No. 04-5293

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2004

CARMAN L. DECK,
Petitioner,

v.

STATE OF MISSOURI,
Respondent.

On Writ of Certiorari
to the Supreme Court of Missouri

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Is restraining a defendant during a capital penalty phase proceeding, held after the guilty verdict was affirmed but the penalty reversed and remanded, constitutionally unfair regard-less of the circumstances?

If restraining a defendant during a new capital penalty phase is not constitutionally unfair regardless of the circum-stances, what burden does the defendant bear to show that it would be constitutionally unfair in the circumstances of his penalty-phase retrial?

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STATEMENT OF THE CASE

Petitioner Carman Deck was convicted of two counts of first-degree murder and received two death sentences for killing an elderly couple during a home-invasion robbery. The Missouri Supreme Court upheld Deck=s convictions and sentences on direct appeal, but in a separate appeal involving Deck=s motion for post-conviction relief, it set aside the death sentences and remanded the case for a new penalty phase. In the penalty-phase retrial, during which Deck was restrained in Aleg irons@ and a Abelly chain,@ a jury again

declared that he should receive two death sentences. On appeal, the Missouri Supreme Court upheld the death sentences and rejected Deck=s claim that the restraints violated his constitutional rights.

The Murders. In its original direct appeal opinion affirming Deck=s convictions and previous death sentences, the Missouri Supreme Court described the murders that Deck committed (Joint Appendix (AJ.A.@) 6-8). The facts described in that opinion, with pertinent additions appearing in the transcripts from the first trial and the penalty-phase retrial, are as follows:

In June 1996, Deck and his mother=s boyfriend concocted a plan to obtain money that the boyfriend needed for a trip to Oklahoma. Deck planned to steal the money from James and Zelma Long, who lived in DeSoto, Missouri. Deck chose the Longs because some thirteen years earlier, he had entered the Longs= house with their grandson, who then stole money from his grandparents= safe. Deck planned to break into the Longs= house on a Sunday, while they were at church, and take money from their safe.

Deck and his mother=s boyfriend made several trips to DeSoto to canvass the area. Deck bragged to a woman he met that he knew some people with money and that he was prepared to do Aanything it took@ to get it (1st Tr. 603-04). But several Sundays passed without Deck carrying out his plan (1st Tr. 763). On Monday, July 8, 1996, the boyfriend told Deck that he and Deck=s mother wanted to leave for Oklahoma the following Friday. The boyfriend then gave Deck his .22 caliber auto-matic pistol.

That evening, Deck and his sister left her St. Louis

County apartment and drove to rural Jefferson County, near DeSoto, where they parked on a back road and waited for dark. At nine o=clock, they drove closer to the Longs= house and pulled in the driveway.

Deck and his sister knocked on the door. When Zelma Long answered, they asked her for directions. Mrs. Long invited them into the house and explained the directions to them while Mr. Long wrote them down. As Deck walked toward the front door to leave, he pulled the pistol from his waistband, pointed it at the Longs, and ordered them to lie face down on their bed. They complied without a struggle and pleaded with Deck not to hurt them.

Deck ordered Mr. Long to open the safe, but Mrs. Long, who knew the combination, opened the safe and took out papers and jewelry. She also told Deck that she had $200 in her purse; Deck sent Mrs. Long to the kitchen to get that money. Mr. Long told Deck that there was about $200 in a decorative canister on top of the television set, and Deck took that also. Still hoping to avoid harm, Mr. Long even offered to write Deck a check. Later, in referring to this offer during his con-fession to police, Deck said, AThat=s just how nice he was@ (Tr. 443; 1st Tr. 765).

Deck then ordered the Longs to get on the bed and lie on their stomachs with their faces to the side. Deck stood at the foot of the Longs= bed for ten minutes deciding what to do with them. Deck was convinced that the Longs had recognized him (Tr. 442). He said later that he thought, AIf I leave >em, I=m fucked. If I shoot >em, I=m fucked@ (Tr. 443; 1st Tr. 766). As he stood there, the Longs begged him to take anything he wanted, saying to him, Ajust don=t hurt us.@

Deck=s sister, who had been watching at the front door, came down the hallway, told Deck that it was time to leave, and then ran out to the car.

Deck placed the gun on James Long=s head and shot him twice. Deck then either reached across or walked around the bed, put the gun on Zelma Long=s head, and shot her twice. The Longs died from the gunshots.

Deck grabbed the money and left. On the drive back, Deck=s sister complained of stomach pains and Deck dropped her off at a hospital. He gave his sister about $250 of the Longs= money, kept the quarters in the decorative cannister, and drove to his sister=s apartment in St. Louis County.

Arrest and Initial Trial. St. Louis County Police arrested Deck in the parking lot of his sister=s apartment complex. Inside the car, police found the murder weapon and the decorative tin filled with quarters. Deck was also wearing a Afanny pack@ containing $242 in cash.

Deck was read his rights and agreed to speak with detectives from the Jefferson County Sheriff=s Department (Tr. 429-30; 1st Tr. 743-745). At first, Deck said that he and his sister had been in Jefferson County looking for cars to buy (Tr. 431; 1st Tr. 748). Later, Deck changed his story and said that he and his sister had followed his mother=s boyfriend to DeSoto, that they parked on a back road, and that fifteen minutes later the boyfriend returned and handed Deck the .22 caliber pistol and the canister full of coins through the car window (Tr. 432-33; 1st Tr. 752-53). After being informed that his mother=s boyfriend had an alibi, Deck

finally admitted that he committed the murders, and he made a tape-recorded confession (Tr. 435-36, 438-43; 1st Tr. 761-66, 769).

In February 1998, Deck was brought to trial before a jury in Jefferson County Circuit Court, with Judge Gary P. Kramer presiding. The jury found Deck guilty of two counts of first-degree murder, two counts of armed criminal action, and one count each of first-degree robbery and first-degree burglary. After the penalty phase, the jury returned a verdict finding the existence of all the statutory aggravating circumstances presented to it and declaring that Deck be given a death sen-tence for each murder. The Missouri Supreme Court affirmed Deck=s convictions and sentences on direct appeal (J.A. 6-39).

Throughout his first trial, and without objection, Deck was allowed to wear civilian clothes, but was restrained by a leg brace (J.A. 5).

Post-Conviction Proceedings. Deck filed a motion for post-conviction relief, alleging that he received ineffective assistance of counsel. Judge Kramer heard evidence that Deck had been on a suicide watch before his first trial and had to be evaluated concerning his competency to stand trial (J.A. 3-4; PCR Tr. 153-54).[1] The psychologist=s

[1] Both parties have requested permission to lodge with this Court relevant testimony and evidence admitted during the hearing on Deck=s motion for post-conviction relief and the Missouri Supreme Court=s opinion in the appeal involving that motion. The transcript from the hearing is referred to as APCR Tr.,@ and the deposition testimony admitted into evidence is referred to by the deponent=s last name.

competency report mentioned allegations by jail personnel, which Deck denied, that Deck had Aattempted to escape by loosening window caulking and attempted to injure himself by hitting his head against the cell wall@ (Surratt Dep., Ex. 66). Other evidence suggested that Deck had been raped in prison and that he had a Alow frustration level@ and had Aacted out@ while incarcerated (PCR Tr. 153-54, 222-23, 224; Cummings Dep. 85-88; Tesreau Dep. 17-18). Judge Kramer overruled Deck=s motion.

On appeal, the Missouri Supreme Court affirmed the denial of post-conviction relief as to the guilt phase, but it reversed the denial of relief as to the penalty phase. *See Deck v. State*, 68 S.W.3d 418, 422 (Mo. 2002). Holding that Deck received ineffective assistance of counsel during the penalty phase because counsel failed to object to faulty jury instruc-tions, the court set aside Deck=s death sentences and remanded the case for a retrial of the penalty phase. *Id.* at 429-31.

Penalty-Phase Retrial. Before the penalty-phase retrial, Judge Kramer ordered that Deck be allowed Ato dress in court clothes for trial@ (J.A. 40). But Judge Kramer denied Deck=s motion to appear at trial free from restraints (J.A. 41-56).

