Evidence Adduced at Trial

At this penalty phase retrial, the jury's duty was to determine whether Deck's punishment was to be life without parole or the death penalty. §565.030.4.[4] To do so, it was required to follow a four step process. First, the jury was to determine unanimously whether the State had proved a statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1). Second, the jury was to determine unanimously and beyond a reasonable doubt whether the evidence in aggravation of punishment warranted a death sentence. §565.030.4(2).[5] Third, the jury was to determine whether the evidence in mitigation

[4] *See* Appendix for text of statute. All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise indicated.

[5] The statute was amended in 2001, eliminating this step. §565.030.4, RSMo Cum. Supp. 2001.

outweighed the evidence in aggravation. §565.030.4(3). Finally, the jury was to exercise its discretion to decide whether to impose a death sentence or a sentence of life without parole. §565.030.4(4).

The State presented evidence that Deck confessed to the police that he robbed and killed an elderly couple, James and Zelma Long, at their home on July 8, 1996 (Tr.436-37; Ex.69). Deck knew the Longs kept large sums of money in a safe in their bedroom (Tr.439; Ex.69). He and his sister knocked on the Longs' door and asked for directions (Tr.440; Ex.69). The Longs invited them in and gave them directions (Tr.440; Ex.69). As Deck headed to the door, he pulled a gun, pointed it at the Longs, and ordered them to lie on their bed (Tr.441; Ex.69). Deck took about $410 from them (Tr.443; Ex.69). Deck, nervous and scared, contemplated what to do for ten minutes as the Longs begged for their lives (Tr.442; Ex.69). He knew that if he left them alive he would be sent to jail, but he also knew that if he shot them, he would go to jail (Ex. 69). Deck's sister had been standing at the front door but ran back toward the bedroom and yelled that they needed to leave (Ex.69; Tr.442). Deck heard her run out to the car and the screen door slam shut (Ex.69). Not knowing what to do, Deck "just shot them" both twice in the head (Ex.69; Tr.442). Later that evening, Deck was apprehended (Tr.291). He initially denied any involvement, but, a few hours later, confessed to the crimes (Tr.431-32,435-37).

The State presented evidence that Deck had twelve nonviolent prior felony convictions (J.A.59-62). The convictions were for second degree burglary, attempted second degree burglary, felony stealing, possession of burglar's tools, and aiding an escape (J.A.59-62). As to the last conviction, Deck admitted that in 1985, he helped two

other inmates escape from a county jail, by procuring a sawblade and helping the others saw through their jail bars (J.A.62-63).

The State also presented victim impact testimony from the victims' two daughters and one son (Tr.387-400,410-21). They described their parents and how their deaths had affected them, their family, and friends of the family (Tr.387-402,410-421).

Deck did not testify but presented the testimony of various family members, a foster parent, and a child psychiatrist. Deck was born to the troubled and unstable union of Pete and Kathy Deck. Kathy was unable to provide even the most basic parenting needs, such as affection, food, and clothing (Tr.484,501). She was never at home but instead, "liked to get out and flaunt it, run around with other men" (Tr.467). Deck often went without food and once, as an infant, was so dehydrated from lack of food and water that he had to be hospitalized (Tr.484).

Kathy punished Deck brutally. When Deck was two or three, she whipped him hard enough to raise welts because he made too much noise while playing (Tr.497). She later forced him to sit in a corner for hours, and if he so much as whimpered, she cursed and screamed at him (Tr.497).

Pete had even less ability to parent Deck and preferred to remain estranged from his child (Tr.484). He left money that was supposed to be for Deck, but never made the effort to ensure that it actually helped feed or clothe his child (Tr.485). Deck's parents often went out at night to bars and left him alone (Tr.485).

Kathy and Pete had three more children (Tr.485-86, 498). From about age five, Deck was placed in charge of the other children and took on the role of parent (Tr.485-86; M.D.Depo.8). He gathered whatever food was available – perhaps a stick of butter or dry dog food (Tr.487,506). At times, he stole food so they could eat (M.D.Depo.8). Deck clothed and cleaned his brother and sisters, including his mentally retarded sister (Tr.487-88). The children wore the same clothes – even the same diapers – for days (Tr.488). Deck was the primary caregiver for his siblings until he was in late elementary school, when a mentally retarded uncle occasionally cared for them (Tr.468,485,507).

When Deck was nine or ten, Pete left Kathy (Tr.489). Child welfare agencies became involved when, a few days before Thanksgiving, Kathy ran off with a truck driver for three days and left the children alone, filthy, and without food (Tr.468-69,490). The children were taken to a relative's house for Thanksgiving dinner (Tr.455,461,490; M.D.Depo.9-10). Deck's three-year-old brother was so hungry that he wolfed down his food, threw it up on his plate, and then tried to re-eat it (Tr.456,469,490; M.D.Depo.9-10).

When Deck was twelve, the children moved in with Pete and his new wife, a bad alcoholic (Tr.493). Deck's stepmother made the children kneel on broomsticks in the corner, and she slapped and spanked them, or pulled their hair (M.D.Depo.13-14). She was especially malicious in punishing Deck (Tr.493). One time, she told the children to sit in the car and not leave to use the bathroom (Tr.494). After several hours, Deck defecated in his pants (Tr.494; M.D.Depo.12-13). Upon his stepmother's return, she smeared Deck's feces on his face (Tr.472,494; M.D.Depo.12-13). She made him leave it there, allowing it to cake and

dry, so that all that could be seen through the feces were Deck's eyes (Tr.472,494). Meanwhile, she verbally abused him, telling him how embarrassed he should be of himself (Tr.494). She photographed Deck and told him she would show everyone the picture and tell everyone what he had done (Tr.494).

One evening, the children heard their stepmother give their father an ultimatum – he must choose her or them (M.D.Depo.14). The next day, Deck was shipped back to his mother, and the three other children were sent to an uncle (Tr.462-63,491; M.D.Depo.14).

Deck began a long string of foster home placements, interrupted by brief stints with his mother (Tr.491). Kathy repeatedly retrieved Deck from foster homes, only to abandon him again (Tr.491).

At age fourteen or fifteen, Deck spent about a year in the foster home of Reverend Major Puckett (Tr.526,528). He did well and fit in "just like he was born there" (Tr.528). Reverend Puckett described Deck as a very likable boy who never argued and always did his chores (Tr.526,528). Deck treated his blind foster mother as if she were his own mother:

> He would read the instructions off the cans to her [when she'd cook] and help her in the kitchen and he just tried to take all the work off of her that he could. He was like a son to her.

(Tr.529). The foster family wanted to adopt Deck, but Deck was again given back to his mother (Tr.530). Deck argued that he should be able to stay, since making him leave was "killing me on the inside" (Tr.530).

In his mid-teen years, Deck was reunited with his siblings (M.D.Depo.16). His brother "really enjoyed" being with Deck, whom he had seen only at birthdays and holidays for the past seven years (M.D.Depo.16,19). Deck started getting in trouble for stealing and burglary, but when he was out of prison, he spent "quality time" with his young niece (M.D.Depo.17). Deck always bought her things, took her places, and generally treated her "like a princess" (M.D.Depo.17). Deck's brother loves him and always will and has visited him in prison (M.D.Depo.17, 26-27).

In closing argument, defense counsel argued that Deck would do well in a structured prison environment and would never hurt anyone else (Tr.555). Counsel further argued that killing another human in self-defense is justifiable, but that the jury did not need to do that since Deck would be in prison for the rest of his life (Tr.558).

The jury found six statutory aggravating circumstances for each of the two counts of first degree murder: (1) that the murders were committed while Deck was engaged in the commission of another unlawful homicide; (2) that Deck murdered the victims for the purpose of receiving money or any other thing of monetary value; (3) that the murders involved depravity of mind; (4) that the murders were committed for the purpose of avoiding a lawful arrest; (5) that the murders were committed while Deck was engaged in the perpetration of burglary; and (6) that the murders were committed while Deck was engaged in the perpetration of robbery (J.A.65-67). The jury returned verdicts recommending death (Tr.563).

In the motion for new trial, defense counsel provided further detail regarding the physical restraints used at trial (J.A.68-69). Counsel recounted the numerous times the jury clearly saw Deck – chained, handcuffed and shackled – paraded in and out of the courtroom or standing when the judge and jury entered or left the courtroom (J.A.69). At sentencing, neither the court nor the prosecutor disputed these facts. The court overruled the motion for new trial and imposed death (L.F.51-52).

On appeal, Deck argued that the trial court abused its discretion in overruling his "Motion to Have Accused Appear at Trial Free of Restraints" and in forcing him to appear throughout the penalty phase in legirons and handcuffed with a belly chain (App.Br.62-77). He argued that this action deprived him of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and freedom from cruel and unusual punishment, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution (App.Br.62-63).

The Missouri Supreme Court stressed that the trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints. *State v. Deck*, 136 S.W.3d 481, 485 (Mo.banc 2004) (J.A.72). It held that the record supported the court's use of restraints, noting that (1) it could be assumed that Deck was a flight risk, since he was a repeat offender who killed the victims to avoid being returned to custody; (2) defense counsel "made no record of the extent of the jury's awareness of the restraints throughout the penalty phase;" and (3) Deck did not claim that the restraints impeded his participation in the proceedings. *Id*.

(J.A.72-73). The Missouri Supreme Court further held that,

> Even assuming, arguendo, that the trial court did abuse its discretion in this instance, [Deck] has not demonstrated that the outcome of his trial was prejudiced. [Deck] offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.

Id. (J.A.73). The court stressed that the venire panel was questioned in *voir dire*, and all members responded that Deck's appearance in shackles would not affect their decision. *Id*. at 486 (J.A.73).

SUMMARY OF THE ARGUMENT

Shackling a defendant jeopardizes rights that are essential to a fair trial and due process, such as the presumption of innocence, the right of confrontation, and the right to an impartial, unbiased jury. Shackling diminishes the presumption of innocence by affecting how the jury views the defendant – the shackles make the defendant look guilty. Shackling therefore allows the jurors to convict based on mere suspicion rather than evidence proven in court and subject to cross-examination. Shackling also limits the defendant's ability to participate in the proceedings, and it is an affront to the dignity and decorum of the courtroom.

In response to these problems, the Court has established a standard that also protects essential state interests. Trial

courts may order that a defendant be physically restrained, but only if the restraints further an essential state interest specific to the trial, and only if they are used as a last resort. *Illinois v. Allen*, 397 U.S. 337 (1970); *Estelle v. Williams*, 425 U.S. 501 (1976); *Holbrook v. Flynn*, 475 U.S. 560 (1986). This standard has been universally accepted and has proven effective.

The interests at stake in a capital sentencing trial are as important as the interests affected by restraints in the guilt phase and may be more vulnerable to erosion by shackling. A capital sentencing trial is an extension of the guilt phase. The jury must determine whether the State has established the death-eligibility factors beyond a reasonable doubt. Until the State has done so, a presumption exists that the defendant is "innocent" of the death penalty. A key consideration for any capital sentencing jury is whether the defendant would pose a future danger if sentenced to life without parole. Shackling the defendant suggests a frightening answer to this question. Just as shackling implicates the presumption of innocence in the guilt phase by making the defendant look particularly guilty, shackling in the penalty phase makes the defendant look particularly dangerous. Thus, shackling allows the jury to make negative assumptions about aspects of the defendant's character that are likely to be of critical importance for its sentencing choice and to consider them in its deliberations – although they were not proven by evidence or subject to confrontation by the defense. As in the guilt phase, shackling limits the defendant's ability to participate in the proceedings. It undercuts the need for reliability that is crucial in capital sentencing proceedings.

This Court should apply the *Allen, Estelle*, and *Holbrook* standard to the penalty phase. The Court should

find that shackling violates the Constitution unless a properly supported finding is made on the record, after due inquiry, that (1) there is a need to shackle the defendant to further an essential state interest specific to the case at bar; and (2) lesser measures would not suffice to protect that essential state interest. This standard would protect the defendant's rights to due process and a fair trial, society's interests in reliable capital sentencing procedures, and the State's interests in the security of the courtroom.

Claims that a trial court's error in shackling a capital defendant is harmless should be reviewed under the familiar standard of *Chapman v. California*, 386 U.S. 18 (1967). Shackling jeopardizes numerous constitutional guarantees, and the Court has indicated that the *Chapman* standard is particularly appropriate when the impact of a constitutional violation is subtle and hard to quantify, as it is with shackling.

Here, Carman Deck was ordered to proceed throughout his capital sentencing trial in legirons and handcuffed to a belly chain, even though the trial court made no supportable factual findings of a specific justification for the restraints, failed to consider alternative security procedures before resorting to shackling, and took no measures to ensure that the restraints were the least restrictive possible. This procedure violated Deck's constitutional rights to meet and challenge the prosecution's case for death in a fair and reliable sentencing proceeding.

The State cannot show that the error was harmless. The legirons and handcuffs were visible to the jury throughout the trial. Although the crime was an ugly one, Deck's evidence in mitigation was substantial. In such a

close case, the *Chapman* standard will not tolerate the risk that shackling gave the jurors an unwarranted impression Deck remained particularly dangerous and that this impression affected their weighing of the evidence in aggravation and in mitigation. Because the State cannot show that Deck's appearance before the jury – in legirons and handcuffed to a belly chain – did not contribute to the death verdict, Deck should receive a new sentencing trial.

ARGUMENT

I. Compelling a criminal defendant to appear before the jury in physical restraints, without sufficient justification, jeopardizes basic federal constitutional rights.

The Constitution endows every criminal defendant with a set of interconnected rights that work together to ensure a fair trial on reliable evidence: the presumption of innocence, the right to be present and confront the prosecution's proof, the right to cross-examine witnesses, and the right to have the facts determined solely on the evidence by an impartial, unbiased trier of fact. Each of these rights is jeopardized when the defendant is forced to appear in physical restraints before the jury.

The presumption of innocence originated in ancient times, was adopted through English common law, and has emerged as a bedrock principle of American jurisprudence. *Coffin v. United States*, 156 U.S. 432, 453-56 (1895). It is implicit in the right to a fair trial and is the "undoubted law, axiomatic and elementary" in a criminal trial. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). Enforcement of the

presumption of innocence "lies at the foundation of the administration of our criminal law." *Coffin*, 156 U.S. at 453.