After Judge Kramer conducted individualized voir dire in chambers over hardship and publicity issues, Deck=s counsel returned to the restraint issue, noting, ACarman is actually in leg-irons and hand chains and the defense objects to that. We think that it is undulyBit prejudices him towards the jury and makes him look dangerous@ (J.A. 57-58; Tr. 74). The trial court overruled the objection: AHe has been

convicted and will re-main in legirons and a belly chain@ (J.A. 58; Tr. 74).

The matter then proceeded before the juryBbut the record as to whether, when, and what the jury could see of Deck=s restraints is minimal.

During voir dire, Deck=s counsel directed the potential jurors= attention to Deck=s restraints. He asked the venire panel whether anyone would be affected by them:

> The other thing about [Deck] that you all either do or will know is that there=s chains on him. I guess that=s what happens when you get con-victed, but I don=t want anybody to think anything or to make it more likely that you=re gonna render one sentence or another. Is that gonna affect anyone in any way? Let me ask it this way. Everybody over here, can you guaran-tee me the fact thatBI mean he=s shackled, his hands, it=s not gonna affect you one way or another in the ultimate verdict? Can I see a sign of hands that everybody would agree that it=s not gonna affect them whatsoever, yes, it=s not
>
> going to? Over here, would everybody agree? Is there anyone that it would affect?

(J.A. 58). No one indicated that the restraints would have any effect.

At the conclusion of voir dire, Deck=s counsel renewed

his objection to the restraints, this time in a motion to strike the entire venire panel because Deck had been Ashackled@ (J.A. 58). Counsel argued that the restraints made the panel Athink that [Deck] is . . . violent today@ and might Ado something in the courtroom or do something to them and it puts fear in their minds, which is not appropriate for someone who=s gonna [sic] decide the penalty in this case@ (J.A. 58-59). In overruling the objection, Judge Kramer stated that Deck Abeing shackled takes any fear out of their minds@ (J.A. 59).

Nowhere else in the record is there mention of restraints; Deck=s additional description of the restraints and their visibility consists of untested, post hoc allegations. There was opportunity during the proceeding to mention the restraints, if they were indeed noticeable. For example, during the penalty phase, numerous witnesses identified Deck in front of the jury. They could have referred to him as the person who was shackled. Instead, they all used descriptive phrases relating largely to Deck=s clothing: Deck was Aseated at this table over here with the green shirt on@ (Tr. 303); Asitting at the Defendant=s table in the green shirt with the black stripes@ (Tr. 308); Asitting at the defense table in the green pullover shirt@ (Tr. 347); and Asitting over there in kind of a brown striped shirt@ (Tr. 429).

The only on-the-record reason Judge Kramer gave for restraining Deck during the penalty phase retrial was the fact that Deck had already been convicted (J.A. 58). But he had other information; not only had he presided over Deck=s first trial, he had also conducted the post-conviction hearing during which evidence was taken and witnesses were heard. As noted above, Judge Kramer heard evidence of Deck=s

mental con-dition, dangerousness, and potential for escape.

During the penalty-phase retrial, the State presented several witnesses and exhibits from the guilt phase of Deck=s first trial to acquaint the new jury with the nature of the murders of which Deck had been convicted. The State also presented evidence of Deck=s numerous burglary and stealing convictions from 1985 until 1993 (J.A. 59-62), including a 1985 conviction for aiding an escape in which Deck procured a saw blade and assisted in cutting jail bars to help two prisoners escape (J.A. 61, 63).

During closing argument, the prosecutor focused nearly exclusively on the nature of the murders Deck committed (Tr. 545-53, 559-63). Deck=s counsel argued, on the other hand, that the jury should not impose a death sentence because of Deck=s difficult childhood and the fact that a sentence of life without the possibility of parole meant that Deck would never get out of prison. He told the jury: AA life verdict mean[s] he=d never walk the street. He will go to prison. He will never be free@ (Tr. 555), and, A[h]e will be in prison for the rest of his life@ (Tr. 558).

The jury found all six statutory aggravating circumstances presented to it on both counts of first-degree murder: (1) that the murders were each committed while Deck was engaged in the commission of another unlawful homicide; (2) that Deck murdered each victim for the purpose of receiving money or any other thing of monetary value; (3) that both murders involved depravity of mind; (4) that each murder was committed for the purpose of avoiding a lawful arrest; (5) that each murder was committed while Deck was engaged in the perpetration of

burglary; and (6) that each murder was committed while Deck was engaged in the perpetration of robbery (J.A. 65-67).[2] The jury returned a verdict declaring that Deck should receive two death sentences (J.A. 2; L.F. 231, 234).

Post-trial motions and sentencing. Before sentencing, Deck filed a motion for a sentence of life without probation or parole or for a new penalty phase trial (J.A. 68-69). There, Deck began to add allegations to the minimal record regarding restraints. Deck urged that his pre-trial motion to appear free of restraints should have been granted Afor the reasons stated in the motion and on the record at the time of the hearing on the matter@ (J.A. 68). Deck then alleged that during an off-the-record pretrial discussion, Judge Kramer indicated that Deck could wear his own clothes to court, but that he would be restrained by a leg brace under those clothes for security purposes (J.A. 68). According to Deck, the judge changed this ruling on the morning of trial when he ordered Deck to be Ashackled and handcuffed (with a belly chain) throughout the entirety of the trial@ (J.A. 68-69). Deck=s motion made no specific mention of Aleg irons.@ Deck=s allegations continued, adding description that has never been verified or tested:

> During the trial there were numerous times when the jury saw Mr. Deck paraded in and out of the courtroom or standing when the judge and jury entered or left the room with his chains, handcuffs and shackles clearly within view of both the voir dire panels and the

[2] The jury in Deck=s first trial found identical statutory aggravating circumstances (J.A. 37).

actual jury who decided his fate.

(J.A. 69).

Later, at the sentencing hearing, Deck=s counsel noted that a motion for a life sentence or new trial had been filed and indicated that Deck would stand on the motion without offering argument or evidence (Tr. 565). After Judge Kramer overruled the motion, Deck read a statement in open court professing his innocence (Tr. 565-68). Judge Kramer then imposed the two death sentences recommended by the jury (J.A. 2; Tr. 565, 570-71; L.F. 257-58).

Appeal from the Penalty-Phase Retrial. On appeal, the Missouri Supreme Court affirmed Deck=s death sentences (J.A. 70-84). In resolving Deck=s claim that his constitutional rights were violated by the restraints imposed during the retrial, the court noted that a trial court=s decision Ato impose security by use of restraints is an individual and fact-specific inquiry@ (J.A. 72). In holding that Deck had failed to show that his constitu-tional rights had been violated, the court found that Deck had Amade no record of the extent of the jury=s awareness of the restraints throughout the penalty phase,@ that Deck had not claimed Athat the restraints impeded him from participating in the proceedings,@ and that Deck was a Arepeat offender@ and that the evidence showed that Ahe killed his two victims to avoid being returned to custody@ (J.A. 72-73).

In addition, the court found that Deck offered Anothing more than speculation@ that the outcome of his trial had been prejudiced (J.A. 73). The court rejected the notion that simply being viewed in shackles is, by itself, proof

of prejudice, and pointed out that Deck=s failure to prove prejudice was reinforced by the venire panel=s response during voir dire that seeing Deck in restraints would not affect their decision (J.A. 73).

SUMMARY OF ARGUMENT

Restraining a defendant during trial may be required in certain circumstances. Those circumstances include factors relating to the defendant and those relating to the courtroom and the need to maintain the safety of the trial participants, court personnel, and spectators. This Court=s decisions 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), confirm that security measures may be necessary and that the question of what measures to use when must largely be left to the trial judge. But they also suggest that the use of visible security measures, including visible restraints, during a guilt-phase trial can adversely impact the presumption of innocence.

This Court=s precedents do not, however, extend that presumption to the context of a penalty phase, particularly a penalty-phase retrial. To suggest that Deck=s jurors were or should have been presuming him to be innocent ignores not only precedent flatly to the contrary, but also the fact that Deck=s jury knew that they were there only to decide his sentence, and that his guilt had already been determined. The presumption of innocence necessarily falls out of any consider-ation of the use of restraints in penalty phase.