Implicit in the presumption of innocence is the principle that jurors may consider only evidence presented in court. "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

That principle, in turn, dovetails with the defendant's right to confront the evidence and cross-examine witnesses. "[A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." *Kirby v. United States*, 174 U.S. 47, 55 (1899). The right to confront one's accusers is "essential to a fair trial in a criminal prosecution," *Pointer v. Texas*, 380 U.S. 400, 404 (1965), and, with the right to cross-examine the witnesses, "ensur[es] the integrity of the fact-finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

To aid confrontation and the truth-finding function of the trial, the defendant has a right to be present at his trial. The right to be present flows from the Sixth Amendment's Confrontation Clause and, when the defendant is not actually confronting witnesses or evidence against him, the Due Process Clause. *Snyder v. Massachusetts*,

291 U.S. 97, 105-106 (1934); *United States v. Gagnon*, 470 U.S. 522, 526 (1985). The defendant's presence is essential to his opportunity to defend against the charges. *Snyder*, 291 U.S. at 106. It enables the defendant to assist his lawyer, *id*., and to testify in his defense. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987). It also furthers the "fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table." *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring).

Together, these rights advance an undeniable goal of the legal system – to arrive at the truth. *United States v. Havens*, 446 U.S. 620, 626 (1980). A procedure that frustrates "the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins v. United States*, 358 U.S. 74, 81 (1958) (Stewart, J., concurring). The need for truth-finding and accuracy extends to sentencing. *See*, *e.g.*, *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Each of these rights is jeopardized when a defendant is shackled at trial. In *Illinois v. Allen*, 397 U.S. 337 (1970), this Court stressed that shackling and gagging a defendant has "serious shortcomings." *Id.* at 345. The Court expressed concern that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." *Id.* at 344.[6] The restraints also create "something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking

[6] Justice Kennedy, writing for the court in *Spain v. Procunier*, 600 F.2d 189, 198 (9th Cir. 1979), recognized that the general population is not accustomed to seeing prisoners and the "presence of the shackles may confirm their worst beliefs about felons."

to uphold." *Id.* They "offend[ ] not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." *Id.* at 350-51 (Brennan, J., concurring). In addition, they greatly reduce the defendant's ability to communicate with his counsel. *Id.* at 344. Because of these "inherent disadvantages and limitations," "no person should be tried while shackled and gagged except as a last resort." *Id.* at 344-45.

Shackling jeopardizes the right to be present by affecting the defendant's ability to participate fully in the proceedings and by tainting his appearance before the jury. In *Riggins v. Nevada*, 504 U.S. 127, 134-38 (1992), where a mentally ill individual was medicated over his objection throughout both phases of his capital trial, this Court recognized that a defendant has the right to be free from a State-imposed condition that diminishes his ability to participate fully in the proceedings and that may prejudice the jury against him. Balancing Riggins' rights against the State's interests, the Court reiterated that a defendant could not be forcibly medicated at his trial unless the State established that the medication was medically appropriate; that it was essential for the defendant's safety or the safety of others; and that less intrusive alternatives had been considered. *Id*. at 135. Because Riggins was forcibly medicated without such a showing and the error could have impaired his constitutionally-protected trial rights, the Court reversed his conviction. *Id*. at 136-38. "It is clearly possible that . . . [the] side effects [of the medication] had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id*. at 137. The defendant must be free

to communicate effectively with counsel at every critical stage of the proceedings. *Geders v. United States*, 425 U.S. 80, 89 (1976), citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Justice Kennedy's concurring opinion in *Riggins* emphasized that forced medication can make a defendant appear before the jury in such a way as to cast a negative light on his character. A key component of the right to be present at trial is the opportunity to present oneself to the observation of the jury. *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring). "At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial." *Id.* Through control of the defendant's appearance, the State can create a prejudicial negative demeanor that, although subtle, "does not make [it] any less real or potentially influential." *Id*. at 143. "Serious due process concerns are implicated when the State manipulates the evidence in this way." *Id*. at 142.

By affecting how the jury views the defendant, shackling diminishes the defendant's right to be presumed innocent. In *Estelle*, *supra*, Chief Justice Burger, writing for the Court, recognized that the appearance of a defendant before the jury in jail clothing diminishes the presumption of innocence, since "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." 425 U.S. at 504-505. The defendant's clothing "is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." *Id*. at 505. Finding that no essential state interest

was furthered by requiring criminal defendants to wear jail clothing, the Court held that the practice violated the defendant's Fourteenth Amendment rights to due process and equal protection. *Id*. at 505-506, 512.[7]

In *Holbrook v. Flynn*, 475 U.S. 560 (1986), the defendant alleged that his rights to a fair trial, under the Sixth and Fourteenth Amendments, were violated by the visible, heightened security measures used at his trial. *Id*. at 567-68. To resolve the question presented, the Court balanced the State's interest in courtroom security against the defendant's right to a fair trial. The Court recognized that certain practices, like shackling or requiring the defendant to wear prison clothing, are inherently prejudicial, since they are "unmistakable indications of the need to separate a defendant from the community at large." *Id*. at 568-69. Thus, these practices "should be permitted only where justified by an essential state interest specific to each trial." *Id*. In contrast, however, the presence of guards did not necessarily indicate that the defendant was particularly dangerous or culpable and so was not inherently prejudicial. *Id*. at 569.[8]

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[7] The Court, however, held that the defendant had waived the right by failing to request that he not be tried wearing jail clothing. *Id*. at 509-12.

[8] The Court reasoned that the jurors may have believed that the guards were there to protect against disruptions arising from outside the courtroom, or to deter tense courtroom exchanges from deteriorating into violence; or the jurors may not have inferred anything at all from the guards' presence, since armed guards have become commonplace in public places. *Id.* The Court suggested that the guards' presence may not be given much import "so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.*

Shackling allows the defendant to be convicted based on factors that were not presented as evidence in court. Shackles therefore violate the defendant's right to be judged only on evidence presented in court, *Taylor*, 436 U.S. at 485, and the right to confront the evidence and cross-examine witnesses. Shackling also interferes with the defendant's right to a fair and reliable sentencing determination, by interjecting into the sentencer's deliberations negative impressions that, although potentially untrue, the defendant is disabled from refuting effectively. *See*, *e.g.*, *Townsend*, 334 U.S. at 741 (due process violated when a defendant lacking counsel is sentenced based on untrue assumptions).

Through *Allen*, *Estelle*, and *Holbrook*, the Court recognized that shackling a defendant has "inherent disadvantages and limitations" that jeopardize the defendant's constitutional rights. *Allen*, 397 U.S. at 344. Shackles affect how the jury views the defendant. They impair the presumption of innocence, by making the defendant look dangerous, hence, guilty. They interfere with the defendant's ability to communicate with counsel and participate fully in the trial. Shackles demean the dignity and decorum of the courtroom and the respect for the individual, "which is the lifeblood of the law."

Other courts have expounded on the dangers of shackling. Shackles may confuse or embarrass the defendant, thereby distracting him from the proceedings. *Eaddy v. People*, 115 Colo. 488, 491, 174 P.2d 717, 718 (Colo. 1946). They may interfere with the defendant's thought processes and ability to communicate with counsel. *State v. Tolley*, 290 N.C. 349, 366, 226 S.E.2d 353, 367 (N.C. 1976). Shackling may impede a defendant from testifying, which in turn, may deny the defendant the right to present his defense

altogether. *See*, *e.g.*, *Hardin v. Estelle*, 365 F.Supp. 39, 46 (W.D.Tex.), *aff'd*, 484 F.2d 944 (5th Cir. 1973); *see also People v. Duran*, 16 Cal.3d 282, 288, 545 P.2d 1322, 1326 (1976).

To forestall these unacceptable consequences, American courts universally have adopted the standard set forth in the trilogy of *Allen*, *Estelle* and *Holbrook* for guilt-phase trials. American courts abide by the standard that the use of physical restraints in the courtroom is permissible only when justified by an essential state interest specific to each trial, and only as a last resort.[9] *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. This standard has proven a workable, effective means of balancing the defendant's rights to due process and a fair trial, and the State's interest in courtroom security.

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[9] The American Bar Association's standards are in accord:

> (c) No defendant should be removed from the courtroom, nor should defendants and witnesses be subjected to physical restraint while in court unless the court has found such restraint necessary to maintain order. Removing a defendant from the courtroom or subjecting an individual to physical restraint in the courtroom should be done only after all other reasonable steps have been taken to insure order. In ordering remedial measures, the court must take all reasonable steps to preserve the defendant's right to confrontation of witnesses and consultation with counsel.
>
> (d) If the court orders physical restraint or removal of a defendant from the courtroom, the court should enter into the record of the case the reasons therefor. Whenever physical restraint or removal of a defendant or witness occurs in the presence of jurors trying the case, the court should instruct those jurors that such restraint or removal is not to be considered in assessing the proof and determining guilt.

ABA Standards for Criminal Justice: Discovery and Trial by Jury, Standard 15-3.2 at 15-78 (3rd ed. 1996).

II. Capital sentencing trials like those in Missouri are an extension of the guilt phase of trial. Many, if not all, of the rights guaranteed to the defendant in the guilt phase extend to the defendant in the penalty phase.

A capital sentencing trial bears many of the hallmarks of the guilt-phase trial. It is, in effect, a trial on the greater offense of "murder plus one or more aggravating circumstances."[10] In Missouri, the sentencing trial starts with the presumption that the defendant shall not be sentenced to death. This presumption can be overcome only when the State has proven each element of its case for death-eligibility beyond a reasonable doubt. Among other rights, the defendant has the right to be present, the right to rebut matters considered by the jury, and the right to a fair and reliable proceeding.

In *Bullington v. Missouri*, 451 U.S. 430, 436-37 (1981), this Court considered whether the defendant's right to be free from double jeopardy was violated when the State, in a retrial, sought a death sentence after a prior jury had imposed a sentence of life without parole. The Court recognized that, like the guilt-innocence phase of the trial, a capital penalty phase in Missouri includes counsel's opening statements, the presentation of testimony and evidence, instructions to the jury, and closing arguments. *Id.* at 438 n.10. The rules of discovery and procedure apply. *Id*. at 434, 435 n.4.[11] The jury's discretion is guided by providing only two options – life without parole or

[10] *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (opinion of Scalia, J.). *See* note 13, *infra*.

[11] The opinion cites §565.006, RSMo 1978, which has since been amended and replaced with §565.030.4, RSMo 2000.

death – and standards are given to guide that choice. *Id*. at 438. The jury deliberates and then returns a formal punishment verdict, which must be unanimous. *Id.* at 434-35.

Most importantly, the State bears the burden of proving at least one aggravating circumstance beyond a reasonable doubt – the same standard used in the guilt phase – before the death penalty may be imposed. *Id*. at 441. The Court stressed that, by using this standard, the State recognizes that the defendant's interests are just as great in the penalty phase as in the guilt phase. *Id*.

The Court concluded that a capital penalty phase in Missouri "resemble[s] and, indeed, in all relevant respects [i]s like the immediately preceding trial on the issue of guilt or innocence. It [i]s itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id*. at 438.[12] By enacting a procedure that so closely "resembles a trial on the issue of guilt or innocence, . . . Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id.* at 444 (emphasis in original). Because the defendant had been "acquitted" of the death penalty at his first trial, he could not face the death penalty upon his retrial. *Id*. at 446.[13]

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[12] *See also Monge v. California*, 524 U.S. 721, 731-32 (1998) ("The penalty phase of a capital trial is . . . in many respects a continuation of the trial on guilt or innocence of capital murder."); *Caspari v. Bohlen*, 510 U.S. 383, 393 (1994), quoting *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). ("A capital sentencing proceeding . . . is . . . like a trial in its adversarial format and in the existence of standards for decision.").

[13] In *Arizona v. Rumsey*, 467 U.S. 203, 209 (1984), the Court extended *Bullington* to a case in which the trial court, rather than a jury, had made a finding that the State failed to establish the death-eligibility factors

(Continued on following page)

The requirement that the State must prove an aggravating circumstance beyond a reasonable doubt also implies that the defendant is presumed to be "innocent" of those circumstances until the State has proved one or more of them by evidence presented in open court.[14] And other constitutional protections follow as well. In *Specht v. Patterson*, 386 U.S. 605, 609-11 (1967), the Court confirmed that procedural safeguards attach to any hearing at which a harsher sentence may be imposed based upon "a new finding of fact . . . that was not an ingredient of the

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beyond a reasonable doubt. The Court held that the "initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment." *Id*. at 211. Of course, when no finding has been made that is tantamount to an acquittal, double jeopardy is not offended by a penalty retrial. That was the situation in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), involving a hung jury. *Sattazahn* reaffirmed *Bullington*'s holding that if a capital jury returns a verdict refusing to find any aggravating circumstance beyond a reasonable doubt in a jurisdiction where this is a precondition of death-eligibility, the verdict would constitute an acquittal barring retrial. Drawing together the teachings of *Bullington* and of *Ring v. Arizona*, 536 U.S. 584 (2002), Justice Scalia's *Sattazahn* opinion expresses the parallelism of a guilt-innocence trial and of a penalty trial under procedures like Missouri's by describing the two trials combined as a trial of the "offense of murder plus one or more aggravating circumstances." 537 U.S. at 111. In this regard, as well as for the reasons set forth in *Bullington* and *Rumsey*, it is altogether unlike non-capital sentencing proceedings. *See Monge*, 524 U.S. at 734, distinguishing *Bullington* in the non-capital context, where any trial-like protections stem from legislative, not constitutional, mandate.

[14] The Court has held that the presumption of innocence and the principle that the State must establish each element of a crime beyond a reasonable doubt are not logically separate and distinct. *Taylor v. Kentucky*, 436 U.S. 478 (1978). Instead, the presumption of innocence is implicit within the principle, and serves as a reminder, that the State must prove the elements beyond a reasonable doubt. *Id*. at 483, 483 n.12.

offense charged." Those safeguards include the right to be present with counsel, the right to confront witnesses, the right to cross-examine, and the right to present favorable evidence. *Id*. at 610.

The defendant is entitled to be present at his capital sentencing trial. *See*, *e.g.*, *Stincer*, 482 U.S. at 745 (a defendant is entitled to "be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure"); *Davis v. Woodford*, 384 F.3d 628, 646 (9th Cir. 2004) (a defendant has a Sixth Amendment right to be competent at the penalty phase). As in the guilt phase, the defendant's presence is essential to allow him to communicate with counsel, assist in his defense, and have the jury observe his demeanor. *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring).