Of course, the penalty phase raises new concerns, not present in guilt phase, about reliability of sentencing. This Court=s Eighth Amendment and Due Process Clause cases establish that reliability can be compromised when the sentencer is misled in some fashion, either affirmatively or by omission. In such circumstances, the defendant in a capital sentencing proceeding has the right to present

evidence, argument, or instruction to rebut any incorrect or incomplete evidence that the State has presented with evidence of his own, consistent with the general rule of capital sentencing pro-ceedings that the defendant be permitted to present any relevant, accurate evidence in mitigation that might provide the jury with a reason to give a sentence less than death.

But, in Deck=s case, restraints were not misleading. Deck is a twice-convicted murderer; by definition, he is dangerous. Further, penalty-phase restraints convey at most a mixed message: they are as likely to suggest that a defendant is being and can continue to be restrained as they are to suggest that incarceration could be insufficient. If a restrained defendant, like Deck, can behave appropriately in court while restrained, jurors may decide that the defendant will do well in, and benefit from, a similarly structured prison environment. To the extent that restraints may suggest future dangerousness to other inmates, that suggestion can hardly be countenanced, particularly on Deck=s facts, because the State never argued or injected the issue of future dangerousness. In fact, in his argu-ment, Deck all but admitted his own dangerousness in an attempt to convince jurors that his dangerousness could be contained through lifetime incarceration.

The record in Deck=s case is simply too thin to support the conclusion that his sentencing was unreliable or otherwise improper. Deck urges unreliability based upon mere allegations in a motion for new trial that have not been tested for truth. Likewise, as to Deck=s theory that his restraints tainted his appearance before the jury, Deck must rely on statements of an advocate masquerading as facts,

so the suggestion of taint or manipulation of his demeanor collapses as well. This record, consisting of conclusions that have no factual support and defense arguments that highlight the ostensible problem, cannot support overturning the sentences of death. In fact, the dearth of specifics on the record demonstrates the need for a rule that imposes at least a minimal burden on defendants: a burden to make a record as to what the jury can perceive.

ARGUMENT

I. Courtroom security issues, including decisions regarding restraints, are and must be discretionary.

Courtroom security, in any given courthouse and on any given day in America, depends on many factors. The defen-dant=s history, the type of crime or crimes involved, the physical layout and features of the courtroom, and the number of and competing demands upon court security personnel can all figure prominently in a particular judge=s decisions about how best to maintain safety and order. As a result, A[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations.@ *Illinois v. Allen*, 397 U.S. at 343.

Of course, concerns about the security of courtroom employees, witnesses, and spectators can clash with a defen-dant=s desire to appear free from restraints. But a defendant=s quest to avoid being identified as such cannot always be indulged. While defendants are entitled to A>have . . . guilt or innocence determined solely on the basis of the evidence introduced at trial,=@ that Adoes not mean . . . that every practice tending to single out the accused from everyone else in the courtroom must be struck down.@ *Holbrook v. Flynn*, 475 U.S. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)); *see also Kelly v. Oregon*, 273 U.S. 589, 591 (1927) (it Ais a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary . . . must, in order to secure a fair trial, be entirely freed from custody@). Indeed, this Court has recognized that jurors are more savvy than that:

> Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant=s due proc-ess rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence.

Holbrook v. Flynn, 475 U.S. at 567; *see also Estelle v. Williams*, 425 U.S. 501, 503, 512 (1976) (relying, in part, on the presumption of innocence in concluding that a state cannot constitutionally compel an accused to stand trial before a jury when dressed in identifiable prison clothes).

II. Guilt-phase concerns that may caution against the use of restraints, even when used to preserve court-room security, do not apply in the penalty phase.

A. Courts have split over whether and when restraints can be used in the penalty phase of a capital trial.

Against this legal backdrop, courts have reached differ-ing results when it comes to restraining a convicted felon in the penalty phase of a capital proceeding. Some, applying the teachings of this Court literally, have held that shackling is inherently prejudicial and should not be used B in

guilt or penalty phase B absent a compelling state interest and consider-ation of less restrictive alternatives. *See, e.g., Elledge v. Dugger,* 823 F.2d 1439, 1450-52 (11th Cir. 1987) (relying on *Holbrook v. Flynn*, 475 U.S. at 568), *opinion withdrawn in part*, 833 F.3d 250, *cert. denied*, 485 U.S. 1014 (1988).[3] Others have taken the position that shackling a convicted defendant at the outset of his penalty phase merely confirms what jurors already know B that the defendant has been convicted. *See, e.g., Marquez v. Collins,* 11 F.3d 1241, 1244 (5th Cir. 1994), *cert. denied* 513 U.S. 881 (1994) (highlighting the need for trial court discretion and rejecting any Aleast means@ analysis when considering, on federal habeas review, shackling in the penalty phase).

This split presents more than a theoretical exercise. Courtroom security is a real concern when considering the fate of twice-convicted murderers like Deck; setting too strict a standard will Atie the hands of the [trial court] judge, rather than those of the defendant . . . [and] set the scene for . . . tragedy.@ *Lovell v. State,* 702 A.2d 261, 289 (Md. 1997) (Wilner, J., concurring).

B. The presumption of innocence does not apply in the penalty phase of a capital trial.

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[3] The Eleventh Circuit in *Elledge* acknowledged that *Holbrook* did not involve a penalty phase, but reasoned that this Court was surely aware that capital cases were bifurcated and that *Holbrook* Ameans what it says.@ *Elledge v. Dugger,* 823 F.2d at 1451 n.22. Judge Edmondson, concurring in part and dissenting in part, took a different view, and urged that A[a] case is only authority for what it actually decides.@ *Id.*, 823 F.2d at 1454 n.3.

Courts that permit restraint of a convicted felon during the penalty phase of a capital trial have the better argument. That is because this Court has unambiguously decreed that once a defendant is convicted, his world B and, by extension, the world inside the courtroom B Achanges dramatically.@ *Marti-nez v. Court of Appeal*, 528 U.S. 152, 162 (2000). No longer is the defendant the accused, or innocent; rather A[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of

innocence disappears.@ *Herrera v. Collins*, 506 U.S. 390, 399 (1993).[4]

Deck lost the presumption of innocence when he was found guilty of two counts of murder by his first jury in 1998 (J.A. 1). Deck appealed those convictions, but they were affirmed on direct appeal. *State v. Deck,* 994 S.W.2d 527 (Mo. 1999), *cert. denied,* 528 U.S. 1009 (1999); (J.A. 6-39). Notably, Deck raised no issue as to the sufficiency of the evidence to support those convictions. *Id.* Therefore, Deck Ain the eyes of the law . . . does not come before the Court as one who is >innocent,= but, on the contrary, as one who has

[4] *See also Portuondo v. Agard,* 529 U.S. 61, 76 (2000) (Stevens, J., concurring in the judgment) (the presumption of innocence survives until a guilty verdict is returned); *Ramdass v. Angelone*, 530 U.S. 156, 207 (2000) (Stevens, J., dissenting) (AA guilty verdict, however, means that the defendant=s presumption of innocence B with all of its attendant trial safeguards B has been overcome@); *Schlup v. Delo*, 513 U.S. 298, 326 n.42 (1995) (a defendant who has Abeen convicted by a jury of a capital offense . . . no longer has the benefit of the presumption of innocence@); *Delo v. Lashley*, 507 U.S. 272, 278 (1993) (AOnce the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears@); *see also Duckett v. Godinez,* 67 F.3d 734, 747 (9th Cir. 1995) (AThe presumption of innocence, however, no longer applies in the penalty phase of a bifurcated trial@); *Elledge v. Dugger,* 823 F.2d at 1450 (convicted defendant Ano longer entitled to a presumption of innocence@). Several state supreme courts, in rejecting defendants= claims that their constitutional rights were violated by penalty phase restraints, have reached the same conclusion. *See State v. Young*, 853 P.2d 327, 350 (Utah 1993); *Duckett v. State*, 752 P.2d 752, 755 (Nev. 1988); *Bowers v. State*, 507 A.2d 1072, 1081 (Md. 1986), *cert. denied*, 479 U.S. 890 (1986).

been convicted by due process of law of two brutal murders.@ *Herrera v. Collins*, 506 U.S. at 399-400.

When Deck came before the jury in the penalty-phase retrial, his two murder convictions were neither a secret nor were they in dispute. The jury was aware of its role solely as sentencer (Tr. 8, 106, 111, 183-85, 188, 201, 202, 215-16, 222, 230-32, 241, 244, 246, 248, 254, 273, 274).[5] The presumption of innocence did not and could not apply. Minus the pre-sumption of innocence, the restraints equation changes substantially. *See Elledge v. Dugger,* 823 F.2d at 1453-54 (Edmondson, J., concurring in part and dissenting in part) (noting that A[t]he primary constitutional concern at the guilt-innocence phase B fear that the restraint will interfere with the defendant=s presumption of innocence@ is not present in the penalty phase, and that Athe single major analytic thrust of all the guilt-innocence phase cases is to determine whether the defendant=s right to a presumption of innocence was infringed by the security measure adopted by the trial court@ (footnotes omitted)).

Deck, however, tries to resurrect a presumption that the jury knew to be untrue in his case, *i.e.*, that he was innocent of murder, by reference and analogy to this Court=s double jeopardy jurisprudence (Petitioner=s Brief APet. Br.@ at 23-28). Indeed, Deck tries to resurrect the presumption of

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[5] Of course, Deck also knew that he had already been convicted of two murders, among other crimes (J.A. 59-62). Quintessentially, Deck and others like him know that whatever their behavior, it will not extend what is already, at minimum, a sentence of life in prison without parole.

innocence, even while conceding that it is Aobviously not at issue in penalty phase@ (Petition for Writ of Certiorari at 6). Having disavowed the presumption of innocence in his petition for writ of certiorari, Deck should not be permitted to rely on it in his brief.

III. Concerns regarding the impact of restraints on the reliability of capital sentencing do not justify summarily reversing the verdict in this penalty-phase retrial.

A. The penalty phase of a capital trial raises concerns, not present in the guilt phase, about reliability of sentencing.

As the presumption of innocence necessarily falls out of any consideration of penalty-phase restraints, the penalty phase raises concerns, not present in guilt phase, about reliability in sentencing. Because Adeath is qualitatively different,@ there must be a Agreater degree of reliability when the sentence of death is imposed.@ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

To prevent arbitrary imposition of capital punishment and insure reliable sentencing, therefore, the Eighth Amendment requires the States Ato perform two somewhat contradictory tasks@ before imposing a sentence of death. *Romano v. Oklahoma*, 512 U.S. 1, 6 (1994) (A*Romano*@). AFirst, States must properly establish a threshold below which the penalty cannot be imposed.@ *Id.* To satisfy this require-ment, States Amust establish rational criteria that narrow the decisionmaker=s judgment as to whether the

circumstances of a particular defendant=s case meet the threshold.@ *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987).

But after this winnowing process is satisfied, the Eighth Amendment precludes the States from Alimit[ing] the sen-tencer=s consideration of any relevant circumstance that could cause it to decline to impose the penalty.@ *Id.* at 306. ATo this end, >States cannot limit the sentencer=s consideration of any relevant circumstance that could cause it to decline to impose=@ a death sentence, A>but must allow it to consider any relevant information offered by the defendant.=@ *Romano*, 512 U.S. at 7 (quoting *McCleskey v. Kemp*, 481 U.S. at 306); *see also Lockett v. Ohio*, 438 U.S. at 604 (the Eighth Amendment requires that Athe sentencer . . . not be precluded from con-sidering, *as a mitigating factor*, any aspect of a defendant=s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death@ (emphasis in original)); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (AJust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.@ (emphasis in original)). This Court=s Eighth Amendment decisions on capital sentencing thus seek to insure that a State=s sentencing procedures Asuitably direct and limit the decisionmaker=s discretion >so as to minimize the risk of wholly arbitrary and capricious action.=@ *Romano*, 512 U.S. at 7 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976)).

But A[w]ithin these constitutional limits, >the States enjoy traditional latitude to prescribe the method by which those who commit murder shall be punished.=@ *Id.* at 7

(quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990)). AThe States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs.@ *Payne v. Tennessee*, 501 U.S. 808, 824-25 (1991) (holding that introduction of victim-impact evidence during the penalty phase of a capital proceeding does not offend the Eighth Amend-ment); *see also Romano*, 512 U.S. at 10-12 (extending this principle to evidentiary rules in capital sentencing proceedings). This latitude must also extend to allowing the States to adopt security measures to insure the orderly conduct of criminal proceedings, including the discretion to restrain a convicted murderer during a penalty-phase retrial. The employment of such security measures neither makes capital sentencing decisions unreliable, nor precludes a defendant from offering mitigating evidence.

In 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. For example, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the prosecutor in a capital murder case argued to the sentencing jury that its verdict as to punishment was not Afinal,@ but, instead, was reviewable by the appellate courts. *Id.* at 325-26. This Court held that it was impermissible under the Eighth Amendment Ato rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant=s death rests elsewhere.@ *Id.* at 328-29. A[T]he prosecutor=s remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury=s sense

of responsibility.@ *Id.* at 342 (O=Connor, J., concurring).[6]

Caldwell involved affirmatively misleading statements during argument that affected the sentence=s reliability. But incomplete information resulting from a defendant=s inability to present accurate mitigation evidence also raises

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[6] AAs Justice O=Connor supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.@ *Romano*, 512 U.S. at 9. *Caldwell* has since been read as Arelevant only to certain types of comments B those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.@ *Id.* (quoting *Darden v. Wainwright*, 477 U.S. 168, 184 n. 15 (1986)).

reliability concerns. Thus, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court found an Eighth Amendment violation when a capital defendant was precluded from presenting mitigating evidence concerning his good behavior while in jail awaiting trial in a case in which the defendant=s future dangerousness was at issue. But in *Romano*, this Court found no Eighth Amendment violation when the defendant=s conviction and death sentence in a separate case were admitted into evidence during the penalty phase of his capital murder trial because the evidence was Aaccurate@ when the penalty phase was held. 512 U.S. at 14-15 (O=Connor, J., concurring). *See also California v. Ramos*, 463 U.S. 992 (1983) (holding that the Eighth Amendment is not violated by a state law requiring an instruction accurately informing the sentencing jury that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole).

Like its Eighth Amendment cases, this Court=s cases construing the Fourteenth Amendment=s Due Process Clause in the context of capital sentencing focus on ensuring accuracy by perserving defendant=s ability to meet the evidence relied on by the State and to introduce accurate evidence of his own.[7]

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[7] Claims under the Due Process Clause, which applies to the penalty phase of capital proceedings, *Romano*, 512 U.S. at 12, are analyzed more narrowly than claims involving the deprivation of specific constitutional rights. *See Medina v. California*, 505 U.S. 437, 443 (1992). Consequently, in evaluating a Due Process Clause claim, the Arelevant question . . . is whether [the alleged error] so infected the sentencing proceeding with unfairness as to render the jury=s imposition of the death penalty a denial of due

process.@ *Romano*, 512 U.S. at 12. And, the specific alleged error is not viewed in Aartificial isolation,@ but is considered in the context of the entire proceeding. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). *See also Darden v. Wainwright*, 477 U.S. at 180-81 (prosecutor=s closing argument, though widely condemned and Aundoubtedly@ improper, did not A>so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process=@) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

For example, in *Gardner v. Florida*, 430 U.S. 349 (1977), this Court held that a defendant=s due process rights were violated when the judge who sentenced him to death relied on confidential information contained in a pre-sentence report not made available to the defendant.[8] *Id.* at 362. The defen-dant=s death sentence in *Gardner* was reversed, A[b]ecause 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.@ *California v. Ramos*, 463 U.S. at 1004 (emphasis supplied). Similarly, the Court has insisted most notably in *Simmons v. South Carolina*, 512 U.S. 154 (1994) (A*Simmons*@), that a capital defendant be permitted to inform the jury of accurate information concerning his parole ineligibility when future dangerousness is at issue. *See* 512 U.S. at 178 (O=Connor, concurring in the judgment) (holding that a defendant, who was sentenced to death and whose future dangerousness was made an issue by the State, was denied due process when the trial court prevented him from presenting evidence or argument during the penalty phase that he was ineligible for parole, and the only sentencing alternatives available to the jury were death or life imprisonment without parole).[9] *See also Shafer v.*

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[8] Justice White, who supplied the fifth vote reversing the conviction, concurred in the judgment, but expressed his opinion that the decision in *Gardner* was controlled by the Eighth Amendment. *Id.* at 362-64.