As in the guilt phase, a capital defendant has a due process right to rebut any information that the jury considers and upon which it may rely in its penalty phase deliberations. In *Gardner v. Florida*, 430 U.S. 349 (1997), the trial court sentenced the defendant to death based on the contents of a presentence investigation report, portions of which were not disclosed to defense counsel. In a plurality opinion, Justice Stevens warned of the danger that erroneous or misinterpreted information could form the basis for a death sentence. *Id*. at 359. He concluded – and a majority of the Court agreed – that the defendant was denied due process because "the death sentence was

imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id*. at 362.[15]

So, too, in *Simmons v. South Carolina*, 512 U.S. 154, 165 (1994), the Court held that the defendant had been denied due process when the trial court refused to advise the jury that he would never be eligible for parole, after the State had argued his future dangerousness as the basis for a death sentence. The *Simmons* plurality opinion stressed that the defendant was prevented from rebutting information that the jury "considered, and upon which it may have relied, in imposing the sentence of death." *Id*. at 165. And the concurring Justices observed that by refusing the defendant the "ability to meet the State's case against him," the State had denied Simmons "one of the hallmarks of due process in our adversary system." *Id*. at 175 (O'Connor, J., concurring, joined by Rehnquist, C.J., and Kennedy, J.); *see also Kelly v. South Carolina*, 534 U.S. 246 (2002); *Shafer v. South Carolina*, 532 U.S. 36 (2001); *Ramdass v. Angelone*, 530 U.S. 156, 179 (2000) (O'Connor, J., concurring).

In the capital context, the need for reliable sentencing is paramount. The Eighth Amendment "requires provision

[15] This rationale for the *Gardner* decision was explicitly endorsed by Justice White, 430 U.S. at 362, 364, and Justice Brennan, *id*. at 364, as well as by the plurality opinion speaking for Justices Stevens, Stewart and Powell. *And see Tuggle v. Netherland*, 516 U.S. 10, 13 (1995) (per curiam) ("The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation. As a result, the Commonwealth's psychiatric evidence went unchallenged, which may have unfairly increased its persuasiveness in the eyes of the jury."); *Skipper v. South Carolina*, 476 U.S. 1, 9-11 (1986) (Powell, J., concurring) (defendant's right to due process was violated when he was denied the ability to present evidence that he behaved well in jail awaiting trial).

of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.'" *Simmons*, 512 U.S. at 172 (Souter and Stevens, J.J., concurring), quoting *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). The Court has repeatedly said that "[b]ecause the death penalty is unique 'in both its severity and its finality,' . . . we have recognized an acute need for reliability in capital sentencing proceedings." *Monge*, 524 U.S. at 732. The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion of Burger, C.J.). As a result, it is vitally important that decisions made regarding capital sentencing "be, and appear to be, based on reason rather than caprice or emotion." *Monge*, 524 U.S. at 732, quoting *Gardner,* 430 U.S. at 358.

III. The concerns fueled by shackling in the guilt-innocence phase are implicated just as much, if not more, in capital sentencing trials.

Shackling a defendant before the jury that must decide if he lives or dies erodes the defendant's constitutional rights in the penalty phase for reasons that fall into three major categories. First, by conveying to the jurors a wide range of negative impressions about the defendant, the shackles violate the principle that the State must prove the defendant worthy of a death sentence only by evidence presented in court and not by presumptions, prejudices or suggestions that the defendant is not allowed to rebut. Second, the shackles impede all of the functions that give meaning to the defendant's right to be present at his trial – limiting his ability to communicate with counsel,

discouraging his full participation in the trial, and tainting his demeanor before the jury. Third, the shackles impair the reliability of the sentencing determination, by allowing arbitrary and unproven considerations to form the basis for a death sentence.

A. Restraints allow jurors to consider unproven, unrebuttable, and potentially false information in their assessment of whether the defendant should live or die.

The purpose of the penalty phase is to provide the jury with accurate information that permits it to make an individualized sentencing determination based on the defendant's character and record and the circumstances of the particular offense. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). "[P]robably the bulk of what most sentencing is all about" is a determination of the defendant's "acceptance of responsibility, repentance, character, and future dangerousness." *Mitchell v. United States*, 526 U.S. 314, 340 (1999) (Scalia, J., dissenting).

1. Future dangerousness is a crucial consideration during the jury's deliberations.

The issue of future dangerousness is a vitally important concern for capital sentencing juries. In *Jurek v. Texas*, 428 U.S. 262, 275 (1976), Justice Stevens recognized that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

Social science studies have confirmed that the defendant's future dangerousness is a crucial aspect of capital

sentencing deliberations. *See* Bowers, Sandys & Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DePaul L. Rev. 1497, 1503 (2004) (jurors in multi-state Capital Jury Project study reported that a "great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness"); Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998) (analyzing South Carolina Capital Jury Project data and concluding "[f]uture dangerousness appears to be one of the primary determinants of capital-sentencing outcomes"); Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L.Rev. 1, 6 (1993) (South Carolina study data reveals that "[o]ther than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues jurors discuss most. Discussion of dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it.").

2. Physically restraining a defendant in the courtroom makes the defendant an exhibit of his own future dangerousness and bad character.

Physically restraining a defendant unfairly shapes the jury's consideration of future dangerousness by communicating that the defendant remains particularly dangerous, violent, or untrustworthy. Jurors assume that the court would not impose such restraints unless it had heard evidence and found that they were warranted. They

believe that the defendant poses a genuine threat of escaping, or that he has threatened physical violence to people in the courtroom, including, perhaps, to the jurors themselves. The jurors believe that, if the defendant still has not accepted responsibility or calmed down in the years before trial, he is likely to remain dangerous if sentenced to life in prison. These beliefs become part of the body of "evidence" that the jurors incorporate in their deliberations about whether the defendant is to live or die.

Numerous courts have concluded that shackling a defendant in the penalty phase so jaundices the issue of future dangerousness as to warrant relief. In *State v. Finch*, 137 Wash.2d 792, 975 P.2d 967 (Wash.), *cert. denied*, 528 U.S. 922 (1999), the defendant wore leg restraints during his entire trial and sentencing proceedings. Additionally, one hand was cuffed to his chair and his legs were shackled to a table leg during the testimony of two of the witnesses. *Id*., 975 P.2d at 1002. The Washington Supreme Court held that the clear error in the unjustified restraints was harmless as to the guilt phase, but not as to penalty. *Id*. at 1007-08. Even though neither side had specifically argued the issue of future dangerousness, the restraints so affected the issue that the error was not harmless. *Id*. at 1008-09. "It is undisputed that placing the defendant in restraints indicates to the jury that the defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security." *Id.* at 1008.

In *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996), the Court of Appeals concluded that "the constitutional rules regarding shackling at trial apply equally in the sentencing context."

Although the jury knows that the defendant has been convicted of murder, "the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence." *Id*.

> "[N]ot all convicted felons are so dangerous and violent that they must be brought to court and kept in handcuffs and leg irons." Unlike prison clothes, physical restraints may create the impression in the minds of the jury that the court believes the defendant is a particularly dangerous and violent person.

Id., quoting *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993).

In *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987), *withdrawn in part*, 833 F.2d 250, *cert. denied*, 485 U.S. 1014 (1988), the trial court had ordered that the defendant proceed through the penalty phase in legirons. The Court of Appeals for the Eleventh Circuit recognized that "a jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." *Id*. The court ordered penalty-phase relief on this ground. *Id*. at 1452.

In *Laird v. Horn*, 159 F.Supp.2d 58, 99-102 (E.D.Pa. 2001), the court granted habeas relief because the defendant was forced to wear handcuffs and shackles in the penalty phase. Shackling a capital defendant in the penalty phase "could . . . create[ ] the presumption in the minds of the jurors that petitioner was dangerous and worthy of the death sentence . . . . This risk is ever-present in a death penalty case." *Id*. at 101, citing *Commonwealth*

v. Chester, 526 Pa. 578, 601, 587 A.2d 1367, 1378-79 (Pa.), *cert. denied*, 502 U.S. 849 (1991). The error was held so prejudicial that the defendant was entitled to a new penalty phase, even though his attorney never objected to the restraints. *Laird*, 159 F.Supp.2d at 100, 102.

Federal courts have recognized the need to restrict the use of shackles and other restraints even in civil cases. Civil commitment proceedings are analogous to capital penalty proceedings in some respects, since neither formally involves a question of guilt or innocence, and both have a critical focus on whether the defendant is dangerous. In *Tyars v. Finner*, 709 F.2d 1274, 1285 (9th Cir. 1983), the court invalidated Tyars' involuntary commitment, because "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced without at least some prior showing of necessity." The court held that, without a showing that the restraints were necessary or that less restrictive means could not have achieved the same purpose, the circumstances "deprive[d] the . . . proceeding of the appearance of evenhanded justice which is at the core of due process." *Id*., quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

Similarly, during the trial of a civil rights action brought by a prison inmate, the Seventh Circuit ruled that the inmate could not be forced to wear shackles unless extreme need were demonstrated. *Lemons*, *supra*, 985 F.2d at 357-58.

> In a civil case, the plaintiff is still entitled to a fair trial in which the jury decides the case based on admissible evidence. The shackles suggest to the jury in a civil case that the plaintiff is a violent person. Since plaintiff's tendency towards violence was at issue in this case, shackles inevitably prejudiced the jury.

Id. at 357.

3. Physical restraints lessen the State's burden of proof.

In *Estelle*, this Court held that forcing a defendant to wear jail clothing at his trial diminished the State's burden of proof by undermining the presumption of innocence. 425 U.S. at 503-504. The defendant's clothing was so likely to be a continuing influence through the trial, reminding the jurors that the defendant was in custody, that it presented an unacceptable risk of impermissible factors affecting the result. *Id*. at 504. The Court expressed the need to guard against practices that whittle away the principle that guilt is to be decided by probative evidence and beyond a reasonable doubt. *Id*. at 503.

The use of physical restraints in the penalty phase tends to water down the State's burden of proof just as the jail clothing did in *Estelle*. In the penalty phase, the jury must determine whether one or more aggravating circumstances is factually established, and the defendant is presumed to be innocent of those circumstances until the State proves them beyond a reasonable doubt. As in the trial of murder simpliciter, the defendant is entitled to have his guilt or innocence of aggravated murder determined "solely on the basis of the evidence introduced at

trial, and not on . . . other circumstances not adduced as proof at trial." *Taylor*, 436 U.S. at 485.

Under Missouri's statute, the State must establish three elements of death-eligibility before the jury may consider imposing a death sentence in its discretion. §565.030.4; *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo.banc 2003). First, the jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. §565.030.4(1). Second, the jury must determine that the "facts and circumstances" in aggravation of punishment warrant a death sentence. §565.030.4(2). Third, the jury must find that the evidence in mitigation does not outweigh the evidence in aggravation. §565.030.4(3). If the jury finds these three elements, it then proceeds to the fourth, discretionary step, deciding whether to impose a death sentence or life without parole. §565.030.4(4).

Shackling a defendant can affect the jury's deliberations on the second and third death-eligibility elements. The jury is instructed that it may consider all evidence presented at trial in assessing the "facts and circumstances" in aggravation of punishment. Missouri Approved Instructions, CR3d 313.41A, 313.44A. This includes not just the statutory aggravating circumstances, but also any facts and circumstances that the jurors find to be in aggravation of punishment. §565.030.4(2). Negative conclusions about the defendant's character and potential for future dangerousness become part of the evidence in aggravation of punishment. Thus, jurors may use the conclusions they drew from viewing the defendant in shackles as evidence in aggravation of punishment that (2) warrants death, and (3) outweighs the evidence in mitigation.

By allowing consideration of facts that were not presented as evidence in court, the use of physical restraints eases the State's burden of proof. Before one piece of evidence has been admitted or one word of testimony is given, the jurors perceive the defendant as someone who remains dangerous, violent, and untrustworthy. As with jail clothing, shackling a defendant creates "a significant danger . . . of corruption of the factfinding process through mere suspicion." *Estelle*, 425 U.S. at 518 (Brennan, J., dissenting). If the State wants the jury to consider as evidence that the defendant behaved badly in jail awaiting trial, made threats, attempted to escape, was unremorseful, or was particularly violent or dangerous, it must present that evidence in court. It must not be permitted to backdoor those inferences through the use of visible restraints.

4. Physical restraints shift the burden of proof to the defendant.

When the jurors observe the defendant in shackles, they form negative beliefs about him. The shackles become the "elephant in the room," that everyone sees but nobody discusses. The defendant is forced to choose which of two vital constitutional principles he will forego. He can stand by while the jury draws negative inferences from the shackling, and thereby have the death-eligibility elements determined under a diminished standard of proof. Or, he can shoulder the burden of proving a negative – that he has not done anything to warrant the restraints – and thereby allow the State to shift the burden of proof to him. By shifting the burden of proof to the defendant, requiring him to disprove a critical fact in dispute, the State greatly

increases the likelihood of an erroneous result. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

5. Physical restraints deny the defendant the ability to rebut damaging inferences.

Because the shackles permit inferences that are not based upon evidence, the defendant cannot confront, cross-examine, or rebut those inferences. The shackles generate negative conclusions about the defendant – that he is inherently dangerous or violent; that he is likely to escape; or that he has threatened people in the courtroom, including even the jurors themselves. Yet there is no witness to cross-examine, because the State has not presented the testimony of any witness. There is no document to refute, because the State has not presented any documentation.

This Court has reversed death sentences when those sentences were based on matters that had not been disclosed to defense counsel, *Gardner*, 430 U.S. 349, and when the defendant was not allowed to rebut the State's argument of the defendant's future dangerousness, *Simmons*, 512 U.S. 154. Shackling presents the same danger because it generates negative conclusions about the defendant that the jurors will consider in their deliberations. Yet, as in *Simmons*, the defendant does not have the chance to refute that information, and, as in *Gardner*, the sentencer may base its death sentence on erroneous or misinterpreted information.

B. Physical restraints limit the procedural protections which are supposed to be secured by the defendant's right to be present at trial and to participate in the proceedings.

One of the benefits secured to the defendant by the right to be present in the courtroom is the opportunity to be observed by the jury. In the penalty phase, the defendant needs to show his humanity, that he is not a mad dog that needs to be put down for everyone's safety. He needs to show that he is not so different from the jurors and is someone to whom the jurors can relate and to whom they should extend mercy. Parading the defendant before the jury in chains, as a dangerous animal, defeats this goal as much as would presenting him in a cage.

By shackling a defendant, the State uses the defendant's presence at trial against him. The State manipulates the evidence, creating a prejudicial negative demeanor, making the defendant appear dangerous and volatile, even though he is not. As Justice Kennedy has recognized:

> The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

Riggins, 504 U.S. at 144 (concurring opinion).

From the moment the defendant first appears, handcuffed and shackled, before the penalty phase jury, the jury draws inferences from his restraints. Realizing this, some defendants may relinquish altogether their right to be present, rather than be presented in such a negative fashion. A defendant may decide that it is preferable for the jury not to observe him at all, rather than to view him in full restraints, with all the trappings of a dangerous and violent man.

Alternatively, shackling may discourage the defendant from testifying. A shackled defendant may decide not to testify, lest he be forced to shuffle to the witness stand in handcuffs and legirons, chains jangling, in full view of the jury.