[9] Justice O=Connor wrote the Aprevailing opinion@ that controls. *Kelly v. South Carolina*, 534 U.S. 246, 258 (2001) (Rehnquist, J., dissenting).

South Carolina, 532 U.S. 36, 54 (2001) (applying the *Simmons* rule and rejecting the State=s claim that a third sentencing alternative was available to the jury); *Kelly v. South Carolina*, 534 U.S. at 252-255 (again applying the *Simmons* rule and rejecting the State=s claim that the defendant=s future dangerousness was not at issue under the facts in that case); *compare Ramdass v. Angelone*, 530 U.S. at 181 (O=Connor, concurring in the judgment) (holding that the *Simmons* rule did not apply because an instruction on parole ineligibility would have been inaccurate because the defendant was not actually parole ineligible at the time of sentencing).

B. The use of restraints in Deck=s penalty-phase retrial did not, by itself, render the death sentences unreliable because the jury was not misled and Deck was not precluded from presenting mitigating evidence relating to restraints or any message those restraints might have conveyed.

In the context of capital sentencing proceedings, then a constitutional violation occurs when the sentencer is prevented from receiving relevant, accurate information regarding sen-tencing. Put another way, constitutional concerns arise where the State=s procedures have caused the sentencing entity to be misinformed or misled B either because the defendant was barred from telling some part of his story, or because the state, by word or deed, sent a misleading message.

The restraints applied here violated neither the Eighth Amendment nor the Due Process Clause because the

sentencer was not misled and Deck was not precluded from presenting any relevant mitigating evidence relating to restraints or any message those restraints might have conveyed. Here, Deck claims that the use of restraints implicated concerns with reliability of sentencing B *i.e.*, that the jury was misled. But his claim is based on the simple fact that he was restrained, and that fact alone does not mislead.

To the contrary, restraints in penalty phase simply reflect what the jurors already know: that the defendant has been convicted. *Elledge v. Dugger*, 823 F.2d at 1454 (Edmond-son, J., concurring in part and dissenting in part) (in penalty phase, Athe shackles are expected@). That a person convicted of two vicious murders would be physically restrained in some way could hardly come as a shock. Indeed jurors might be far more concerned to see a twice-convicted murderer no more restrained than they, a position the trial court took in this case (J.A. 58-59).[10] Deck had been convicted of two counts of murder and the jury knew this; this fact alone, therefore, made Deck a person who, indisputably, was dangerous.

Likewise, any restraint of his person would not have been surprising or misleading to the jury given that the penalty-phase retrial occurred more than five years after the first trial (J.A. 1). Whatever the jurors may or may not have

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[10] *See Lovell v. State,* 702 A.2d at 288 (Wilner, J. concurring) (where defendant was convicted of killing a police officer, Athe average juror would be at least incredulous, if not truly fearful, to see such a person sitting just a few feet away without some form of visible restraint@).

suspected about the first trial, or the appellate process that netted Deck a second penalty phase, it would be the naive juror indeed who thought that Deck was wandering the streets in the years intervening. Though not explicitly stated, the jurors must have known that Deck had been in prison, and for a substantial period of time. Any restraint at the second penalty phase, therefore, was nothing more than a predictable manifestation of what was already fairly obvious.

Restraints, moreover, do not mislead the jury by leading inevitably and exclusively to the conclusion that the defendant is dangerous. Although their use may confirm that a twice-convicted murderer has already been B and ought to be B separated from society and might incrementally heighten the jurors= extant awareness that Deck, a convicted murderer, was dangerous, they also convey a message of control. That is, jurors may assume that if a defendant, like Deck, is being successfully controlled in restraints, then he would likely do well in a structured, restraining environment like prison.

Deck, however, seizes on *future* dangerousness, arguing that jurors consider it, and he complains that his restraints carried the misleading message that he had already been adjudicated to be dangerous (Pet. Br. at 29-30).[11] But the prosecutor did not argue future

[11] Although the Missouri Supreme Court has noted that evidence of future dangerousness may be admitted during the penalty phase of a capital case, *State v. Chambers*, 891 S.W.2d 93, 107 (Mo. 1994), Missouri statutes, unlike those in some other states, do not make future dangerousness an issue that must be considered by the jury during its penalty phase deliberations. *See*

dangerousness. To the contrary, the prosecutor=s argument focused on the circumstances surrounding the murders Deck had committed and framed the request for a death sentence

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Mo. Rev. Stat. ' 565.032 (2000). The closest Missouri comes to a statutory aggravating circumstance that potentially touches on the issue of future dangerousness is one asking the jury whether the Aoffense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions.@ Section 565.032.2(1). This latter circumstance was not a statutory aggravating circumstance in Deck=s case (J.A. 65-67).

on those factors alone (Tr. 545-53, 559-63). Nothing in the prosecutor=s closing argument suggested that Deck was a future danger or that the jury should consider future dangerousness in imposing its sentence.

In fact, while the State did not discuss future dangerousness, defense counsel did, and pleaded for Deck=s life on the basis that, though dangerous, Deck could be controlled

and thwarted from harming the public by incarcerating him for life:

> !AYou know what, life without parole, life with never be eligible for parole [sic], he certainly deserves that. He should never be on the streets@ (Tr. 553).
>
> !AA life verdict mean [sic] he=ll never walk the street. He will go to prison. He will never be free@ (Tr. 555).
>
> !AYou know that under that good structure [in a particular foster home placement] that he could survive and actually the penitentiary is the ultimate structured environment and the rest of his life he=s never eligible for parole@ (Tr. 555).
>
> !AOne of the things that we do under our law, there are times when it=s appropriate to actually kill another human being out of self-defense and in this case you can take care of that. He will be in prison for the rest of his life@ (Tr. 558).

Given that the State did not argue future dangerousness, while the defense all but admitted it, Deck cannot bring himself within the rule of *Simmons* or show that he was somehow prevented from presenting meaningful evidence or arguments.[12] This is so even though A[e]vidence

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[12] Indeed, defense counsel=s argument is akin to the prosecutor=s argument in *Simmons* that the jury had to figure out Awhat to do with [petitioner] now that he is in our midst@ and that a Averdict for death would be >a response of society to someone who is a threat. Your verdict will be an act of self-defense.=@

of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future@ and Aits relevance to that point does not disappear merely because it might support other inferences or be described in other terms.@ *Kelly v. South Carolina*, 534 U.S. at 254 (footnote omitted). While Aevidence of violent behavior in prison can raise a strong implication of >generalized . . . future dangerousness,=@ *Id.* at 253 (quoting *Simmons*, 512 U.S. at 171), the shackling of a defendant in the penalty phase seems, at best, an implication once removed.

Even assuming that Deck=s restraints raised implications of future dangerousness not already highlighted by defense counsel in closing argument, the implications that Deck is left with, if any, are those relating, however tenuously, to any danger he might pose to other prisoners. And, while this is certainly a valid consideration for juries, standing alone it seems unlikely that this additional veneer would transmogrify what would otherwise have been a life sentence into a unanimous decision to give death. *See State v. Finch*, 975 P.2d 967, 1014 (Wash. 1999), *cert denied*, 528 U.S. 922 (1999) (Talmadge, J., dissenting) (arguing that the theory that shackles tip the balance and cause juries to give death out of Asolicitude for the safety of imprisoned criminals@ required Asubstantial suspension of disbelief@); *see also Hall v. Luebbers*, 296 F.3d 685, 699 (8th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003) (finding unpersuasive the suggestion that penalty-phase shackling Awould necessarily lead jurors to conclude that they must impose a death sentence@ because the shackles could be seen as a reasonable security measure since the jurors had

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Simmons, 512 U.S. at 157 (citations omitted).

found defendant guilty of first-degree murder); *Romano*, 512 U.S. 13-14 (holding that it was Aimpossible to know,@ and an Aexercise in speculation@ to determine, how evidence of the defendant=s prior death sentence influenced the jury=s verdict and that it was Aequally plausible@ that this evidence made the jurors either more or less inclined to impose a sentence of death, either conclusion resting Aupon one=s intuition@).

Whatever the implications left from shackling, Deck argues repeatedly that those implications Awere not proven by evidence or subject to confrontation by the defense@ (Pet. Br. at 13); raised Aprejudices or suggestions that the defendant is not allowed to rebut@ (Pet. Br. at 28); and were, variously, Aunproven,@ Aunrebuttable,@ and Apotentially false@ (Pet. Br. at 29); *see also* Pet. Br. at 37 (Aas in *Simmons*, the defendant does not have the chance to refute . . . information@ about shackling); Pet. Br. at 37 (discussing *Gardner v. Florida*, 430 U.S. 349 (1997)).

But, again, the question here is whether sentencing was reliable, and reliability is judged, in part, on whether Deck was able to present evidence to rebut evidence and inferences in his penalty-phase retrial. Deck was never denied an opportunity to rebut anything. He does not cite to any ruling denying him the opportunity to rebut the supposed specter of dangerousness that his restraints conjured, or refusing to provide instruction to the jury that would disabuse them of any false or unfair notions stemming from restraints. Nor does Deck point to any evidence that might tend to show that he would not be a danger in the future. Such evidence was not forthcoming despite the wide latitude afforded. Deck=s claim that the

implications raised by his restraints were Aunrebuttable,@ therefore, may prove too much, as he was either unable[13] or unwilling[14] to garner evidence that might refute any residual hint of dangerousness suggested by the restraints beyond that suggested by his killing of two innocent human beings.

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[13] It is certainly possible that there was no evidence that Deck behaved or adjusted in prison; in jail awaiting his first trial, Deck Aacted out quite a bit@ (PCR Tr. 224). Deck experienced these kinds of difficulties due to what his attorney described as a Alow frustration level@ (PCR Tr. 223-24).

[14] AUnwilling@ seems to be a real possibility, given Deck=s conspiracy theories and claims of innocence (Tr. 566-68).

C. To the extent that Deck might have been put to the choice of whether to offer evidence that might rebut any allegedly misleading inferences created by restraints, any such choice was not of a constitutional dimension.

At root, Deck claims that he was barred from addressing the allegedly misleading message sent by restraints because he was precluded from rebutting the mere suggestion of dangerousness that restraints might have raised. That really amounts to a claim that he either could not provide such rebuttal, or that he could but was unsure whether to do so and was unhappy about being put to the choice.

As to the former B that he could not provide rebuttal B again, if Deck had relevant evidence in mitigation of punishment that could provide the jury a basis for a sentence less than death, or, more particularly, evidence that would blunt any Anegative conclusions@ (Pet. Br. at 37) flowing from restraints, he need only have brought it to court. But he did not. Nor did he make a claim in the trial court that he had such evidence, but, due to the recency of the trial court=s final decision on restraints, the defense needed additional time to bring it forth.

As to the latter proposition B that perhaps Deck chose not to bring in any evidence to blunt whatever negative assumptions the jury might draw from restraints B the problem confronting Deck at trial is the same problem at issue here: shackling in penalty phase is ambiguous. Evidence of conduct problems in prison or prosecutorial argument urging jurors to mete out a death sentence lest

the defendant victimize again, carry a plain and articulable message of future dangerousness. But shackling may carry a mixed message, or no message at all.

The real issue, therefore, is not that Deck was precluded from presenting evidence in mitigation, because he certainly was not. Rather, Deck=s complaint is that he either had to leave restraints unaddressed or to confront them with evidence that could well be assailed and leave him worse off than before. So, the question then becomes, is that a choice that the Constitution protects Deck from having to make? It is not. Indeed, such choices are both common and, largely, constitutional:

> The Acriminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.@ *McGautha v. California,* 402 U.S. 183, 213 (1971) (citation and internal quotation marks omitted).

McKune v. Lile, 536 U.S. 24, 41 (2002).

In *McKune v. Lile*, the prisoner asserted that his Fifth Amendment rights were violated by requiring him to disclose his sexual offenses as part of a sex offender treatment program or not participate in the program at all, with a loss of various prison privileges as the result. *Id.* at 30. Deck, on the other hand, makes the bare claim that A[t]he defendant

is forced to choose which of two vital constitutional principles he will forego@ (Pet. Br. at 36), though he does not actually identify those constitutional principles by specific reference to the Constitution. What he does say is that he was forced to either allow the jury to Adraw negative inferences from the shackling, and thereby have the death-eligibility elements determined under a diminished standard of proof,@ or to prove that the restraints were unwarranted, Athereby . . . shift[ing] the burden of proof to him@ (Pet. Br. at 36).

Deck is wrong on both counts. As to the death-eligibility decision, under Missouri=s statutory scheme, ' 565.030.4, Mo. Rev. Stat. (2000), the jury must first find the existence of a statutory aggravating circumstance B circum-stances that, in Deck=s case, related factually to the details of the crime. Deck does not and could not seriously dispute them, and restraints had no bearing on, or relevancy to, those circumstances anyway.

As to the second and third steps of Missouri=s statute, Deck argues that they relate to the death-eligibility decision in an attempt to liken his penalty-phase retrial to determinations a jury makes in a guilt-phase proceeding (Pet. Br. at 35, relying on *State v. Whitfield*, 107 S.W.3d 253, 258-61 (Mo. 2003)). Under the Missouri statute in effect when Deck was tried, the penalty-phase jury had to consider four steps before imposing a death sentence. *See* Mo. Rev. Stat. ' 565.030.4 (2000). First, it had to find the existence of at least one statutory aggravating circumstance. Second, it had to conclude that the evidence in aggravation of punishment taken as a whole warranted a death sentence.[15] Third, it had to determine that the

[15] In 2001, the Missouri legislature removed step 2 as a

evidence in mitigation of punishment was insufficient to outweigh the evidence in aggravation. And, fourth, it must decline to use its unfettered discretion to impose a life sentence. Relying on the *State v. Whitfield*, and its interpretation of *Ring v. Arizona*, 536 U.S. 584 (2002), Deck argues that the findings under the second and third steps are Afactual@ findings.

But, the second and third steps under the Missouri scheme do not require the finding of a particular fact, but ask the jury to use its discretionary judgment in determining whether the circumstances taken as a whole warrant death and whether mitigating circumstances exist that are sufficient to outweigh the aggravating circumstances. The issue in *Ring* was limited only to whether a statutory aggravating circumstance must be found by a jury instead of a judgeBthe Court expressly stated that it was not considering any claim regarding mitigating circumstances or whether a jury must make the ultimate decision whether to impose a death sentence. *Ring*, 536 U.S. at 597 n. 4. Any doubt about the limitation of this Court=s holding in *Ring* is resolved by Justice Scalia=s concurring opinion: AWhat today=s decision says is that the jury must find the

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required separate finding. *See State v. Whitfield*, 107 S.W.2d at 259 n.5; *see also* Mo. Rev. Stat. ' 565.030 (2002).

existence of the *fact* that an aggravating factor existed.@ *Id.* at 612 (Scalia, J., concurring) (emphasis in original). Consequently, the majority in *State v. Whitfield* misinterpreted *Ring* by suggesting that *Ring* required it to find that steps two and three under Missouri=s scheme are Afactual@ determinations. *See State v. Whitfield*, 107 S.W.3d at 259-61.

In any event, whatever hint of future dangerousness stemming from restraints might have materialized, beyond the obvious dangerousness of a man with two murder convictions and convictions on a dozen or so other offenses (J.A. 59-62), it would not have changed the calculus. This is especially so because the restraints were not misleading to the jury in any way B as a twice-convicted murderer, Deck most assuredly is dangerous, and his counsel said as much in his closing argument.

As to the actual decision to impose the death penalty, where Deck claims that he would have been required to shoulder the burden of proof (Pet. Br. at 36), he misapprehends the jury=s role at this point. As opposed to guilt-phase or death- eligibility determinations, which are factual, the decision in Missouri to impose the death penalty or a life sentence is ultimately a discretionary, moral one. *State v. Whitfield*, 107 S.W.3d at 277-78 (Limbaugh, Jr., C.J., dissenting).

At the end of the day, therefore, Deck has no constitutional right to avoid strategic choices, particularly on the factually unsupportable position that the trial court somehow prevented him from making them. Restraints, entirely expected as they are once one has been found guilty of murder, did not change the death-eligibility decision here

(and, notably, two juries have found their way down that path without difficulty), and matter not when the jury=s ultimate discretionary and moral decision is at issue, permitting as it does the consideration of any relevant evidence in mitigation that the defendant might offer as a reason to give a sentence less than death.

IV. The minimal record in this case provides no basis for holding that this particular penalty-phase retrial was unconstitutionally tainted by the use of restraints.

A. Deck failed to create a record that would meet even a minimal standard for showing that his restraints were inappropriate.

The record here is bereft of any evidence that jurors noticed or cared about Deck=s restraints save for the fact that defense counsel brought the issue to their attention. Thus Deck can prevail only if the Court holds that there is a presumption against use of restraints in penalty-phase retrials B and that the presumption is so strong that once a defendant cries ARestraints!,@ the court must gather evidence to support its decision and the prosecution must bear the burden of proof to justify the court=s choice. For the reasons stated above, the precedents that apply to guilt-phase restraints cannot justify such a rule in this context.

Once a defendant has been found guilty of murder, and the only choice is between indefinite incarceration and death, there must be some burden on the defendant. 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. *See Elledge v. Dugger*, 823 F.2d at 1453 (Edmondson, J., concurring in part and dissenting in part) (noting that Athe defense did not request a hearing, nor did the defense contest the factual accuracy of the judge=s statements, request curative instructions or suggest alternative, less restrictive means of restraint@) (footnotes omitted).[16] Then an appellate court would have

[16] Deck did not do any of these things either, except for suggesting alternative, less restrictive means of restraint (J.A.

something, at least, to review.

41-56). Deck muddies the facts on the timing of that request; he argues that after he was Aled into court wearing leg irons and handcuffed to a belly chain@ on the morning of trial, defense counsel Aimmediately@ filed a motion objecting to the restraints (Pet. Br. at 3). In reality, the second penalty-phase trial began on April 29, 2003, and Deck filed his motion that same day (J.A. 1). But, absent a time stamp on the motion, there is nothing in this record to suggest that Deck did not file the motion prior to trial commencing and prior to allegedly being Aled into court wearing leg irons and handcuffed to a belly chain@ (Pet. Br. at 3, citing J.A. 68-69), because according to Deck, the trial court had ordered him to appear in leg braces three weeks prior (Pet. Br. at 3, citing J.A. 68). In other words, the motion could have been filed pre-trial, in response to the leg-brace-only ruling, as opposed to Aimmediately@ following the court=s decision to augment the restraints.

This record, and Deck=s brief, cry out for such a rule. Again, there is no evidence in the record that the jurors saw, heard, or otherwise perceived anything about Deck=s restraints until defense counsel brought the restraints to the jurors= attention. Deck=s motion for new trial contains nothing more than post hoc conclusions about what the jurors saw, unencumbered by actual, record evidence (J.A. 68-69). Deck=s brief, consistently and of necessity, carries forward the tenor of the motion for new trial through the use of descriptive phrases that simply have no support in the record.

Deck speaks colorfully but in the abstract of A[p]arading the defendant before the jury in chains@ (Pet. Br. at 38) and forcing defendants Ato shuffle to the witness stand in handcuffs and leg irons, chains jangling, in full view of the jury@ (Pet. Br. at 39). As to his own situation, Deck argues that on the morning of trial, he Awas led into court@ in restraints (Pet. Br. at 3, citing J.A. 68-69), and A[t]he restraints were visible,@ because Athe jury clearly saw Deck B chained, handcuffed and shackled B paraded in and out of the courtroom or standing when the judge and jury entered or left the courtroom,@ but he can only cite again to the motion for new trial in support (Pet. Br. at 46, citing J.A. 69).

A motion for new trial, of course, is not evidence. To get out from under that problem, Deck notes that at sentencing Aneither the court nor the prosecutor disputed these facts [sic]@ or the Afurther detail [sic] regarding the physical restraints used at trial@ (Pet. Br. at 11). That the State did not refute con-clusions that defense counsel was

attempting to pass off as Afacts@ is hardly surprising; counsel chose not to argue the motion for new trial, so there would be no reason for the State to bid against itself in this fashion and try to refute arguments it thought Deck might think were important, nor would there be any reason for the court to get involved.

Because without a record on restraints, we cannot possibly know how they affected Deck (or the jury), Deck=s brief speaks largely of the theoretical. For example, Deck argues that if defendants know that they will have to appear before the jury in restraints, Asome defendants may relinquish altogether their right to be present@ (Pet. Br. at 39), though we know that Deck did not relinquish that right. Deck argues that A[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@ and thus absent himself from trial (Pet. Br. at 39), though we have no idea if Deck was thinking in those terms, and there is nothing in the record to suggest that he did not remain present throughout trial. Deck argues that Ashackling may discourage the defendant from testifying@ (Pet. Br. at 39), and while we do not know precisely why Deck did not testify, we do know that later he claimed innocence, and that an innocence claim at penalty phase might annoy or antagonize jurors who have been told that the defendant=s guilt had already been determined.

As to the minimal facts we do know, Deck argues that he did not cause disturbances at his earlier court proceedings (Pet. Br. at 43), though perhaps that was because Deck wore leg braces during his initial trial (J.A. 5). In any event, he also faults the trial court for not considering various alternative forms of restraint (Pet. Br. at 43-44),

but while his motion provided a fairly comprehensive legal discussion, including mention of security measures besides shackling, his plea for relief was to be entirely free of restraints, without qualification or request for alternative relief (J.A. 41, 56). Likewise, at trial Deck objected to restraints and asked to have the venire panel stricken, but he did not suggest the use of alternative forms of restraint or different courtroom security measures (J.A. 57-59). It would be difficult to fault the trial court for failing to implement alternative security measures that Deck himself did not, or did not want to, wholeheartedly endorse.

This Court is left, therefore, with a record that appears to be scant by design. True, the trial court did not *sua sponte* make a detailed evidentiary record regarding its rationale for restraints, and that would have been helpful. But, the test is not whether the trial court could have done a better job; the test is whether the trial court=s action or inaction violated a specific constitutional guarantee. *See Portuondo v. Agard*, 529 U.S. at 76 (Stevens, J., concurring in the judgment) (noting the Ahigh threshold that separates trial error B even serious trial error B from the kind of fundamental unfairness for which the Constitution requires that a state criminal conviction be set aside@). And again, in the penalty-phase context, a defendant should be required to make at least a minimal record before he can impose on the court or the state an obligation to disprove his claim of a constitutional violation.

B. Deck=s restraints did not adversely affect his ability to assist counsel or to participate at trial, nor did they unfairly manipulate his comportment before the sentencing jury.

Beyond his Eighth Amendment and Due Process claims, Deck suggests he can make a Sixth Amendment challenge. Though Deck objected at trial that the restraints Ama[d]e him look dangerous@ (J.A. 58), Deck has never complained that the restraints affected his ability to communicate with counsel B until now, albeit obliquely, in his brief before this Court (Pet. Br. at 39). Deck also extrapolates and argues that because restraints negatively affected his appearance, this derogated his right to be present at trial B again, a complaint he never made in state court (Pet. Br. at 18, 38).

Addressing the latter contention first, Deck was present during his trial. As to the former contention, regarding Deck=s ability to assist counsel or participate at trial, Deck=s penalty phase was his second. It did not differ materially from the first. As a consequence, nothing in the second penalty phase was factually novel. To the extent that Deck=s ability to assist counsel related to matters of fact in dispute, he could have and should have explored any such controversies with his counsel in connection with the first penalty phase. Moreover, on this record, there is no indication of what, if anything, Deck was hoping to communicate to counsel but, due to restraints, could not.

In lieu of any such objections or facts on which they could have been based, Deck relies on *Riggins v. Nevada,* 504 U.S. 127, 134-38 (1992), in support of the notion that A[s]hackling 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@ (Pet. Br. at 18); *see also* Pet. Br. at 38 (by shackling, Athe state uses

the defendant=s presence at trial against him@ and Amanipulates the evidence@). Riggins was required to take anti-psychotic medication during trial. *Riggins v. Nevada,* 504 U.S. at 130-131. At trial, Riggins= defense was insanity, and he testified at trial that voices in his head told him that killing his victim would be justifiable homicide. *Id.* at 131. The jury convicted Riggins and sentenced him to death. *Id.*

This Court held that involuntarily medicating Riggins with anti-psychotic drugs was improper. *Id.* at 135-138. Unless the state could show that forcible medication was Amedically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins= own safety or the safety of others@ it could not force him to go to trial when involuntarily medicated. *Id.* at 135.

Forcible medication, in Riggins= case, Amay well have impaired the constitutionally protected trial rights Riggins invoke[d].@[17] *Id.* at 137. Riggins= medication, at the dosage administered, had serious side effects that quite possibly Ahad 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

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[17] The grant of certiorari in *Riggins* was Ato decide whether forced administration of antipsychotic medication during trial violated rights guaranteed by the Sixth and Fourteenth Amendments.@ 504 U.S. at 132-133. Riggins raised an Eighth Amendment claim that the forced administration of medication Adenied him an opportunity to show jurors his true mental condition at the sentencing hearing@ but because Riggins did not present the issue in state court or in the petition for certiorari, this Court declined to address the Eighth Amendment question. *Id.* at 133.

the substance of his communication with counsel.@ *Id.* Thus Justice Kennedy expressed concern about the side effects of anti-psychotic medication, such as restlessness, Parkinsonism, slowed speech functions, or a Asedation-like effect@ that may affect thought processes. *Id.* at 142-143 (Kennedy, J., concurring). Where forced medication results in side effects that alter demeanor and affect cognition, the State may not Amanipulate[] the evidence in this way.@ *Id.* at 142-143; *see also*, 504 U.S. at 139 (Kennedy, J., concurring), citing *Brady v. Maryland,* 373 U.S. 83, 87 (1963), and *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988) (AWhen the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant=s behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence.@).

But restraints are quite unlike forced medication. First, while such medication is avowedly to change the behavior of a mentally ill defendant so that he may be tried, shackles are a response to courtroom security issues, of which the defendant=s possible behavior is but one of several variables. Second, while a defendant=s reaction to anti-psychotic medication will depend on his unique physiology and the dosage, a defendant=s reaction to restraints is largely, if not entirely, a product of his own choice.[18] Third,

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[18] *But see Spain v. Rushen,* 883 F.2d 712, 723 (9th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990) (affirming grant of habeas relief where extensive record showed that defendant was Aheavily chained@ throughout four years= worth of pretrial proceedings and seventeen months= worth of trial, and defendant=s complaints about the pain caused by his restraints were Aimmediate, chronic, and impassioned@).

that volitional reaction to restraints is not the kind of Amanipulation@ of evidence that occurs with forced medication, which can produce any number of uncontrollable, undesirable side effects. Indeed, a restrained defendant who is able to comport himself appropriately in the courtroom may be able to shape the impressions that the jury is left with; if jurors see that a restrained defendant is behaving appropriately, they may conclude that he will likely conduct himself appropriately in a structured prison environment.

Deck=s *Riggins* analogy thus disintegrates. While forced medication can affect a defendant in various ways that may Aimpact . . . the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel,@ 504 U.S. at 137, restraints do not touch B literally or figuratively B upon a defendant=s personhood. In all but the most extreme cases[19] B and Deck=s is not one of them, even assuming the accuracy of Deck=s creative description B restraints may make it more challenging for a defendant to physically, mechanically communicate with counsel, but restraints would not change the substance of what a defendant can say or how he might say it.

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[19] *See Spain v. Rushen,* 883 F.2d at 723.

Any effect of restraints in sentencing, therefore, simply cannot be compared to the prejudice that can result from forced medication. While restraints may touch a defendant=s hands or legs, they in no measure compromise his heart or mind, or affect his contrition or lack thereof.[20]

C. Deck=s restraints were not an affront to courtroom dignity.

Finally, Deck mentions an affront to courtroom decorum as a factor in the restraints calculus, in regard to the guilt phase anyway (Pet. Br. at 17-18). While this factor militates against the use of restraints generally, it is the least important one in the calculus as any affront to courtroom dignity and decorum cannot be tied to individualized prejudice. *See Spain v. Rushen*, 883 F.2d at 722. Indeed, the use of restraints, whether during the guilt or the penalty phase, may work to preserve the dignity and decorum of the courtroom. *See Marquez v. Collins*, 11 F.3d at 1244 (Ashackling a defendant may be necessary to *preserve* the dignity of the trial and to secure the safety of its participants@ (emphasis supplied)).

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[20] As noted, though Deck did not testify, he revealed his utter lack of contrition at sentencing (Tr. 566-68).

The suggestion that use of restraints is an affront is particularly weak on this record, where there is no evidence that jurors saw, heard, or otherwise perceived anything about restraints until Deck=s counsel brought them to the jury=s attention; it is difficult to imagine how any affront to courtroom dignity occurred at all, much less an affront that threatened the fairness of Deck=s penalty-phase retrial. This is underscored by the fact that none of the state=s witnesses C many of whom were in law enforcement C identified Deck as the person in restraints; rather, they identified him based upon the particulars of his civilian attire (Tr. 303, 308, 347, 429). *Cf. Estelle v. Williams*, 425 U.S. at 501 n.1 (Brennan, J., dissenting) (noting that the defendant had appeared at trial in a t-shirt and dungarees with AHarris County Jail@ stenciled on them, and that A[b]oth of the principal witnesses for the State at respondent=s trial referred to him as the person sitting in the >uniform=@). However indecorous any restraints might have been, they were not an affront to the dignity or decorum of Deck=s courtroom because, on this record, there is no evidence that either the witnesses or the jurors even noticed them.

V. Deck has not shown error, much less harmless error.

At the start of his penalty-phase retrial, Deck was a twice-convicted murderer who had long since lost the presumption of innocence and who was once again facing the stark reality of either death or life imprisonment without possibility of probation or parole. In these circumstances, restraints could hardly be said to be misleading, as murderers like Deck are, by definition, dangerous. And, to the extent that Deck=s restraints might have suggested that Deck would present a danger in the future to his fellow

inmates, any such suggestion B adding only incrementally as it does to the notion that Deck was, indisputably, a dangerous person B would not have caused jurors to vote for death.

Deck received all the process that was his due. His penalty-phase retrial was neither unfair nor its result unreliable, and the limited record in this case B where Deck highlighted his own restraints for the jury B cannot support overturning his sentences on any constitutional basis.

Thus, Deck has failed to establish a constitutional violation under these facts. Deck=s harmless error analysis, therefore, collapses. Before that standard may be applied, a defendant must demonstrate a constitutional violation. *See Darden v. Wainwright*, 477 U.S. at 183 n. 15. Deck has failed to carry that burden here. And, by arguing that it is unconstitutional to restrain a defendant *without justification* (Pet. Br. at 15), Deck concedes that the use of restraints is not *per se* unconstitutional; thus, his constitutional claim does not involve a Astructural defect@ in the trial=s framework not amenable to harmless-error analysis. *See Arizona v. Fulminate*, 499 U.S. 279, 309-10 (1991). So, even if Deck had established a constitutional violation in the method or procedure the trial judge employed in ordering restraints, the same reasoning that reveals no constitutional violation also demonstrates that any constitutional violation that may have occurred was, on the facts of this case, harmless beyond a reasonable doubt.

CONCLUSION

The decision of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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