Shackling also impedes the defendant's ability to communicate with counsel. This Court recognized that "one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint." *Allen*, 397 U.S. at 344. Physical restraints may also distract and physically irritate the defendant, making him unable to concentrate fully on the evidence presented. Handcuffed, he can not take notes or write notes to his attorney. The jury thus may believe he is disinterested in his own fate, when actually, he is trying to minimize the jury's view of the restraints.

C. Shackling a defendant in the penalty phase leads to arbitrary sentence determinations.

Shackling a defendant before the jury that will decide if he lives or dies results in an arbitrary sentencing determination. Because the jury infers from the shackles facts that have not been proven in court and are not subject to cross-examination or refutation, a significant risk emerges that the jury will base its determination of sentence on inaccurate information. "Accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg*, *supra*, 428 U.S. at 190 (joint opinion of Stewart, Powell, and Stevens, JJ.). By misleading the jury, shackles create an unacceptable risk that the death sentence will be imposed arbitrarily or capriciously, or by whim or mistake. *See Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring).

IV. The procedures and conditions established as prerequisites to shackling in *Estelle*, *Allen* and *Holbrook* are required in the penalty phase of a capital case, no less than in the guilt phase.

Certain practices pose such a threat to the "fairness of the factfinding process" and fundamental rights that they must be subjected to "close judicial scrutiny." *Holbrook*, 475 U.S. at 568, quoting *Estelle*, 425 U.S. at 504. Shackling a defendant – in either the guilt phase or the penalty phase – is such a practice. Just as shackling in the guilt phase erodes the presumption of innocence by making the defendant appear guilty, shackling in the penalty phase tilts the scales toward death by making the defendant

appear especially dangerous, even years after his crime, and even in the confines of the courtroom. Shackling diverts the jurors' attention from trial-tested evidence to matters that the defense has not been able to confront or refute. It allows a death sentence based on suspicions and false assumptions and offends the heightened standard of reliability that this Court has repeatedly demanded in capital sentencing proceedings. *See*, *e.g.*, *Gardner,* 430 U.S. at 357-58; *Monge,* 524 U.S. at 732.

Because shackling a defendant in the penalty phase endangers so many vital constitutional rights, the same standards and procedures that the Court has established for guilt-phase shackling are indispensable in the penalty phase as well. Shackling violates the Constitution unless a properly supported finding is made on the record, after due inquiry, that (1) there is a need to shackle the defendant to further an essential state interest specific to the case at bar; and (2) lesser measures would not suffice to protect that essential state interest. *Allen*, 397 U.S. at 344; *Estelle*, 425 U.S. at 505; *Holbrook*, 475 U.S. at 568-69. This standard is easy to apply, effectively balances the interests of the State while protecting the constitutionally guaranteed rights of the defendant, and is already in use by many courts in the penalty phase.

V. The unjustified use of physical restraints violated Deck's constitutional rights, and thus, the State must demonstrate that the error was harmless beyond a reasonable doubt.

A. The trial court violated Deck's rights by needlessly imposing physical restraints and by failing to take any remedial action to reduce the prejudicial effect of the restraints.

In the circumstances of this case, there was no justification for shackling Deck with legirons and handcuffs. The only reason the trial court gave for shackling Deck was that Deck had been convicted (J.A.58). If that were sufficient, every defendant in every capital penalty phase would be shackled and handcuffed. That cannot possibly be the rule of the Constitution.

> The mere fact that a jury convicted a defendant of first degree murder is not a sufficient basis for a decision to shackle him during the penalty phase. The trial court should look at the particular facts of the case and the conduct of the proceedings and should balance the need for safety and security in the courtroom against the potential for prejudice.

State v. Young, 853 P.2d 327, 350-51 (Utah 1993). *See also Lovell v. State*, 347 Md. 623, 648, 702 A.2d 261, 273 (Md. 1997) ("Murder is intrinsically a most violent crime, but, if that alone justified shackling at a capital sentencing, then all murderers could be shackled when sentenced by a jury. That is not the way in which the Due Process Clause applies."); *Bello v. State*, 547 So.2d 914, 918 (Fla. 1989) (remanding for a new penalty phase because court failed

to make a record as to why shackles were necessary; conviction itself was not sufficient).

Not only did the court give no other reason than Deck's conviction for the decision to restrain Deck, but none existed. Deck caused no disturbances at his first trial, at the hearing on his motion for postconviction relief, or at the penalty phase retrial. He made no threats of violence. Deck's prior convictions involved only non-violent crimes (J.A.59-62).

Any escape attempt by Deck was remote in time, rather half-hearted, and did not involve violence. Seven years prior to his retrial, in his first months in jail, Deck was suicidal and allegedly removed some caulking from his jail cell window (PCR Ex.66, Surratt Depo.). He underwent a mental health evaluation, but no charges were filed, and no evidence was presented about the incident (J.A.3). In 1985, about seventeen years prior to the retrial, Deck had aided an escape by two other inmates – he obtained a sawblade and helped the other inmates saw through their bars, but he himself did not attempt to escape (J.A.62-63).

Even if some form of restraint were justified, the court's order that Deck appear throughout the penalty retrial in legirons and handcuffed to a bellychain was manifestly excessive and disregarded the principle that shackles be employed only as a last resort. At his initial trial, the court had required Deck to appear in leg braces, which are worn under the clothing (J.A.5). The leg braces obviously sufficed, because the trial proceeded without incident. The court had no need to impose even more severe restraints after Deck had behaved properly at his first trial with minimal restraints. Much less severe

measures would have satisfied the State's interest in security, without subjecting Deck to the prejudicial effects of the visible restraints.

Furthermore, the court failed to take any measures to reduce those prejudicial effects. Counsel filed a lengthy motion that proposed alternatives to the use of shackles, such as placing additional guards in the courtroom (J.A.41-56). Counsel gave examples of ways that other trial judges in Missouri, while using restraints, had undertaken to ensure that the jury could not see the restraints (J.A.48-50). But the court made no effort to alleviate the prejudice in Deck's case by following counsel's suggestions – placing boxes around the defense table so the legirons could not be seen; ensuring that Deck was not paraded before the jury in his restraints; and using restraints that would not rattle or be seen easily (J.A.48-50). Instead the court overruled defense counsel's motion in its entirety, content that the shackles were displayed to the jury on the theory that Deck's "being shackled takes any fear out of [the jurors'] minds" (J.A.56, 59).

B. The *Chapman* standard should govern a State's claim of harmless error when a defendant has been unconstitutionally shackled during a capital sentencing trial.

Chapman v. California requires that, before a federal constitutional error can be held harmless, the State must prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 386 U.S. at 24. The *Chapman* standard is applicable here because shackling a defendant is an inherently prejudicial practice, violating several of the defendant's constitutional rights, yet its effects are subtle and not easily quantifiable.

The restraints send a message to the jury which may influence the jurors' deliberations without their even being fully cognizant of it.

In the penalty phase, the prejudice resulting from shackling is even harder to quantify than it is in the guilt-innocence phase. The jury's deliberations are more subjective than in guilt phase – concerned with character, remorse, and future dangerousness – rather than such objective facts as whether the defendant committed the acts charged. *Finch*, 975 P.2d at 1007-1008. As a result, "[u]nlike the guilt phase, the prejudice to the Defendant during a special sentencing proceeding cannot necessarily be overcome by objective and overwhelming evidence." *Id*. The question therefore must be that posed in cases like *Estelle* and *Riggins*, *supra*: whether the court-imposed practice presents an unacceptable risk that impermissible factors will affect the verdict. *See Estelle*, 425 U.S. at 504. The burden is on the State to show beyond a reasonable doubt that such a risk does not exist. It would be fundamentally unfair to require the defendant whose rights have been violated to pinpoint precisely how this unquantifiable prejudice affected his trial.

The Court most recently acknowledged this point in *Riggins*. There, it refused to require the forcibly medicated defendant to prove actual prejudice, noting that efforts to do so would be futile and "purely speculative." 504 U.S. at 137. Justice O'Connor, writing for the Court, held that "[l]ike the consequences of compelling a defendant to wear prison clothing, [citing *Estelle*, *supra*, 425 U.S. at 504-505], or of binding and gagging an accused during trial, [citing *Allen*, *supra*, 397 U.S. at 344], the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript." *Id*.

C. The State cannot prove that the error was harmless.

To determine the likely effects of a particular procedure, courts must rely on "reason, principle, and common human experience." *Estelle*, 425 U.S. at 504. Applying these factors, the State cannot show that Deck's legirons and handcuffs had no place in any juror's deliberations.

1. The restraints were visible.

The physical restraints imposed upon Carman Deck cannot be considered harmless beyond a reasonable doubt. Deck was handcuffed to a belly chain and wore legirons throughout his capital sentencing trial (J.A.57-59). Numerous times, the jury clearly saw Deck – chained, handcuffed and shackled – paraded in and out of the courtroom or standing when the judge and jury entered or left the courtroom (J.A.69). This is not a case in which shackling can be deemed harmless because it was inconspicuous.

2. Shackling could have made a difference in the outcome of this close case.

This was a close case, where the shackling could have made a difference. *See Dyas v. Poole*, 317 F.3d 934, 937 (9th Cir.), *cert. denied*, 540 U.S. 937 (2003) ("Because the case was close, an otherwise marginal bias created by the shackles may have played a significant role in the jury's decision."). Deck presented a compelling mitigation case, putting into play the possibility of a life without parole sentence. The Missouri Supreme Court itself acknowledged that, in the first penalty phase, Deck presented "substantial mitigating evidence" of his "horribly abusive

childhood." *Deck v. State*, 68 S.W.3d 418, 422 (Mo.banc 2002).

The evidence presented in this second penalty trial was no less substantial. From infancy, Deck was alternately abused and abandoned by his mother, who preferred running around with other men to caring for Deck and his sisters and brother (Tr.467,483-86,497). Deck shouldered the role of parent and did his best to clothe, clean, and feed his three younger siblings (Tr.485-87). Usually left without food, Deck scavenged or stole to feed them, even if it was just a stick of butter or dry dog food (Tr.487,506). Abandoned by their mother, the children were shipped from relative to relative (Tr.468-69,490-91). Deck lived with an alcoholic stepmother, who repeatedly abused him, including smearing feces on his face, making him keep it there until it dried, photographing him, and taunting him that she would tell others what he had done (Tr.493-94; M.D. Depo. 12-14).

Although Deck eventually was placed in foster homes, he was given back to his mother at her whim, only to have her abandon him again (Tr.491). When he finally found a foster family that gave him love, structure and stability, and wanted to adopt him, Deck again was abruptly removed, despite his protestations that making him leave was "killing me on the inside" (Tr.526-30).

When Deck was finally reunited with his siblings, they enjoyed being together (M.D.Depo.16). Deck showered his baby niece with attention and presents, showing her the love that he never received (M.D.Depo.17). His brother loves him and visited him in prison (M.D.Depo.16,26-27).

As evidence in aggravation of punishment, the State presented the facts of the crime; Deck's prior convictions

for burglary, stealing and aiding an escape (J.A.59-62); and victim impact testimony by several members of the victims' family (Tr.387-400,410-21).

3. Deck's future dangerousness was in issue.

Future dangerousness is often a subject that worries jurors in capital sentencing deliberations, and it was specifically in issue here. The State made it an issue by presenting Deck as an "exhibit" of his own bad character and future dangerousness by forcing him to appear before the jury in legirons and handcuffed to a belly chain. The defense futilely tried to counter that "evidence" by arguing in closing that Deck would do well in the structured environment of prison and would never hurt anyone else (Tr.555,558). Seven years had passed from the date of the crime to the penalty phase retrial. By presenting Deck to the jury in visible handcuffs and shackles, the court communicated to the jury that, even after so much time had passed, Deck was still dangerous, warranting these extreme measures. The restraints communicated that Deck had not yet adjusted, and therefore likely would never adjust, to a life in prison.

4. *Voir dire* questioning did not alleviate the harm.

The State cannot claim that defense counsel's questioning of the venire resolves the issue. Referring to the shackles, counsel suggested, "I guess that's what happens when you get convicted" and asked if that would sway anyone to render one sentence or another (J.A.58). By

raising their hands, the jurors agreed that the chains would not affect them (J.A.58).

This Court has rejected the notion that, merely because jurors state during *voir dire* that they would not be influenced by a procedure in the courtroom, the defendant could not have suffered prejudice. *Holbrook*, 475 U.S. at 565, 570. The Court acknowledged that "[i]f 'a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process,' *Estes v. Texas*, 381 U.S. 532, 542-43 (1965), little stock need be placed in jurors' claims to the contrary." *Holbrook*, 475 U.S. at 570, citing *Sheppard v. Maxwell*, 384 U.S. 333, 351-52 (1966); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). "Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Holbrook*, 475 U.S. at 570. The relevant question is not "whether jurors actually articulated a consciousness of some prejudicial effect, but rather, whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.*, citing *Estelle*, 425 U.S. at 505; *see also Dyas*, 317 F.3d at 937-38; *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147, 153 (3rd Cir. 1995), *cert. denied*, 516 U.S. 1145 (1996) (district court should not rely simply on the jurors' subjective assessments of their own impartiality).

Defense counsel's attempt to alleviate the prejudice did not cure the court-created error. Reversal has been warranted even when the trial court instructed the jury to disregard handcuffs and legirons. In *Lovell*, *supra*, 347 Md. at 649 n.6, 702 A.2d at 274 n.6, the trial court instructed the jury that the capital defendant's handcuffs and legirons were part of the normal procedure for anyone

convicted of murder and facing a lengthy sentence. It instructed the jury, "to draw no conclusions regarding future dangerousness or any other conclusions based upon these normal security measures." *Id*., n.6. The appellate court reversed, holding, "[w]e do not believe that this instruction cures the error by causing the balance to tip sufficiently away from prejudice and in favor of the State interest in courtroom security to sustain the decision to shackle." *Id*.

Presenting Deck to the jury while in legirons and handcuffed to a belly chain throughout the sentencing trial, without justification, stripped the proceedings of the heightened degree of reliability that is so essential to capital sentencing trials. Under *Chapman*, it cannot be found beyond a reasonable doubt that the risk of prejudice from this unwarranted procedure did not materialize, and Carman Deck must receive a new sentencing trial.

CONCLUSION

The judgment of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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APPENDIX

Revised Missouri Statutes (2000), §565.030.4:

If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials. Such evidence may include, within the discretion of the court, evidence concerning the murder victim and the impact of the crime upon the family of the victim and others. Rebuttal and surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier is a jury it shall be instructed on the law. The attorneys may then argue the issue of punishment to the jury, and the state shall have the right to open and close the argument. The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:

(1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

(2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

If the trier is a jury it shall be so instructed. If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. The court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree.