994 S.W.2d 527
Supreme Court of Missouri,
En Banc.

STATE of Missouri, Respondent,
v.
Carmen L. DECK, Appellant.

No. 80821. | June 1, 1999. | Rehearing Denied June 29, 1999.

Defendant was convicted in the Circuit Court, Jefferson County, Gary P. Kramer, J., of 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, and was sentenced to death for each murder count. Defendant appealed. The Supreme Court, Limbaugh, J., held that: (1) evidence of pretrial publicity and knowledge of case by local residents and prospective jurors did not entitle defendant to change of venue; (2) police officer had reasonable suspicion of criminal activity, which thus justified seizure of defendant, protective sweep of passenger compartment of vehicle, and seizure of pistol from beneath seat; (3) prosecutors gave sufficiently specific, clear, and gender-neutral explanations for use of peremptory challenges; (4) alleged emotional level in courtroom resulting from victim impact testimony did not require mistrial; (5) incomplete pattern jury instructions on mitigating circumstances during penalty phase did not rise to level of plain error; and (6) prosecutor's closing argument reference to granting mercy to people in courtroom did not constitute improper argument that jurors could not lawfully grant mercy on defendant.

Affirmed.

West Headnotes (43)

[1] **Criminal Law** ⇐ Grounds for Change

110Criminal Law
110IXVenue
110IX(B)Change of Venue
110k123Grounds for Change
110k124In general

Change of venue is required when it is necessary to assure the defendant a fair and

impartial trial.

[2] **Criminal Law**⇐Discretion of court
Criminal Law⇐Change of venue

110Criminal Law
110IXVenue
110IX(B)Change of Venue
110k121Discretion of court
110Criminal Law
110XXIVReview
110XXIV(N)Discretion of Lower Court
110k1150Change of venue

Decision to grant or deny a request for change of venue for cause rests within the trial court's discretion, and the trial court's ruling will not be reversed absent a clear showing of abuse of discretion and a real probability of injury to the complaining party.

[3] **Criminal Law**⇐Local Prejudice

110Criminal Law
110IXVenue
110IX(B)Change of Venue
110k123Grounds for Change
110k126Local Prejudice
110k126(1)In general

Trial court abuses its discretion in denying request for change of venue when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there.

[4] **Criminal Law**⇐Jurisdiction and venue

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.5Jurisdiction and venue
(Formerly 110k1158(1))

In reviewing the trial court's ruling on a request for change of venue, it is understood that the trial court, rather than the appellate court, is in the better position to assess the effect of publicity on the members of the community.

[5] **Jury**⇨Pretrial publicity

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k98Formation and Expression of Opinion as to Cause
230k100Pretrial publicity

In assessing the impact of potentially prejudicial publicity on prospective jurors, the critical question is not whether they remember the case, but whether they have such fixed opinions regarding the case that they could not impartially determine the guilt or innocence of the defendant.

[6] **Criminal Law**⇨Weight and effect of opposing affidavits or other evidence

110Criminal Law
110IXVenue
110IX(B)Change of Venue
110k129Application
110k134Affidavits and Other Proofs
110k134(4)Weight and effect of opposing affidavits or other evidence

Evidence of pretrial publicity and knowledge of case demonstrated by opinion poll of local residents and questioning during jury selection did not entitle defendant to change of venue, where poll was taken more than a year before trial and did not ask whether residents' opinions would keep them from following the law and making a determination based on the evidence adduced at trial, and where potential jurors who consistently felt

their opinions would keep them from being fair and impartial were excused.

2 Cases that cite this headnote

[7] **Criminal Law**⇐Affidavits and Other Proofs

110Criminal Law
110IXVenue
110IX(B)Change of Venue
110k129Application
110k134Affidavits and Other Proofs
110k134(1)In general

Pretrial publicity could not be considered presumptively prejudicial so as to require change of venue where media accounts of crimes of which defendant was accused were factual in nature and occurred long before trial, and absent barrage of inflammatory publicity immediately prior to trial.

2 Cases that cite this headnote

[8] **Criminal Law**⇐Matters preliminary to introduction of other evidence
Criminal Law⇐Presumptions and burden of proof

110Criminal Law
110XVIIEvidence
110XVII(C)Burden of Proof
110k326Burden of Proof
110k334Matters preliminary to introduction of other evidence
110Criminal Law
110XVIIEvidence
110XVII(I)Competency in General
110k392.1Wrongfully Obtained Evidence
110k392.49Evidence on Motions
110k392.49(2)Presumptions and burden of proof
(Formerly 110k394.6(4))

At a hearing on a motion to suppress and ultimately at trial, the state has the burden to justify a warrantless search and seizure.

2 Cases that cite this headnote

[9] **Criminal Law**⇐Evidence wrongfully obtained

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)2Matters or Evidence Considered
110k1134.17Evidence
110k1134.17(2)Evidence wrongfully obtained
(Formerly 110k1134(2))

In reviewing the trial court's ruling on the suppression of evidence obtained by a warrantless search and seizure, the Supreme Court considers the record made at the suppression hearing as well as the evidence introduced at trial.

19 Cases that cite this headnote

[10] **Searches and Seizures**⇐Probable or reasonable cause

349Searches and Seizures
349IIn General
349k60Motor Vehicles
349k62Probable or reasonable cause

Reasonable suspicion required to justify a warrantless search of the passenger compartment of an automobile is a less demanding standard than probable cause and is to be determined by reference to the totality of the circumstances. U.S.C.A. Const.Amend. 4; V.A.M.S. Const. Art. 1, § 15.

11 Cases that cite this headnote

[11] **Arrest**⇐Particular cases

35Arrest
35IIOn Criminal Charges
35k60.4What Constitutes a Seizure or Detention
35k60.4(2)Particular cases
(Formerly 35k68(4))

Seizure of defendant did not occur when police officer initially approached defendant's vehicle and identified himself, but did occur later when officer ordered defendant to sit

up in his car and display his hands and defendant then complied, thereby submitting to assertion of police authority.

2 Cases that cite this headnote

[12] **Arrest**⇨What Constitutes a Seizure or Detention

35Arrest
35IIOn Criminal Charges
35k60.4What Constitutes a Seizure or Detention
35k60.4(1)In general
(Formerly 35k68(4))

Person is not "seized" until either being subjected to the application of physical force by the police or by voluntarily submitting to the assertion of police authority.

5 Cases that cite this headnote

[13] **Arrest**⇨Particular cases
Arrest⇨Duration of detention and extent or conduct of investigation

35Arrest
35IIOn Criminal Charges
35k60.3Motor Vehicle Stops
35k60.3(2)Particular cases
(Formerly 35k63.5(6))
35Arrest
35IIOn Criminal Charges
35k60.3Motor Vehicle Stops
35k60.3(3)Duration of detention and extent or conduct of investigation
(Formerly 35k63.5(6), 35k63.5(8))

Defendant's driving in parking lot at night without headlights, police dispatch that suspects in car like defendant's vehicle were armed and dangerous, and defendant's attempt to reach for or conceal something when approached by police officer provided officer with reasonable suspicion of criminal activity, which thus justified seizure of defendant, subsequent order for defendant to exit vehicle, pat-down search of defendant, protective sweep of passenger compartment of vehicle, and seizure of pistol from beneath passenger seat.

4 Cases that cite this headnote

[14] **Arrest**⇐Time of existence; after-acquired information

35Arrest
35IIOn Criminal Charges
35k63Officers and Assistants, Arrest Without Warrant
35k63.4Probable or Reasonable Cause
35k63.4(4)Time of existence; after-acquired information

Although a detention and search and seizure is generally unlawful if conducted solely on the basis of an anonymous tip, an anonymous tip need not be ignored and police instead may properly consider such evidence if it is in conjunction with other, independent corroborative evidence suggestive of criminal activity when determining whether reasonable suspicion exists to justify *Terry* "stop and frisk" and protective sweep of automobile.

20 Cases that cite this headnote

[15] **Arrest**⇐Particular cases
Arrest⇐Duration of detention and extent or conduct of investigation

35Arrest
35IIOn Criminal Charges
35k60.3Motor Vehicle Stops
35k60.3(2)Particular cases
(Formerly 35k63.5(6))
35Arrest
35IIOn Criminal Charges
35k60.3Motor Vehicle Stops
35k60.3(3)Duration of detention and extent or conduct of investigation
(Formerly 35k63.5(9))

Tip from informant indicating that defendant had been involved in robbery or homicide, describing his car, and warning that he was probably armed was sufficiently corroborated by other circumstances to be considered when determining whether reasonable suspicion of criminal activity justified detention of defendant, search of passenger compartment of vehicle, and seizure of pistol under seat; tip was corroborated by officer's observation of car matching tipster's description enter parking lot of defendant's residence without lights on at night, and by defendant's attempt to reach for something upon seeing police.

8 Cases that cite this headnote

[16] **Jury**⇐Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

To make a successful *Batson* challenge, the defendant must object to the state's peremptory strike and identify the protected class to which the prospective juror belongs, the state is then required to provide a reasonably specific and clear, race and/or gender-neutral explanation for the strike, and if the state provides such an explanation, the burden then shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the prospective juror's race or gender.

7 Cases that cite this headnote

[17] **Jury**⇐Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

In evaluating the prosecutor's explanation for use of peremptory strikes for purposes of *Batson* challenge, the chief consideration is whether the explanation is plausible in light of the totality of the facts and circumstances surrounding the case.

2 Cases that cite this headnote

[18] **Jury**⇐Peremptory challenges

230Jury
230IIRight to Trial by Jury

230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

While the presence of similarly-situated white or male jurors is probative of pretext concerning State's use of peremptory challenges, it is not dispositive of *Batson* challenge.

[19] **Criminal Law**⇐Jury selection

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.17Jury selection
(Formerly 110k1158(3))

Reviewing court will reverse the trial court's decision on a *Batson* challenge only upon a showing of clear error.

[20] **Jury**⇐Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

Prosecutors' explanations that they used peremptory challenges against prospective juror because her general demeanor suggested she was "weak" and because of arrest and incarceration of her relatives were reasonably specific, clear, and gender-neutral and thus satisfied *Batson* analysis.

3 Cases that cite this headnote

[21] **Jury**⇨Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

Prospective juror's failure to disclose her prior conviction of driving while intoxicated (DWI) was appropriate and gender neutral basis for use of peremptory strike against her, and decision of prosecutors not to strike male prospective juror with prior DWI conviction did not suggest pretext for use of peremptory against female prospective juror in light of fact that male admitted his prior conviction and thus was not similarly situated.

5 Cases that cite this headnote

[22] **Jury**⇨Peremptory challenges

230Jury
230IIRight to Trial by Jury
230k30Denial or Infringement of Right
230k33Constitution and Selection of Jury
230k33(5)Challenges and Objections
230k33(5.15)Peremptory challenges

Lawyers are not prohibited from using information outside the record as a basis for a peremptory strike.

2 Cases that cite this headnote

[23] **Criminal Law**⇨Overruling challenges to jurors

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1166.5Conduct of Trial in General
110k1166.18Overruling challenges to jurors

Statute declaring that qualifications of prospective juror could not constitute ground for reversal unless prospective juror actually served upon jury at defendant's trial precluded

claim of error concerning denial of challenge for cause of prospective juror who indicated that he might automatically impose death penalty, in light of defendant's use of peremptory strike to remove him from panel. V.A.M.S. § 494.480, subd. 4.

2 Cases that cite this headnote

[24] **Sentencing and Punishment**⇐Harm or injury attributable to offense

350HSentencing and Punishment
350HIISentencing Proceedings in General
350HII(F)Evidence
350Hk307Admissibility in General
350Hk310Harm or injury attributable to offense
(Formerly 110k986.2(1))

Victim impact evidence is admissible under the United States and Missouri Constitutions.

4 Cases that cite this headnote

[25] **Criminal Law**⇐Presence and conduct of bystanders

110Criminal Law
110XXTrial
110XX(B)Course and Conduct of Trial in General
110k659Presence and conduct of bystanders

Although emotional outbursts are to be prevented insofar as possible, the trial court exercises broad discretion in determining the effect of such outbursts on the jury.

[26] **Sentencing and Punishment**⇐Matters Related to Jury

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing

350Hk1779Matters Related to Jury
350Hk1779(1)In general
(Formerly 110k867)

Trial court did not abuse its discretion in overruling motion for mistrial based on alleged emotional level in courtroom resulting from victim impact testimony, absent any evidence of emotional outbursts other than muted crying during testimony of victims' children.

3 Cases that cite this headnote

[27] **Sentencing and Punishment**⊕Instructions

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(3)Instructions
(Formerly 203k311)

Listing of nonstatutory factors in mitigation in jury instructions during penalty phase of capital murder trial is not constitutionally required.

1 Cases that cite this headnote

[28] **Criminal Law**⊕Particular Instructions

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1038Instructions
110k1038.1Objections in General
110k1038.1(3)Particular Instructions
110k1038.1(3.1)In general

Incomplete pattern jury instructions during penalty phase of capital murder trial, which omitted express language that jurors did not have to find mitigating circumstances by unanimous vote, did not rise to level of plain error, in light of other instructions and closing argument indicating each juror could vote for sentence of life, fact that instructions given only explicitly required unanimity on aggravating circumstance, and

lack of reasonable likelihood that jury applied instructions in way that prevented consideration of mitigating circumstances. MAI Criminal 3d Nos. 313.44A, 313.46A.

3 Cases that cite this headnote

[29] **Criminal Law**⇐Plain or fundamental error

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1038Instructions
110k1038.1Objections in General
110k1038.1(2)Plain or fundamental error

For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury that it is apparent the instructional error affected the verdict.

6 Cases that cite this headnote

[30] **Sentencing and Punishment**⇐Mitigating circumstances in general
Sentencing and Punishment⇐Instructions

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1653Mitigating circumstances in general
(Formerly 110k796, 110k1208.1(5))
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(3)Instructions
(Formerly 110k796)

In a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any relevant circumstance that the defendant proffers as a basis for a sentence less than death, and this principle is violated if the jury is given an instruction that could reasonably be interpreted as precluding them from considering any mitigating evidence

unless the jurors unanimously agree on the existence of such evidence.

1 Cases that cite this headnote

[31] **Sentencing and Punishment**⇐Instructions

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(3)Instructions
(Formerly 110k796)

There is no constitutional requirement that the jury in a capital case be given any particular guidance as to how to undertake the discretionary sentencing decision.

[32] **Criminal Law**⇐Requisites and sufficiency

110Criminal Law
110XXTrial
110XX(J)Issues Relating to Jury Trial
110k863Instructions After Submission of Cause
110k863(2)Requisites and sufficiency

Term "mitigating" had no definition in pattern instructions and thus trial court properly refused jury's requests for legal definition of term and for dictionary during deliberation in punishment phase of capital murder trial. MAI Criminal 3d Nos. 313.44A, 333.00.

[33] **Criminal Law**⇐Misconduct of or Affecting Jurors
Criminal Law⇐Deliberations in General

110Criminal Law
110XXTrial

110XX(J)Issues Relating to Jury Trial
110k855Misconduct of or Affecting Jurors
110k855(1)In general
110Criminal Law
110XXTrial
110XX(J)Issues Relating to Jury Trial
110k857Deliberations in General
110k857(1)In general

Use of a dictionary by deliberating jury is highly improper because the jury should rely solely upon the evidence and the court's instructions; impropriety of permitting jurors to search a dictionary is that it allows them to select at will definitive language that might misrepresent the court's instructions.

[34] **Sentencing and Punishment**⇐Instructions

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(3)Instructions
(Formerly 110k796)

In the context of the jury instructions as a whole in a capital case, the term "mitigating" is not too confusing as it is always contrasted with the term "aggravating" so that no reasonable person could fail to understand that "mitigating" is the opposite of "aggravating."

4 Cases that cite this headnote

[35] **Criminal Law**⇐Communications between judge and jury

110Criminal Law
110XXTrial
110XX(J)Issues Relating to Jury Trial
110k864Communications between judge and jury

Jury's questions about definition of term "mitigating" during deliberations in penalty phase of capital murder trial did not necessarily indicate jurors impermissibly believed

they were prohibited from considering certain facts or circumstances as mitigating.

1 Cases that cite this headnote

[36] **Criminal Law**⇐Arguments and statements by counsel
Criminal Law⇐Summing up

110Criminal Law
110XXIVReview
110XXIV(N)Discretion of Lower Court
110k1152Conduct of Trial in General
110k1152.19Counsel
110k1152.19(7)Arguments and statements by counsel
(Formerly 110k1154)
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2191Action of Court in Response to Comments or Conduct
110k2195Summing up
(Formerly 110k730(1))

Trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant.

4 Cases that cite this headnote

[37] **Criminal Law**⇐Statements as to Facts, Comments, and Arguments

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1171Arguments and Conduct of Counsel
110k1171.1In General
110k1171.1(2)Statements as to Facts, Comments, and Arguments
110k1171.1(2.1)In general

In order for a prosecutor's closing argument statements to require reversal, there must be a reasonable probability that the verdict would have been different had the error not been committed.

1 Cases that cite this headnote

[38] **Sentencing and Punishment**⇐Arguments and conduct of counsel

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel
(Formerly 110k723(1))

Prosecutor's closing argument that death penalty was only sentence jury could impose to show justice and mercy to people in courtroom did not constitute improper argument that jurors could not lawfully grant mercy on defendant.

3 Cases that cite this headnote

[39] **Criminal Law**⇐Sentencing Phase Arguments
Sentencing and Punishment⇐Sympathy and mercy

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2161Sentencing Phase Arguments
110k2162In general
(Formerly 110k723(1))
350HSentencing and Punishment
350HIPunishment in General
350HI(C)Factors or Purposes in General
350Hk49Sympathy and mercy
(Formerly 110k986.2(1))

Mercy is a valid sentencing consideration and, in that connection, prosecutors may argue in closing arguments that the defendant should not be granted mercy, although prosecutors cannot argue that the jurors may not lawfully grant a defendant mercy by imposing a life sentence.

2 Cases that cite this headnote

[40] **Criminal Law**⇨Particular statements, arguments, and comments

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1037Arguments and Conduct of Counsel
110k1037.1In General
110k1037.1(2)Particular statements, arguments, and comments

Prosecutor's closing argument asking jury to think about somebody pointing gun at their heads for ten minutes did not rise to level of plain error resulting in manifest injustice, given that comments were brief and isolated and did not involve graphic detail.

2 Cases that cite this headnote

[41] **Criminal Law**⇨Arguments and conduct in general

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1037Arguments and Conduct of Counsel
110k1037.1In General
110k1037.1(1)Arguments and conduct in general

Relief should rarely be granted on an assertion of plain error in closing argument, and in order to be entitled to relief, a defendant must make a substantial showing that manifest injustice will result if relief is not granted.

2 Cases that cite this headnote

[42] **Criminal Law**⇨Abiding conviction, or full satisfaction to moral certainty

110Criminal Law
110XXTrial
110XX(G)Instructions: Necessity, Requisites, and Sufficiency
110k789Reasonable Doubt
110k789(9)Abiding conviction, or full satisfaction to moral certainty

Phrase "firmly convinced" is essentially synonymous with the phrase "beyond a reasonable doubt" for purposes of jury instructions in both guilt and penalty phases of

capital murder trial.

1 Cases that cite this headnote

[43] **Sentencing and Punishment**⇐Killing while committing other offense or in course of criminal conduct
Sentencing and Punishment⇐More than one killing in same transaction or scheme
Sentencing and Punishment⇐Age

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(D)Factors Related to Offense
350Hk1681Killing while committing other offense or in course of criminal conduct
(Formerly 203k357(7))
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(D)Factors Related to Offense
350Hk1683More than one killing in same transaction or scheme
(Formerly 203k357(7))
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(F)Factors Related to Status of Victim
350Hk1727Age
(Formerly 203k357(7))

Imposition of death penalty for murders of elderly couple in their home during burglary was clearly not excessive or disproportionate to sentence imposed in similar cases.

2 Cases that cite this headnote

Attorneys and Law Firms

***531** Deborah B. Wafer, St. Louis, for Appellant.

Jeremiah W. (Jay) Nixon, Atty. General, Catherine Chatman, Assistant Attorney General, Jefferson City, for Respondent.

Opinion

STEPHEN N. LIMBAUGH, Jr., Judge.

A Jefferson County jury convicted Carmen L. Deck, Jr., of 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. Deck was sentenced to death for each of the two murder counts and concurrent life sentences for the two counts of armed criminal action, as well as consecutive sentences of thirty years imprisonment for the robbery count and fifteen years imprisonment for the burglary count. This Court has jurisdiction of the appeal because the death sentence was imposed. Mo. Const. art. V, sec. 3. The judgment is affirmed.

I. Facts

Viewed in the light most favorable to the verdict, *State v. Rousan,* 961 S.W.2d 831 (Mo. banc), *cert. denied,* 524 U.S. 961, 118 S.Ct. 2387, 141 L.Ed.2d 753 (1998), the facts are as follows: In June 1996, Deck planned a burglary with his mother's boyfriend, Jim Boliek, to help Boliek obtain money for a trip to Oklahoma. Deck targeted James and Zelma Long, the victims in this case, because he had known the Longs' grandson and had accompanied him to the Longs' home in DeSoto, Missouri, where the grandson had stolen money from a safe. The original plan was to break into the Longs' home on a Sunday while the Longs were at church. In preparation for the burglary, Deck and Boliek drove to DeSoto several times to canvass the area.

On Monday, July 8, 1996, Boliek told Deck that he and Deck's mother wanted to leave for Oklahoma on Friday, and he gave Deck his .22 caliber High Standard automatic loading pistol. That Monday evening, Deck and his sister, Tonia Cummings, drove in her car to rural Jefferson County, near DeSoto, and parked on a back road, waiting for nightfall. Around nine o'clock, Deck and Cummings pulled into the Longs' driveway.

Deck and Cummings knocked on the door and Zelma Long answered. Deck asked for directions to Laguana Palma, whereupon Mrs. Long invited them into the house. As she explained the directions and as Mr. Long wrote them down, Deck walked toward the front door and pulled the pistol from his waistband. He then turned around and ordered the Longs to go lie face down on their bed, and they complied without a struggle.

***532** Next, Deck told Mr. Long to open the safe, but because he did not know the combination, Mrs. Long opened it instead. She gave Deck the papers and jewelry inside and then told Deck she had two hundred dollars in her purse in the kitchen. Deck sent her into the kitchen and she brought the money back to him. Mr. Long then told Deck that a canister on top of the television contained money, so Deck took the canister, as well.

Hoping to avoid harm, Mr. Long even offered to write a check.

Deck again ordered the Longs to lie on their stomachs on the bed, with their faces to the side. For ten minutes or so, while the Longs begged for their lives, Deck stood at the foot of the bed trying to decide what to do. Cummings, who had been a lookout at the front door, decided time was running short and ran out the door to the car. Deck put the gun to Mr. Long's head and fired twice into his temple, just above his ear and just behind his forehead. Then Deck put the gun to Mrs. Long's head and shot her twice, once in the back of the head and once above the ear. Both of the Longs died from the gunshots.

After the shooting, Deck grabbed the money and left the house. While fleeing in the car, Cummings complained of stomach pains, so Deck took her to Jefferson Memorial Hospital, where she was admitted. Deck gave her about two hundred fifty dollars of the Long's money and then drove back to St. Louis County. Based on a tip from an informant earlier that same day, St. Louis County Police Officer Vince Wood was dispatched to the apartment complex where Deck and Cummings lived. Officer Wood confronted Deck late that night after he observed him driving the car into the apartment parking lot with the headlights turned off. During a search for weapons, Officer Wood found a pistol concealed under the front seat of the car and, then, placed Deck under arrest. Deck later gave a full account of the murders in oral, written and audiotaped statements.

II. Motion for Change of Venue

Deck first contends that the trial court erred in overruling his motion for change of venue filed under Rule 32.04. As grounds for the motion, he stated that "the case ha[d] received extensive publicity by way of newspaper and television coverage" and that "[t]he residents of Jefferson County [were] biased and prejudiced against defendant and defendant [could] not receive a fair trial." The trial court overruled the motion after an evidentiary hearing, finding that there was not "such overwhelming pre-trial publicity as is likely to render impossible the selection of an impartial jury." Deck now claims that the trial court's error violated his rights to due process of law, trial by fair and impartial jury, reliable sentencing, and freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18(a), and 21 of the Missouri Constitution.

[1] [2] [3] [4] [5] A change of venue is required when it is necessary to assure the defendant a fair and impartial trial. *State v. Kinder,* 942 S.W.2d 313, 323 (Mo. banc 1996). The decision to grant or deny a request for change of venue for cause rests within the trial court's discretion, *State v. Feltrop,* 803 S.W.2d 1, 6 (Mo. banc 1991), and the trial court's

ruling will not be reversed absent a clear showing of abuse of discretion and a real probability of injury to the complaining party. *Id.* A trial court abuses its discretion, however, when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur there. *Id.; Kinder,* 942 S.W.2d at 323. In reviewing the trial court's ruling, it is understood that the trial court, rather than the appellate court, is in the better position to assess the effect of publicity on the members of the community. *Feltrop,* 803 S.W.2d at 6. Finally, in assessing the impact of potentially prejudicial publicity on ***533** prospective jurors, the critical question is not whether they remember the case, but whether they have such fixed opinions regarding the case that they could not impartially determine the guilt or innocence of the defendant. *Id.*

[6] At the hearing on the motion, Deck introduced into evidence nine newspaper articles and several videotapes of television news broadcasts, all of which appeared within a few weeks of the July 8 murders. In addition, Deck offered the testimony of Dr. Kenneth Warren, a professor of political science at Saint Louis University, who was commissioned to conduct an opinion poll to determine the extent to which residents of Jefferson County had heard of the case. Dr. Warren's poll, which was taken between November 13, 1996 and December 9, 1996, more than a year before trial, consisted of a survey of five hundred eighteen residents of Jefferson County. The results showed that sixty-nine percent of the people polled were aware of the case and twenty-seven percent held an opinion regarding Deck's guilt. These circumstances, Deck maintains, demonstrate that the Jefferson County community was saturated with publicity about the case that was prejudicial to him, and thus the trial court abused its discretion in overruling his motion for change of venue.

To reinforce his position, Deck also notes that during jury selection, fifty of the prospective jurors indicated that they had heard about or read about the case. Thirteen of the fifty stated that they had formed opinions regarding Deck's guilt based on the publicity and that it would be difficult or impossible for them to render a fair and impartial verdict. Deck renewed his motion for change of venue at that point, and the trial court again overruled the motion.

The fact that so many residents of Jefferson County were aware of the case does not alone mandate a change of venue. Although Dr. Warren testified that sixty-nine percent of the residents polled were aware of the case, he conceded on cross-examination that with the passage of time, fewer people would remember what they had heard. Further, although twenty-seven percent said that they held an opinion regarding Deck's guilt, Dr. Warren did not inquire whether those opinions would keep them from following the law and making a determination based on the evidence adduced at trial. As to the prospective jurors, the key concern, as noted, is whether those jurors who had heard about the case held such fixed opinions that they could not make an impartial determination regarding

the defendant's guilt. *Feltrop,* 803 S.W.2d at 6. During voir dire, only thirteen of the fifty prospective jurors who had heard about the case stated that their opinions would keep them from being fair and impartial jurors, and of those thirteen, twelve were stricken for cause or otherwise excused. Defense counsel declined to strike the remaining person who apparently changed her response by stating that she had not formed an opinion and could indeed follow the instructions and consider only the evidence at trial. Given the limited inferences that can be made from the polling data and the trial court's effective handling of the voir dire process, there is no indication that Deck was denied a fair and impartial jury.

[7] Citing *Ainsworth v. Calderon,* 138 F.3d 787, 795 (9 th Cir.1998), Deck further claims that the pretrial publicity in Jefferson County should be considered presumptively prejudicial. According to *Ainsworth,* "[p]rejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Id.* Prejudice occurs, for instance, where there is "a barrage of inflammatory publicity immediately prior to trial amounting to a huge ... wave of public passion." *Id.* (quoting *Patton v. Yount,* 467 U.S. 1025, 1033, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). Under *Ainsworth,* courts should also consider whether the media accounts were primarily factual and whether the accounts contained ***534** inflammatory, prejudicial information that was not admissible at trial. *Id.* Under the facts of *Ainsworth,* however, the court determined that the media coverage was not presumptively prejudicial because the coverage was factual in nature and occurred, for the most part, several months before trial. *Id.* The case at hand is similar: The media accounts were factual in nature and occurred long before trial, and there was no "barrage of inflammatory publicity immediately prior to trial."

The evidence presented at the hearing on Deck's motion for change of venue and during voir dire did not show that the residents of Jefferson County were so prejudiced against him that a fair trial could not occur. As such, the trial court did not abuse its discretion in denying the motion for a change of venue.

III. Motion to Suppress

Deck next claims that the trial court erred by overruling his motion to suppress and in admitting at trial the statements he made to the police as well as the pistol and other items seized from his car. In support of his claim, Deck states that Officer Wood did not have "reasonable suspicion" to stop him on the parking lot, and therefore the stop was unlawful. As a result, he contends, the evidence seized and his incriminating statements should have been excluded as "fruit of the poisonous tree." Deck concludes that

introduction of the evidence at trial violated his rights to due process of law, to be free from unreasonable search and seizure, to reliable sentencing, and to be free from cruel and unusual punishment under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 10, 15, 18(a), and 21 of the Missouri Constitution.

[8] [9] At a hearing on a motion to suppress and ultimately at trial, the state has the burden to justify a warrantless search and seizure. *State v. Villa–Perez,* 835 S.W.2d 897, 902 (Mo. banc 1992). In reviewing the trial court's ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial. *State v. Hohensee,* 473 S.W.2d 379, 380 (Mo.1971); *State v. Howard,* 973 S.W.2d 902, 908 (Mo.App.1998).

[10] The Fourth Amendment of the United States Constitution preserves the right of the people to be secure against unreasonable searches and seizures. Missouri's constitutional "search and seizure" guarantee, article I, section 15, is co-extensive with the Fourth Amendment. *State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996). A warrant based upon probable cause is generally required to justify a search or seizure. However, the Fourth Amendment does not prohibit a so-called "*Terry* " stop—a stop followed by a "frisk" or "pat-down" for weapons—that is based on reasonable suspicion supported by articulable facts that the person stopped is engaged in criminal activity. *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *Terry* "stop and frisk" principles have been extended to motor vehicle stops so that police who have the requisite reasonable suspicion may conduct a "search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden...." *Michigan v. Long,* 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). "Reasonable suspicion," which is a less demanding standard than "probable cause," *Alabama v. White,* 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), is to be determined by reference to the "totality of the circumstances." *Id.* (citing *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

Although the state's evidence presented at the suppression hearing and at trial was uncontested, a more detailed recitation of that evidence is necessary to evaluate the grounds for reasonable suspicion. On the day of the murders, an individual identified as Charles Hill told the Jefferson County ***535** Sheriff's Office that he believed that Deck and his sister were involved in a robbery and/or homicide in Jefferson County, that they would be driving a gold two-door car, and that they probably were armed. This information was relayed to the St. Louis County Police, and Officer Woods was dispatched to locate Deck and his sister at their last known address, an apartment complex in St. Louis County.

Sometime after 11 o'clock at night, Officer Wood, who was parked in his vehicle on the side of the road at the apartment complex, saw Deck drive by alone in a two-door gold car and pull into a parking space. The lights to Deck's car were not illuminated even though it was dark. Officer Wood walked toward Deck's car, identified himself as a police officer, and shined his flashlight into the car, whereupon Deck turned away from him and leaned down toward the passenger side of the vehicle. At that point, Officer Wood ordered Deck to sit up and show his hands, and when Deck complied, Officer Wood then asked him to get out of the car. Once outside the car, Officer Wood patted Deck down for weapons, and finding none, then searched the passenger side of the vehicle while a back-up officer detained Deck. When the search revealed a pistol concealed underneath the front seat, Officer Wood placed appellant under arrest for unlawful use of a weapon. The police then impounded the vehicle, and during an inventory search, Officer Wood found the victims' decorative tin filled with coins on the vehicle's floorboard. As noted, Deck later made oral, written, and taped statements.

[11] [12] Deck's primary argument, as we understand it, is that he was unlawfully stopped, or "seized," for the offense of driving without lights when Officer Wood first approached him as he parked the car. As Deck explains, there was no probable cause to be stopped because the statute defining the offense, section 307.040.1, RSMo 1994, applies only to public streets and highways, not to private parking lots like the one at the apartment complex. Regardless of the presence or absence of probable cause under the statute, however, Deck's argument fails because no stop or seizure took place when Officer Wood first approached the car. A person is not "seized" until either being subjected to the application of physical force by the police or by voluntarily submitting to the assertion of police authority. *California v. Hodari D.,* 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Here, Officer Wood did not stop Deck's car, nor did he display his weapon as he approached the vehicle, and instead he merely identified himself and said something like "how you doing?" Under these circumstances, Deck was not subject to the physical control of Officer Wood nor did he submit to Officer Wood's authority when the officer approached the vehicle.

That is not to say, however, that Officer Wood could not have lawfully stopped Deck when he first saw him. Even if there was no probable cause to stop Deck for the *offense* of driving without lights, the *act* of driving without lights late at night in a residential parking lot was some indication that criminal activity was afoot, separate from the offense of driving without lights, itself. That evidence, when coupled with the information relayed by the dispatcher to Officer Wood—that Deck and his sister would be driving a two-door gold car and should be considered armed and dangerous—constituted "reasonable suspicion" that would justify a "*Terry* " stop, at the least.

[13] Notwithstanding Officer Wood's justification to stop Deck when he first pulled into

the parking lot, the actual stop or seizure did not occur until later in the sequence of events when even more evidence developed that gave rise to "reasonable suspicion." Deck's reaction to the initial encounter with Officer Woods was to turn away and reach down toward the passenger side of the vehicle as if he was reaching for something or attempting to conceal something. Only when Officer ***536** Wood ordered Deck to sit up and display his hands, and Deck then complied, thereby submitting to the assertion of police authority, did the seizure occur. *See Hodari D.,* 499 U.S. at 626, 111 S.Ct. 1547. The state's evidence was more than ample to support a reasonable and articulable suspicion that Deck was engaged in criminal activity. *See State v. Hunter,* 783 S.W.2d 493, 495 (Mo.App.1990) (officer had reasonable suspicion to justify investigatory stop where passenger ducked out of sight in an apparent effort to hide something under the seat when officer turned on his "take-down" lights). Thus, under *Terry,* Officer Wood was justified in conducting the ensuing detention, the order to exit the car, and the pat-down search for weapons. In addition, under *Michigan v. Long,* 463 U.S. at 1051, 103 S.Ct. 3469 Officer Wood's subsequent search of the passenger area of the car and the seizure of the pistol from beneath the passenger seat were permissible as part of a "protective sweep" for weapons. Further, after finding the pistol, Officer Wood had probable cause to arrest Deck for unlawful use of weapons. Considering the totality of the circumstances, Officer Wood's conduct was lawful in all of these respects.

[14] [15] As a secondary point, Deck contends that the detention, search and seizure were unlawful because they were based on an informant's tip without any showing that the source of the information was reliable. Although the informant identified himself as Charles Hill, the record does not reveal whether the police had any gauge of his reliability at the time the tip was made,[1] and accordingly, Deck analogizes the situation to cases involving anonymous tips. While it is correct, in general, that a detention and search and seizure is unlawful if conducted solely on the basis of an anonymous tip, *Alabama v. White,* 496 U.S. at 329, 110 S.Ct. 2412, no case has held that an anonymous tip must be ignored in determining whether "reasonable suspicion" exists. Instead, police may properly consider such evidence if it is in conjunction with, as here, other, independent corroborative evidence suggestive of criminal activity. *Id.* at 329–332, 110 S.Ct. 2412. In this case, the information from Hill was corroborated by Officer Wood's observation of 1) a two-door, gold car that matched the description of the car Deck was said to be driving and that pulled in the parking lot of the apartment complex where Deck was said to reside; 2) the same car being driven with the lights off late at night as if to avoid detection; and 3) the driver's reaction when he first saw Officer Woods. In essence, the evidence that corroborates the anonymous tip is the same evidence that, when considered with the anonymous tip, constitutes the grounds for reasonable suspicion.

Because the state has met its burden of showing that no Fourth Amendment violation occurred, this Court holds that the trial court correctly overruled the motion to suppress

and properly admitted the evidence in question at trial.

IV. Voir Dire

A. Gender-*Batson* Challenges

Deck next claims that the trial court erred in overruling his objections to the state's peremptory strikes of two female venirepersons in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). In *Batson,* the United States Supreme Court prohibited the use of peremptory strikes to exclude potential jurors based on race, *Batson,* 476 U.S. at 97, 106 S.Ct. 1712, and in *J.E.B., Batson* was extended to prohibit peremptory strikes on the basis of gender. *J.E.B.,* 511 U.S. at 146, 114 S.Ct. 1419.

***537** [16] Missouri has adopted a three-step process for making a successful *Batson* challenge. *State v. Parker,* 836 S.W.2d 930, 939 (Mo. banc 1992). First, the defendant must object to the state's peremptory strike and identify the protected class to which the prospective juror belongs. *Id.* The state is then required to provide a reasonably specific and clear, race and/or gender-neutral explanation for the strike. *Id.* If the state provides such an explanation, the burden then shifts to the defendant to show that the state's explanation was pretextual and that the strike was actually motivated by the prospective juror's race or gender. *Id.*

[17] [18] [19] In evaluating the prosecutor's explanation, the chief consideration is whether the explanation is plausible in light of the totality of the facts and circumstances surrounding the case. *Id.* While the presence of similarly-situated white or male jurors is probative of pretext, it is not dispositive. *Id.* This Court will reverse the trial court's decision on a *Batson* challenge only upon a showing of clear error. *Id.*

The first of the two gender-*Batson* challenges involved prospective juror number sixteen, a female, who the prosecutors struck with the following explanation:

> MR. JERRELL: Your Honor, the first time I laid eyes on ... and heard her speak, I thought she was a very weak juror. In fact, that's what I wrote in my notes during the middle of voir dire. Also her son's been prosecuted ... and I can't even read my own writing, but I don't want any juror on there, at least her, where her son's been prosecuted.
>
> MR. WILKINS: Actually it's not her son. Her ex-brother-in-law is in the Department of Corrections for burglary and his son has a current charge pending in our county.

MR. JERRELL: I stand corrected. Exactly what my notes say. That's my reasons for [her].

MR. WILKINS: Likewise, Your Honor, I had independent of Mr. Jerrell also written the word weak on [her] and independent of him, also based upon.

[20] The prosecutors' responses indicate that prospective juror number sixteen was stricken not because of her gender but because she would be a "weak" juror and she had relatives who had been or were being prosecuted. An explanation based on a prospective juror's general demeanor, which in this case gave rise to the perception that she was "weak," is facially non-discriminatory. *State v. Smulls,* 935 S.W.2d 9, 15 (Mo. banc 1996). So too is the fact of the arrest, conviction, or incarceration of a prospective juror's relative. *State v. Payne,* 958 S.W.2d 561, 565 (Mo.App.1997); *State v. Johnson,* 930 S.W.2d 456, 461–62 (Mo.App.1996). These explanations were reasonably specific, clear and gender-neutral and thus satisfied the second prong of the *Batson* analysis.

The second gender-*Batson* challenges involved prospective juror number fifty, a female, who was struck for the following reasons:

MR. JERRELL: As for [her], I didn't think much of her either. She does have what we believe to be a prior DWI in Kirkwood, which she never mentioned, from our research on her. I also felt that she was not a strong juror. So that's why we decided to strike her.

MR. WILKINS: Quite frankly, she has a prior DWI in the City of Kirkwood. That's what the criminal history record shows. She was very red-cheeked, sixtiesh, sixty-eight, single. My concern, my interest was that that might signal an alcohol habit, problem, whatever. Had nothing to do with the fact that she was female.

[21] [22] The prosecutors' responses indicate that prospective juror number fifty was struck from the panel because she had a prior DWI conviction that she did not disclose. As stated, a prior conviction is an appropriate and neutral basis for a ***538** peremptory strike. *Payne,* 958 S.W.2d at 565. Deck argues, however, that the strike was pretextual because the prosecutors chose not to strike a similarly situated male who stated during voir dire that he was arrested and pled guilty to driving while intoxicated. To the contrary, the male prospective juror was not similarly situated to her because he admitted his DWI conviction when the prosecutor asked about prior arrests and convictions during voir dire while she did not. Deck further contends that the prosecutors could not properly base the peremptory strike on her DWI because no information regarding the offense was brought out during voir dire. Deck fails to recognize, however, that lawyers are not prohibited from using information outside the record as a basis for a peremptory strike. *See State v. Whitfield,* 837 S.W.2d 503, 509 (Mo. banc 1992) (arrest records may be accessed for use

in selecting jury).

In sum, Deck has not shown that the prosecutors' reasons for striking these two potential jurors were merely pretextual and that the strikes were motivated by gender. The point is denied.

B. Challenge for Cause

[23] Deck also contends that the trial court erred in overruling his motion to strike prospective juror Scott Arnold who gave some indication during voir dire that he might automatically impose the death penalty. According to Deck, this error violated his rights to due process of law, to a fair and impartial jury, to reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18 and 21 of the Missouri Constitution. However, because Deck used a peremptory strike to remove Mr. Arnold from the panel and Mr. Arnold did not serve as a member of the jury, the claim is precluded by section 494.480.4, RSMo 1994, which states:

> The qualifications of a juror on the panel from which peremptory challenges by the defense are made shall not constitute a ground for the granting of a motion for new trial or the reversal of a conviction or sentence unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.

The point is denied.

V. Penalty Phase—Victim Impact Testimony

Deck asserts that the testimony of William Long, the son of the victims, exceeded the guidelines for victim impact evidence established by the United States Supreme Court in *Payne v. Tennessee,* 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), and that the trial court erred in overruling his motion for a mistrial because of the resulting emotional reaction in the courtroom. The matter arose as part of the state's penalty phase testimony when William Long read a statement that the family had prepared. After his testimony, three members of the jury were crying, as were members of the Long family who were seated in the courtroom.

[24] Victim impact evidence is admissible under the United States and Missouri

Constitutions. *State v. Roberts,* 948 S.W.2d 577, 594 (Mo. banc 1997), *cert. denied.* 522 U.S. 1056, 118 S.Ct. 711, 139 L.Ed.2d 652 (1998). According to *Payne,* just as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a "uniquely individual human being," the State is also allowed to present evidence showing each victim's "uniqueness as an individual human being." *Payne,* 501 U.S. at 822–23, 111 S.Ct. 2597. In particular, "the State is permitted to show that victims are individuals whose deaths represent a unique loss to society and to their family and that the victims are not simply 'faceless strangers.' " *Id.* at 825, 111 S.Ct. 2597. *Payne* also holds that victim impact evidence violates the constitution only if it is so "unduly ***539** prejudicial that it renders the trial fundamentally unfair." *Id.* Deck argues that the evidence in this case violated this standard and that the jury based its verdict on emotion. He does not, however, complain of the testimony itself, but of the emotional level in the courtroom and the effect it had on the jury.

[25] Although emotional outbursts are to be prevented insofar as possible, the trial court exercises broad discretion in determining the effect of such outbursts on the jury. *State v. Brooks,* 960 S.W.2d 479, 491 (Mo. banc 1997), *cert. denied,* 524 U.S. 957, 118 S.Ct. 2379, 141 L.Ed.2d 746 (1998). Additionally, this Court has held that "[i]n determining whether to declare a mistrial, the trial court may consider the spontaneity of the outburst, whether the prosecution was at fault, whether something similar, or even worse, could occur on retrial, and the further conduct of the trial." *Id.*

[26] Deck does not point to specific instances in the record that indicate an "extreme emotional level," and therefore, it is difficult to do otherwise than defer to the trial court's discretion. A review of the record does not reflect the "extreme emotional level" Deck describes. There were apparently no emotional outbursts among the family members, only some muted crying during the testimony of the Long children. Furthermore, there is no reason to believe that the family members would not have the same reaction on retrial. In the absence of evidence that emotional outbursts actually occurred, the trial court did not abuse its discretion in overruling Deck's motion for a mistrial.

VI. Penalty Phase—Mitigating Instructions

A. Non–MAI Instructions

[27] Deck next contends that his state and federal constitutional rights were denied when the trial court erroneously refused to submit two non-MAI mitigating circumstance instructions in the penalty phase. Deck's proposed instructions, loosely based on MAI–CR3d 313.44(a), listed six nonstatutory mitigating circumstances for the jury's consideration. This Court again rejects this often-raised claim that the listing of

nonstatutory factors in mitigation is constitutionally required. *State v. Clay,* 975 S.W.2d 121, 133 (Mo. banc 1998) *cert. denied,* 525 U.S. 1085, 119 S.Ct. 834, 142 L.Ed.2d 690 (1999); *Rousan,* 961 S.W.2d at 849.

B. Defective Submission of MAI–CR3d 313.44A

[28] Deck raises the far more problematic claim that the defective submission of Instructions No. 8 and No. 13, the penalty phase instructions on the submission of mitigating circumstances, constituted plain error and violated his right to due process of law, to reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10 and 21, of the Missouri Constitution. The defect was that the final two paragraphs of MAI–CR3d 313.44A, the pattern mitigating circumstances instruction, were inadvertently omitted from Instructions No. 8 and No. 13. That omission, as Deck maintains, created a reasonable likelihood that the jurors mistakenly believed they had to find the existence of any specific mitigating circumstance *by unanimous vote.*

Instruction No. 8, as submitted to the jury, stated:

INSTRUCTION NO. 8

> As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in ***540** aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of the trial.

Instruction No. 13 was identical, except that it referred to Count III.

[29] The final two paragraphs of MAI–CR 3d 313.44A, which were omitted from the instructions in this case, read as follows:

> You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of

> punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

Because Deck failed to object to these instructions at trial, this Court is asked to review for plain error. For instructional error to rise to the level of plain error, the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict. *State v. Doolittle,* 896 S.W.2d 27, 29 (Mo. banc 1995).

[30] [31] In a capital case, the sentencer may not be precluded from considering, as a mitigating factor, any relevant circumstance that the defendant proffers as a basis for a sentence less than death. *Mills v. Maryland,* 486 U.S. 367, 374, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). This principle is violated if the jury is given an instruction that could reasonably be interpreted as precluding them from considering any mitigating evidence unless the jurors unanimously agree on the existence of such evidence. *Id.* at 384, 108 S.Ct. 1860. On the other hand, there is no constitutional requirement that the jury in a capital case be given any particular guidance as to how to undertake the discretionary sentencing decision. *Buchanan v. Angelone,* 522 U.S. 269, 118 S.Ct. 757, 761–62, 139 L.Ed.2d 702 (1998).

The fallacy of Deck's argument—that the jury was likely misled into believing that they had to find mitigating circumstances by unanimous vote—is that it wrongly assumes that the omitted paragraph was necessary to comply with the holding in *Mills*. *See State v. Petary,* 790 S.W.2d 243 (Mo. banc 1990). Before MAI–CR 3d 313.44 was revised, effective January 1, 1989, the omitted paragraph was not part of the pattern instruction, and in its place, was a paragraph that read as follows:

> If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, (then) (then, on Count ___) you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

Like Instructions No. 8 and No. 13 in this case, the old version of the pattern instruction did not specifically advise the jurors that they need not unanimously find the existence of a particular mitigating facts or circumstances. Nonetheless, the old version, despite the alleged defect, survived essentially the same constitutional challenge under *Mills* that is now brought in this case. *State v. Weaver,* 912 S.W.2d 499, 518 (Mo. banc 1995); *Petary,* 790 S.W.2d at 245. Although the alleged defect in this case was the omission of the final paragraph of the instruction, rather than the inclusion of an allegedly defective paragraph in the old version of the instruction, the alleged defect is essentially the same—that both instructions purported to require unanimous votes on mitigating circumstances.

The rationale of this Court's holding in *Weaver* and *Petary* is that when the instructions ***541** in question are considered in conjunction with all the other instructions, the jury is not misled. *Id.* Here, as in *Weaver* and *Petary,* additional explanatory instructions were submitted for both counts. Those instructions, No. 9 and No. 14, were based on MAI–CR 3d 313.46A and were identical except for reference to different counts. Instruction No. 9 stated:

> As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

This Court observed in *Petary* that MAI–CR 3d 313.46A informs the jury,

> in unmistakable terms that it is never obliged to return death sentence. It has already been told that, in making this decision, it may consider any circumstances it finds in mitigation of punishment. It is clear that in making this final resolution each juror may consider any fact or circumstance which he or she considers sufficient to indicate mitigation, or, for that matter, a juror may vote against a death sentence without having a reason.

Petary, 790 S.W.2d at 246.

Because Instructions No. 9 and No. 14 were submitted along with Instructions No. 8 and No. 13, it was made clear to each juror that he or she was individually afforded the discretion to find mitigating circumstances, without unanimity with the other jurors, and vote against a death sentence on the basis of those individual findings alone. Furthermore, the possibility that the jurors were misled should be discounted even more by the fact that defense counsel argued forcefully in his closing that each juror had the individual right to vote for a sentence of life.

Despite Deck's assertions, Instructions No. 8 and No. 13 explicitly require unanimity only in finding facts and circumstances in *aggravation* of punishment. There is no basis for reading that requirement into the rest of the instruction. In fact, it is all the more unlikely that the jurors perceived a unanimity requirement in this case, because there were no statutory mitigators submitted for their consideration. The instructions, as given and taken as a whole, effectively guided the jurors through the deliberation process as set

out in sections 565.030 and 565.032, RSMo 1994, and there is no reasonable likelihood that the jury applied the challenged instructions in a way that prevented the consideration of mitigating circumstances.

In a related argument, Deck contends that the jury was not instructed that they must return a verdict fixing punishment at imprisonment for life if the evidence in mitigation of punishment was sufficient to outweigh the evidence of aggravation of punishment, as required by section 565.030.4(3), RSMo 1994. We disagree. While it is true that Instructions No. 8 and No. 13 did not explicitly mandate the punishment at life imprisonment if the circumstances in mitigation outweighed the circumstances in aggravation, it was nonetheless clear from the other instructions that that result must follow because life imprisonment was the only sentencing alternative available. The point is denied.

C. Failure to Define "Mitigating"

The next issue involves an unusual incident that occurred during the jury's deliberations. The jury sent a note to the trial court asking, "What is the legal definition of mitigating (as in mitigation circumstances)? Instruction 8." The trial court replied, "Any legal terms in the instructions that have a 'legal' meaning would have been defined for you. Therefore, any terms that you have not had defined for you should be given their ordinary meaning." The jury followed up with a note inquiring "Can we have a dictionary?" ***542** The trial court informed the jury, "No, I'm not permitted to give you one." Deck contends that this apparent confusion on a legal issue obligated the trial court to provide the requested definition and that the failure to do so compounded the error concerning the omitted paragraphs from Instructions No. 8 and No. 13. Significantly, Deck did not raise this issue at trial. When the jury posed the questions, Deck did not request that the term "mitigating" be defined, nor did he object to the trial court's responses. In the absence of an objection, Deck asks for plain error review under the manifest injustice standard of Rule 30.20.

[32] Despite the fact that one or more jurors may have been confused, the trial court gave the correct responses to the questions. The first question was a request for the "legal definition" of "mitigating," but this word is not defined in the MAI–CR 3d instructions. *See* MAI–CR 3d 313.44A (10–1–94); MAI–CR 3d 333.00 (1–1–87). This Court has held that "[w]hen MAI notes on use do not provide for a definition, the court must not give one." *State v. Feltrop,* 803 S.W.2d 1, 14 (Mo. banc 1991). In *State v. Wise,* 879 S.W.2d 494, 518 (Mo. banc 1994), a case particularly on point, the defendant claimed the trial court erred in refusing the defendant's tender of an instruction defining the term "mitigation." In upholding the trial court's ruling, this Court stated, "MAI instructions do

not define 'mitigation'; therefore, the court properly refused the proposed definition." *Id.* Consistent with *Feltrop* and *Wise*, the notes on use to the MAI–CR 3d instruction on definitions provides:

> A definition of a term, word, or group of words shall not be given unless permitted by paragraphs A, B, C, D, or E above, [not applicable in this case] even if requested by counsel or the jury. If the jury, while deliberating, requests the definition of a term whose definition is not permitted by paragraphs A, B, C, D, or E above, the following response is suggested:
>
> I am not permitted to define the word(s) ____ for you. (Except for those terms for which you have been supplied definitions, each) (Each) word used in the instruction has its common and generally understood meaning.

MAI–CR 3d 333.00 (1–1–87), Note on Use 2. As noted, the trial court followed this instruction to the letter. No error was committed.

[33] Additionally, the trial court was correct in refusing to provide a dictionary for the jury. All courts view the use of a dictionary as highly improper because the jury should rely solely upon the evidence and the court's instructions. *State v. Suschank,* 595 S.W.2d 295, 297–98 (Mo.App.1979). The impropriety of permitting jurors to search a dictionary is that it allows them to select at will definitive language that might misrepresent the court's instructions. *State v. Taylor,* 581 S.W.2d 127, 129 (Mo.App.1979). In view of these cases, Deck's position that the judge may supplement an instruction with a dictionary definition is not persuasive.

[34] The essence of Deck's argument is that the penalty phase instructions, and the mitigating circumstances instructions in particular, are too easily misunderstood. At the hearing on the motion for new trial, Deck called Dr. Richard Weiner, a psychologist, who testified that "Missouri penalty phase instructions are poorly understood." Dr. Weiner explained that he came to that conclusion as a result of a study he conducted that also showed that jurors have the most difficulty with the concept of mitigation. Dr. Weiner's study, however, must be discounted because the people interviewed for the study did not act as jurors. They were given hypothetical facts that were different than the facts in this case, and they did not hear the testimony of witnesses, observe physical evidence or deliberate with eleven other jurors. More importantly, in the context of the instructions as a whole, the term ***543** "mitigating" is always contrasted with the term "aggravating" so that no reasonable person could fail to understand that "mitigating" is the opposite of "aggravating." That contrast, for instance, is highlighted in Instructions No. 9 and No. 14, which were based on MAI–CR 3d 313.465A and which stated in pertinent part, "you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and

circumstances in aggravation of punishment...."

[35] Finally, Deck's suggestion that the jury's confusion about the word "mitigating" was due in large part to the omission of the concluding paragraphs to Instructions No. 8 and No. 13 likewise has no merit. Those omitted paragraphs do not even purport to define mitigation for the jury. Moreover, Deck's notion that the jury questions reveal that some jurors "thought they were prohibited from considering certain facts or circumstances as 'mitigating' " and therefore in violation of *Mills v. Maryland,* rests on pure speculation and does not logically follow from the content of the questions.

For these reasons, this Court concludes that the trial court committed no error in refusing to define the term "mitigating" or to provide the jury with a dictionary.

VII. Penalty Phase—Closing Argument

[36] [37] Deck next alleges that the trial court erred in permitting the prosecutor to make improper comments during penalty phase closing argument. The trial court has broad discretion in controlling the scope of closing argument and the court's rulings will be cause for reversal only upon a showing of abuse of discretion resulting in prejudice to the defendant. *State v. Rousan,* 961 S.W.2d 831, 851 (Mo. banc), *cert. denied,* 524 U.S. 961, 118 S.Ct. 2387, 141 L.Ed.2d 753 (1998). In order for a prosecutor's statements to have such a decisive effect, there must be a reasonable probability that the verdict would have been different had the error not been committed. *State v. Barton,* 936 S.W.2d 781, 786 (Mo. banc 1996).

A. Mercy Argument

[38] The first particularized claim is that the prosecutor stated that the jury should impose the death penalty because that was "the only sentence [the jury could] impose to show justice and to show mercy to those people, to the people in the courtroom." Defense counsel objected to the statement and requested a mistrial. The trial court sustained the objection, but overruled the motion for a mistrial. The trial court then granted the prosecutor permission to rephrase the comment, but did not advise the jury that the objection had been sustained. Deck argues that the trial court's inaction violated his rights to due process of law, a fair trial, reliable sentencing, and to be free from cruel and unusual punishment as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 10, 18(a) and 21 of the Missouri Constitution.

Deck's argument focuses on the fact that the trial judge did not advise the jury that the objection had been sustained. However, Deck never requested that the trial court advise the jury that the objection was sustained, and, instead, the trial court took sufficient curative action on its own initiative and properly instructed the prosecuting attorney to rephrase his argument.

[39] The need for curative action assumes, of course, that the prosecutor's mercy argument was improper in the first place. Prosecutors may discuss the concept of mercy in their closing arguments because mercy is a valid sentencing consideration, *Rousan,* 961 S.W.2d at 851, and in that connection may argue that the defendant should not be granted mercy. Prosecutors cannot, however, argue that the jurors may not lawfully grant a defendant mercy by imposing a life sentence. *Id.* In this case, the prosecutor did not argue that ***544** the jurors could not lawfully grant mercy on appellant; thus, Deck's argument has no merit.

B. Personalization

[40] Deck also claims that the trial court erred in permitting the prosecutor to personalize his penalty phase closing argument. The prosecutor told the jury that while they were deliberating, they should "count out ten minutes and you think about how long that is and then think about somebody pointing a gun at your head at the same time." No objection was made to the prosecutor's argument; therefore, Deck requests plain error review.

[41] Relief should rarely be granted on an assertion of plain error in closing argument. *State v. Silvey,* 894 S.W.2d 662, 670 (Mo. banc 1995). The reason, as this Court has explained, is that "in the absence of objection and request for relief the trial court's options are narrowed to uninvited interference with [the closing argument] and a corresponding increase of error by such intervention." *Id.* In order to be entitled to relief, appellant must make a substantial showing that manifest injustice will result if relief is not granted. *State v. Wood,* 719 S.W.2d 756, 759 (Mo. banc 1986).

Deck argues that the prosecutor's comment urging the jurors to put themselves in the place of the victim was the same kind of improper personalization this Court condemned in *State v. Storey,* 901 S.W.2d 886, 901 (Mo. banc 1995). In *Storey,* the prosecutor told the jurors to put themselves in the victim's place and then graphically described the crime to the jurors as if they were the victims. This Court concluded that the prosecutor's argument was improper because it "could only arouse fear in the jury," *id.,* and moreover, arguments that inflame and arouse fear in the jury are especially prejudicial when the death penalty is at issue. *Id.* (citing *State v. Tiedt,* 357 Mo. 115, 206 S.W.2d 524, 529

(Mo. banc 1947)).

The prosecutor's argument in this case is distinguishable from the prosecutor's argument in *Storey*. Here, the prosecutor's comments were brief and isolated and did not involve graphic detail, and as such, they did not result in manifest injustice. The point is denied.

VIII. Reasonable Doubt Instruction

[42] Deck claims that the trial court erroneously submitted instructions in both guilt phase and penalty phase by defining "proof beyond a reasonable doubt" with the words, "firmly convinced." Citing *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), Deck contends that this language allowed the jury to reach its decisions on both guilt and punishment based upon a level of proof less than that which is constitutionally mandated. This Court has consistently and repeatedly denied Deck's precise claim. The phrase "firmly convinced" is essentially synonymous with the phrase "beyond a reasonable doubt." *State v. Barnett,* 980 S.W.2d 297 (Mo. banc 1998), *cert. denied,* 525 U.S. 1161, 119 S.Ct. 1074, 143 L.Ed.2d 77 (1999); *State v. Jones,* 979 S.W.2d 171 (Mo. banc 1998), *cert. denied,* 525 U.S. 1112, 119 S.Ct. 886, 142 L.Ed.2d 785 (1999); *State v. Johnson,* 968 S.W.2d 686 (Mo. banc 1998). The point is denied.

IX. Independent Review under Section 565.035.3

Under section 565.035.3, RSMo 1994, this Court is required to determine:

1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2) Whether a statutory aggravating circumstance and any other circumstances found by the trier of fact were supported by the evidence; and

3) Whether the sentence is excessive or disproportionate to the punishment imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

***545** Having thoroughly reviewed the record, this Court is satisfied that there is no evidence to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

With regard to statutory aggravating circumstances, the jury found: 1) that each murder was committed while the defendant was engaged in the commission of another unlawful homicide, section 565.032.2(2); 2) that the murders were committed for the purpose of receiving money or any other thing of monetary value, section 565.032.2(4); 3) that the murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, section 565.032.2(7); 4) that the murders were committed for the purpose of avoiding a lawful arrest, section 565.032.2(10); 5) that the murders were committed while defendant was engaged in the perpetration of burglary, section 565.032.2(11); and 6) that the murders were committed while defendant was engaged in the perpetration of robbery, section 565.032.2(11). From this Court's review of the record, the evidence amply supports the statutory aggravators found by the jury.

[43] Finally, the imposition of the death penalty in this case is clearly not excessive or disproportionate. The strength of the evidence and the circumstances of the crime far outweigh any mitigating factors in Deck's favor.

There are numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person. *See, e.g., State v. Johnson,* 968 S.W.2d 123 (Mo. banc 1998); *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993); *State v. Mease,* 842 S.W.2d 98 (Mo. banc 1992); *State v. Hunter,* 840 S.W.2d 850 (Mo. banc 1992); *State v. Ervin,* 835 S.W.2d 905 (Mo. banc 1992); *State v. Powell,* 798 S.W.2d 709 (Mo. banc 1990); *State v. Reese,* 795 S.W.2d 69 (Mo. banc 1990); *State v. Sloan,* 756 S.W.2d 503 (Mo. banc 1988); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Murray,* 744 S.W.2d 762 (Mo. banc 1988); *State v. Young,* 701 S.W.2d 429 (Mo. banc 1985).

In addition, a sentence of death has often been imposed when the murder involved acts of brutality and abuse that showed depravity of mind. *See, e.g., State v. Kinder,* 942 S.W.2d 313 (Mo. banc 1996); *State v. McMillin,* 783 S.W.2d 82 (Mo. banc 1990); *State v. Sidebottom,* 753 S.W.2d 915 (Mo. banc 1988); *State v. Walls,* 744 S.W.2d 791 (Mo. banc 1988); *State v. Lingar,* 726 S.W.2d 728 (Mo. banc 1987); *State v. Roberts,* 709 S.W.2d 857 (Mo. banc 1986).

This Court has also upheld the death sentence where the murder was committed in hopes of avoiding arrest or detection. *State v. Clemons,* 946 S.W.2d 206 (Mo. banc 1997); *State v. Copeland,* 928 S.W.2d 828 (Mo. banc 1996); *State v. Richardson,* 923 S.W.2d 301 (Mo. banc 1996); *State v. Gray,* 887 S.W.2d 369 (Mo. banc 1994); *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993); *State v. Six,* 805 S.W.2d 159 (Mo. banc 1991); *State v. Kilgore,* 771 S.W.2d 57 (Mo. banc 1989); *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988); *State v. Grubbs,* 724 S.W.2d 494 (Mo. banc 1987); *State v. Foster,* 700 S.W.2d

440 (Mo. banc 1985).

The death penalty imposed in this case is proportionate to the sentence imposed in similar cases.

X.

For the foregoing reasons, the judgment is affirmed.

All concur.

Footnotes

1 Charles Hill testified at the preliminary hearing that he was a retired Marine sergeant and a former boyfriend of Tonia Cummings, who overheard Deck and Cumming's plan for the robbery/murder about a week before it was carried out. Hill did not, however, testify at the suppression hearing or at trial.

68 S.W.3d 418
Supreme Court of Missouri,
En Banc.

Carman L. DECK, Appellant,
v.
STATE of Missouri, Respondent.

No. SC 83237. | Feb. 26, 2002.

After defendant's convictions for first-degree murder, related offenses, and death sentences were affirmed, 994 S.W.2d 527, defendant moved for postconviction relief, alleging ineffective assistance of counsel. The Circuit Court, Jefferson County, Gary P. Kramer, J., denied motion. Defendant appealed. The Supreme Court, Laura Denvir Stith, J., held that: (1) finding of no manifest injustice on direct plain error review does not establish a finding of no prejudice under *Strickland* in postconviction setting, abrogating *Hamilton v. State*, 31 S.W.3d 124, *State v. Kelley*, 953 S.W.2d 73, *State v. Williams*, 945 S.W.2d 575, *State v. Suter*, 931 S.W.2d 856, *State v. Clark*, 913 S.W.2d 399, *State v. Chapman*, 936 S.W.2d 135, *State v. Davis*, 936 S.W.2d 838, *State v. Leady*, 879 S.W.2d 644, *State v. Anderson*, 862 S.W.2d 425, *State v. McKee*, 856 S.W.2d 685, and *Hanes v. State*, 825 S.W.2d 633; (2) failure to offer proper mitigation instructions during penalty phase was ineffective assistance of counsel; and (3) fact that assistant prosecutor represented defendant on unrelated burglary charge three years ago did not create a conflict of interest for prosecutor's office.

Affirmed in part, reversed in part, and remanded.

West Headnotes (26)

[1] **Criminal Law**⇨Necessity of Objections in General

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In General

Although prejudicial error is a condition precedent of "plain error," which is a showing by defendant that an error so substantially affected defendant's rights that a manifest injustice

or a miscarriage of justice would result were the error left uncorrected, prejudicial error does not inevitably rise to the level of plain error. V.A.M.R. 30.20.

21 Cases that cite this headnote

[2] **Criminal Law**⇐Post-Conviction Relief

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.36Post-Conviction Relief
(Formerly 110k1158(1))

Supreme Court's review of the trial court's findings of fact and conclusions of law in denying a postconviction motion is limited to a determination of whether the findings and conclusions are clearly erroneous.

Cases that cite this headnote

[3] **Criminal Law**⇐Review De Novo

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)13Review De Novo
110k1139In General

The proper legal standard to be applied in determining a postconviction motion is an issue of law, which Supreme Court determines de novo, without deference to the motion court.

1 Cases that cite this headnote

[4] **Criminal Law**⇐Prejudice in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General

110k1883Prejudice in General
(Formerly 110k641.13(1))

Benchmark for judging whether counsel is ineffective is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[5] **Criminal Law**⇐Presumptions and Burden of Proof in General
Criminal Law⇐Deficient Representation and Prejudice in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1871Presumptions and Burden of Proof in General
(Formerly 110k641.13(1))
110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1881Deficient Representation and Prejudice in General
(Formerly 110k641.13(1))

To meet ineffective assistance of counsel standard, movant must show by a preponderance of the evidence: (1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances, and (2) that counsel's deficient performance prejudiced the defense. U.S.C.A. Const.Amend. 6.

31 Cases that cite this headnote

[6] **Criminal Law**⇐Presumptions and Burden of Proof in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1871Presumptions and Burden of Proof in General
(Formerly 110k641.13(1))

A movant bears a heavy burden in establishing the deficient performance prong of claim of ineffective assistance of counsel, by a preponderance of the evidence, for the movant must

overcome a strong presumption that counsel provided competent assistance. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15(i).

22 Cases that cite this headnote

[7] **Criminal Law**⊕Deficient Representation in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1882Deficient Representation in General
(Formerly 110k641.13(1))

Movant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness; to do this, movant must identify specific acts or omissions of counsel that resulted from unreasonable professional judgment, and the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15(i).

14 Cases that cite this headnote

[8] **Criminal Law**⊕Prejudice in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1883Prejudice in General
(Formerly 110k641.13(1))

To establish prejudice prong of claim of ineffective assistance of counsel, a movant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, with a "reasonable probability" being a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

35 Cases that cite this headnote

[9] **Criminal Law**⇐Prejudice in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1883Prejudice in General
(Formerly 110k641.13(1))

Standard for prejudice prong of claim of ineffective assistance of counsel is not met by showing that the errors had some conceivable effect on the outcome of the proceeding or that the errors impaired the presentation of the defense, as those standards are either unworkable or subject to being satisfied by every error. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[10] **Criminal Law**⇐Necessity of Objections in General
Criminal Law⇐Effectiveness of Counsel

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In General
110Criminal Law
110XXXPost-Conviction Relief
110XXX(B)Grounds for Relief
110k1511Counsel
110k1519Effectiveness of Counsel
110k1519(1)In General

While, under state law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative, under *Strickland,* an outcome-determinative test cannot be applied in a postconviction setting involving a claim of ineffective assistance of counsel, and therefore, the two tests are not equivalents; abrogating *Hamilton v. State,* 31 S.W.3d 124, *State v. Kelley,* 953 S.W.2d 73, *State v. Williams,* 945 S.W.2d 575, *State v. Suter,* 931 S.W.2d 856, *State v. Clark,* 913 S.W.2d 399, *State v. Chapman,* 936 S.W.2d 135, *State v. Davis,* 936 S.W.2d 838, *State v. Leady,* 879 S.W.2d 644, *State v. Anderson,* 862 S.W.2d 425, *State v. McKee,* 856 S.W.2d 685, and

Hanes v. State, 825 S.W.2d 633. U.S.C.A. Const.Amend. 6; V.A.M.R. 30.20.

21 Cases that cite this headnote

[11] **Criminal Law**⇐Scope of Inquiry

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)4Scope of Inquiry
110k1134.27In General
(Formerly 110k1134(3))

On direct appeal of criminal conviction, the issue is whether the trial court erred in its rulings at trial.

2 Cases that cite this headnote

[12] **Criminal Law**⇐Prejudice to Rights of Party as Ground of Review
Criminal Law⇐Prejudice to Defendant in General

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1162Prejudice to Rights of Party as Ground of Review
110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1165Prejudice to Defendant in General
110k1165(1)In General

Appellate review of preserved error on direct appeal is for prejudice, not mere error, and it will reverse only if the error is so prejudicial that it deprived the criminal defendant of a fair trial.

4 Cases that cite this headnote

[13] **Criminal Law**⇐Necessity of Objections in General

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In General

If no objection was made to an error or the error was otherwise not preserved, then the trial court cannot normally be accused of error in its rulings, much less prejudicial error.

2 Cases that cite this headnote

[14] **Criminal Law**⊸Necessity of Objections in General

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In General

Although the trial court cannot normally be accused of error in its rulings, much less prejudicial error, if no objection was made or the error was otherwise not preserved, to serve the need for accuracy in the outcome of a trial, appellate courts have the discretion to nonetheless review for plain error if manifest injustice would otherwise result. V.A.M.R. 30.20.

21 Cases that cite this headnote

[15] **Criminal Law**⊸Necessity of Objections in General
Criminal Law⊸Prejudice to Defendant in General

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1030Necessity of Objections in General
110k1030(1)In General
110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1165Prejudice to Defendant in General
110k1165(1)In General

Standards of review of both preserved error and unpreserved error on direct appeal presuppose that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged.

1 Cases that cite this headnote

[16] **Criminal Law**⊕Effectiveness of Counsel

110Criminal Law
110XXXPost-Conviction Relief
110XXX(B)Grounds for Relief
110k1511Counsel
110k1519Effectiveness of Counsel
110k1519(1)In General

When a postconviction motion is filed alleging ineffective assistance of counsel, defendant is asserting the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower than that on direct appeal. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15.

5 Cases that cite this headnote

[17] **Criminal Law**⊕Effectiveness of Counsel

110Criminal Law
110XXXPost-Conviction Relief
110XXX(B)Grounds for Relief
110k1511Counsel
110k1519Effectiveness of Counsel
110k1519(1)In General

Ultimate determination, on a motion for postconviction relief alleging ineffective assistance of counsel, is not the propriety of the trial court's actions with regard to an alleged error, but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel, such that the Supreme Court's confidence in the fairness of the proceeding is undermined. U.S.C.A. Const.Amend. 6; V.A.M.R. 29.15.

8 Cases that cite this headnote

[18] **Criminal Law**⇐Other Particular Issues in Death Penalty Cases

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1963Other Particular Issues in Death Penalty Cases
(Formerly 110k641.13(7))

Trial counsel's submission of faulty jury instructions on critical issue of mitigation during penalty phase of capital murder trial, and failure to object to their absence, were sufficiently egregious errors depriving defendant of reasonably effective assistance of counsel; instructions omitted two paragraphs from pattern jury instructions which told jurors that they must consider circumstances in mitigation of punishment and that jurors need not be unanimous, counsel acknowledged that she had a responsibility to see that omitted paragraphs were in instructions and that mitigation was crucial to the defense, and missing paragraphs were required by pattern jury instructions. U.S.C.A. Const.Amend. 6; V.A.M.R. 28.02(c, f); MAI Criminal 3d No. 313.44A.

3 Cases that cite this headnote

[19] **Criminal Law**⇐Deficient Representation in General

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1882Deficient Representation in General
(Formerly 110k641.13(1))

Although counsel's actions should be judged by her overall performance, the right to effective assistance of counsel may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[20] **Criminal Law**⇐Other Particular Issues in Death Penalty Cases

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1963Other Particular Issues in Death Penalty Cases
(Formerly 110k641.13(7))

Trial counsel's professional incompetence in offering instructions that omitted two paragraphs from pattern jury instructions which told capital jurors that they must consider circumstances in mitigation of punishment and that jurors need not be unanimous, and in failing to object to paragraphs' absence, prejudiced defendant, and was thus ineffective assistance of counsel, where major focus of the defense to State's request for death penalty was existence of mitigating circumstances, missing paragraphs were central to the pivotal defense offered by defendant, and jurors indicated that they were confused about the issue of mitigation. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

[21] **Sentencing and Punishment**⇐Avoidance of Arbitrariness or Capriciousness

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(A)In General
350Hk1613Requirements for Imposition
350Hk1616Avoidance of Arbitrariness or Capriciousness

Penalty of death cannot be imposed in an arbitrary and capricious manner.

Cases that cite this headnote

[22] **Criminal Law**⇐Form and Language in General

110Criminal Law
110XXTrial
110XX(G)Instructions: Necessity, Requisites, and Sufficiency
110k805Form and Language in General
110k805(1)In General

Where an applicable state criminal pattern jury instruction exists, it must be given to the

exclusion of any other instruction. V.A.M.R. 28.02(c).

Cases that cite this headnote

[23] **Sentencing and Punishment**⇐Individualized Determination

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(A)In General
350Hk1613Requirements for Imposition
350Hk1615Individualized Determination

Jury is never required to impose the death penalty, no matter how egregious the crime.

Cases that cite this headnote

[24] **Sentencing and Punishment**⇐Proceedings

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)1In General
350Hk1736In General

There is a significant constitutional difference between the death penalty and lesser punishments; because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Cases that cite this headnote

[25] **Criminal Law**⇐Disqualification of One Prosecutor Affecting or Imputed to the Rest of the Office

110Criminal Law
110XXXICounsel
110XXXI(A)Counsel for Prosecution
110k1691Disqualification of Prosecutor
110k1695Disqualification of One Prosecutor Affecting or Imputed to the Rest of the Office

(Formerly 110k639.3)

Fact that an assistant prosecutor represented defendant on burglary charge three years earlier did not create conflict of interest with prosecutor's office which prosecuted defendant on capital murder charge, where burglary case was not substantially related to murder case, and there was no claim that any confidential information was transmitted to new prosecutor in murder case, or that assistant prosecutor had any involvement in murder case.

2 Cases that cite this headnote

[26] **Criminal Law**⇐Mootness

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)3Questions Considered in General
110k1134.26Mootness
(Formerly 110k1134(3))

Defendant did not have standing to raise issue that court rule's 90-day time limit for filing postconviction relief was unreasonably short in violation of due process, where he asserted issue hypothetically, in that he timely filed his postconviction motion. U.S.C.A. Const.Amend. 14; V.A.M.R. 29.15.

1 Cases that cite this headnote

Attorneys and Law Firms

***421** Melinda K. Pendergraph, Asst. Public Defender, Columbia, for Appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., Evan J. Buchheim, Assistant Atty. Gen., Jefferson City, for Respondent.

Opinion

LAURA DENVIR STITH, Judge.

Carman L. Deck received two sentences of death for the double homicide of James and Zelma Long. His convictions and sentences ***422** for these crimes, and for related convictions for armed criminal action, burglary and robbery, were affirmed on direct appeal, *State v. Deck,* 994 S.W.2d 527 (Mo. banc 1999), *cert. denied,* 528 U.S. 1009, 120 S.Ct. 508, 145 L.Ed.2d 393 (1999). He now appeals the denial of his timely-filed Rule 29.15 motion for post-conviction relief based on ineffective assistance of counsel. Because the death penalty was imposed, this Court has jurisdiction. *Mo. Const. art. V, sec. 10;* Order of June 16, 1988.

Mr. Deck asserts numerous grounds on which he says that his motion for post-conviction relief should be granted as to the penalty phase of his trial. This Court considers his claim that his counsel was ineffective in failing to offer proper mitigation instructions during the penalty phase trial. The Court agrees that this error resulted in prejudice sufficient to entitle him to a new penalty phase trial under the standard set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This Court finds no merit to his claim that he was entitled to a new guilt phase trial and that the time limits for filing his Rule 29.15 motion were unconstitutionally short. Accordingly, the denial of Rule 29.15 relief is reversed as to the penalty phase of the trial, but is affirmed as to the guilt phase of the trial. The case is remanded.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts Surrounding Crimes.

On July 6, 1996, Mr. Deck and his sister, Tonia Cummings, executed a scheme to rob James and Zelma Long.[1] As nightfall approached, they knocked on the Longs' door and pretended to need directions. Mr. Deck then pulled out a pistol and ordered the Longs to lie face down on their bed and to give him their valuables. They fully complied, even helping the intruders to open the safe and writing them a personal check. As the Longs then lay on the bed, begging for their lives, Mr. Deck paced around the bedroom trying to decide what to do for about ten minutes. At that point, Ms. Cummings ran in and said time was running out. Mr. Deck put the gun to Mr. Long's temple and fired twice, and then put the gun to Mrs. Long's head and fired twice. Later that same day, the police picked up Mr. Deck based on a tip from an informant. Mr. Deck later confessed.

B. Trial Events Concerning Submission of Penalty Phase Mitigation Issues.

After Mr. Deck was found guilty of first-degree murder in the deaths of the Longs and on related crimes, the penalty phase of the trial was held. Mr. Deck presented mitigation evidence from four witnesses regarding his horribly abusive childhood. His aunt testified that his parents separated when he was eight or nine, and he and his three younger siblings went to live with their mother. The house and the children were filthy. Carman's younger brother, Michael, testified that their mother was always off drunk at clubs or with her boyfriends, so Carman would take care of his

younger siblings. Sometimes he would even have to go out and find food for them, although he had no money, because they were always hungry and their mother was never there. He would give them baths and play with them, almost like he was their parent. Finally, just before Thanksgiving of 1975, when Carman was ten and his youngest brother two and one-half, his mother abandoned him.

***423** Carman and his brothers lived with his father and his father's girlfriend for awhile, but eventually his father got a new girlfriend who did not want him, and he was placed in foster care. The children were not kept together, and Carman was moved from foster home to foster home. When Carman was 13 or so, he went to live with the Pucketts. Mr. Puckett traveled 800 miles to testify at the trial. He said Carman fit in wonderfully with his family, helping to take care of Mrs. Puckett, who was not able to see, and helping with whatever was asked. Carman had a great relationship with the Puckett children. He told the Pucketts he was afraid to love anymore because if he loves it gets taken away from him. The Pucketts said love was there for him with them and that he could love them, and they tried to adopt him. But, DFS took him away and put him back with his mother, over his protest that "if you take me out of here you're killing me."

Carman's mother continued to abuse him, finally throwing him through a plate glass window. At that point, he was sent to live with other relatives, but lost contact with his siblings. When Carman was in his teens he turned to crime and ended up in prison, but later he and Michael again became close. Michael testified he still loved Carman and trusted Carman with his children.

After the parties finished presenting their evidence in the penalty phase of the trial, the court held an instruction conference. Defense counsel offered two instructions regarding non-statutory circumstances in mitigation of punishment based on MAI–CR3d 313.44A. The court refused both instructions. Defense counsel did not have alternate instructions ready, so new instructions based on MAI–CR3d 313.44A were downloaded from the court's computer and printed. Counsel failed to note that the last two paragraphs of MAI–CR3d 313.44A apparently did not print. In any event, she offered an incomplete version of the downloaded instructions. Proposed Instruction 8 said:

> As to Count I, if you unanimously find that the facts and circumstances in aggravation of punishment, taken as a whole, warrant the imposition of a sentence of death upon the defendant, you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh the facts and circumstances in aggravation of punishment. In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial.

Proposed Instruction 13 was identical except for its numbering and its reference to Count III rather than to Count I.

The two paragraphs from MAI–CR3d 313.44A that should have been included at the end of

Instructions 8 and 13, but were not, would have read:

> You shall also consider any (other) facts or circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

MAI–CR3d 313.44A. Defense counsel offered no objections to the omission of these two paragraphs from Instructions 8 and 13 when the court asked for comments or objections on the record with respect to ***424** any instruction. The trial court subsequently charged the jury with the incomplete versions of Instructions 8 and 13.

During deliberations, the jury sent the judge a note asking, "[w]hat is the legal definition of mitigating (as in mitigation circumstances)? Instruction 8." The judge responded, "Any legal terms in the instructions that have a 'legal' meaning would have been defined for you. Therefore, any terms that you have not had defined for you should be given their ordinary meaning." The jury then sent another note, asking, "Can we have a dictionary?" The judge replied, "No, I'm not permitted to give you one." Counsel for Mr. Deck neither requested that "mitigation" be defined nor objected to the trial court's responses to the jury's requests. The jury fixed punishment at death on both counts.

C. Discovery of Missing Mitigation Language Post–Trial.

Defense counsel did not realize that the final two key paragraphs of MAI–CR3d 313.44A had been omitted until one of her experts pointed it out as she was preparing for the sentencing hearing almost a month after trial. She brought the error to the judge's attention in chambers, before sentencing. The prosecutor conceded that an error had been made, but argued defense counsel committed the error, not the court. Defense counsel accepted responsibility, urged the court not to penalize Mr. Deck for her error and argued that the only recourse was to give Mr. Deck a new penalty phase trial. The court rejected this motion, stating that counsel had an obligation to submit the instructions in proper form and had failed to show the omissions resulted in prejudice.

D. Finding of No Plain Error on Direct Appeal.

[1] On direct appeal, this Court rejected Mr. Deck's claim that it was plain error to omit the last two paragraphs of MAI–CR3d 313.44A from Instructions 8 and 13, stating:

> For instructional error to rise to the level of plain error, *the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict.*

Deck, 994 S.W.2d at 540 (emphasis added). This definition of plain error is consistent with that in other cases. Although "prejudicial error" is a condition precedent of "plain error," "prejudicial error" does not inevitably rise to the level of "plain error." *State v. Miller,* 604 S.W.2d 702, 706 (Mo.App. W.D.1980). To show plain error, defendant must show the error so substantially affected his rights that a manifest injustice or a miscarriage of justice would result were the error left uncorrected. Rule 30.20; *State v. Winfield,* 5 S.W.3d 505, 516 (Mo. banc 1999).

Deck determined that the prejudicial effect of the omission of the two noted paragraphs from Instructions 8 and 13 was ameliorated by the giving of Instructions 9 and 14. Instruction 9 stated[2]:

> As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to access and declare the punishment at death. Whether that is to be your final decision rests with you.
>
> If these instructions are read together, *Deck* concluded, the jurors would realize that they did not have to be unanimous as ***425** to each mitigating factor. The instructions, therefore, did not affirmatively mislead them, and the high standard for finding plain error was not met even in the absence of the missing paragraphs. *Id.* at 541. *Deck* also rejected the contention that the court should have defined "mitigating," holding it has no special legal definition and that it was not error to deny the jury's request for a dictionary because "the jury should rely solely upon the evidence and the court's instructions." *Id.* at 542.

II. COMPARISON OF PLAIN ERROR RELIEF STANDARD WITH POST–CONVICTION RELIEF STANDARD UNDER STRICKLAND

A. Standard of Review.

Mr. Deck filed a motion for post-conviction relief under Rule 29.15, which was denied by the motion court. The State argues that the motion court properly rejected Mr. Deck's arguments in regard to error in the mitigation instructions based on this Court's holding on direct appeal that the failure to give the jury the two mitigation paragraphs did not amount to plain error. The State argues, "it is well-settled law that a finding of no 'plain error' on direct appeal forecloses a movant from re-litigating the same issue in a post-conviction motion under the guise of 'ineffective assistance of counsel.' " It concludes that, as a result, "[t]he finding of no manifest injustice under the 'plain error' standard on direct appeal serves to establish a finding of no prejudice under the test of ineffectiveness of counsel enunciated under *Strickland v. Washington,* [466 U.S. at 686–88,

104 S.Ct. 2052]." In support, the State relies on cases such as *Sidebottom v. State,* 781 S.W.2d 791 (Mo. banc 1989), and various intermediate appellate court decisions. Mr. Deck disputes the State's interpretation and application of these cases and argues that, to the extent they may support the State's position, they fail to follow *Strickland* and should be overruled.

[2] [3] This Court's review of the trial court's findings of fact and conclusions of law in denying a post-conviction motion is limited to a determination of whether the findings and conclusions are clearly erroneous. *Rousan v. State,* 48 S.W.3d 576, 581 (Mo. banc 2001). Here the parties have presented an issue as to the proper legal standard to be applied in determining a post-conviction motion. This is an issue of law, which this Court determines *de novo,* without deference to the motion court. *State v. Werner,* 9 S.W.3d 590, 595 (Mo. banc 2000).

B. Strickland Standard for Grant of Post–Conviction Relief.

[4] [5] The United States Supreme Court set out the standard for granting post-conviction relief based on allegations of ineffective assistance of counsel in *Strickland.* It held that the "benchmark" for judging whether counsel is ineffective is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686, 104 S.Ct. 2052. It further explained that in order to meet this standard movant must show by a preponderance of the evidence: (1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and (2) that counsel's deficient performance prejudiced the defense. *Id.* at 687–88, 104 S.Ct. 2052.

[6] [7] A movant bears a heavy burden in establishing the first prong of the standard by a preponderance of the evidence, for the movant must overcome a strong presumption that counsel provided competent assistance. Rule 29.15(i); *Leisure v.* ***426** *State,* 828 S.W.2d 872, 874 (Mo. banc 1992). Movant must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052. To do this, movant must identify specific acts or omissions of counsel that resulted from unreasonable professional judgment, and the "court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance." *Id.* at 690, 104 S.Ct. 2052.

[8] In regard to the second prong of the *Strickland* test, the Court said that an "error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052. For this reason, a movant must claim counsel's errors resulted in prejudice by showing "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052 (emphasis added).

[9] This standard is not met by showing that the errors "had some conceivable effect on the outcome of the proceeding" or that the errors " 'impaired the presentation of the defense,' " as those standards are either unworkable or subject to being satisfied by every error. *Id.* at 693, 104 S.Ct. 2052. On the other hand, the Supreme Court specifically rejected the argument that a movant must meet an "outcome-determinative" test by showing that it is more likely than not that counsel's deficient conduct altered the outcome of the case, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

C. Missouri Courts' Application of Strickland.

While Missouri courts since *Strickland* have uniformly recognized the *Strickland* standard for ineffectiveness and prejudice, some cases have overlooked *Strickland*'s careful admonition that a movant need not prove that an error was outcome-determinative in order to be entitled to post-conviction relief.

The origin of this erroneous application of *Strickland* appears to be in the misinterpretation of *Sidebottom*. *Sidebottom* involved the effect of defense counsel's failure to object to an exhibit that made reference to an uncharged rape and burglary. After setting forth the applicable *Strickland* standard, *Sidebottom* noted that the error was raised on direct appeal, but was determined not to have resulted in plain error. 781 S.W.2d at 796–97. It then determined that, "[o]n the facts of the present case and the law as applied to them, *the bases for* the Court's finding of no manifest injustice on direct appeal serve now to establish a finding of no prejudice under the *Strickland* test." *Sidebottom,* 781 S.W.2d at 796 (emphasis added).

As is evident, *Sidebottom* did not state that a finding of no plain error on direct appeal necessarily equates to a finding of no prejudice under *Strickland.* It simply held that the facts that formed the *bases of* its finding of no plain error in that case also formed *the bases of* the finding of no *Strickland* prejudice on the post-conviction motion. In so doing, it properly applied the *Strickland* standard, not the plain error standard, stating, "*movant fails to show that, but for trial counsel's failure to object and then to request a mistrial, there was a 'reasonable probability that the result* ***427** *would have been different.'* " *Sidebottom,* 781 S.W.2d at 797 (emphasis added).

[10] Various opinions have taken this language from *Sidebottom,* and from two of this Court's later cases,[3] out of context and have incorrectly concluded that "[a] finding of no manifest injustice on direct plain error review establishes a finding of no prejudice for purposes of the *Strickland* test." *State v. Williams,* 945 S.W.2d 575, 583 (Mo.App. W.D.1997).[4] In so doing, they have lost sight of the difference in the standards of review *Strickland* teaches are applicable on plain error review as opposed to on post-conviction review. More specifically, while, under Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome

determinative, *State v. Armentrout,* 8 S.W.3d 99, 110 (Mo. banc 1999), *Strickland* clearly and explicitly holds that an outcome-determinative test cannot be applied in a post-conviction setting.[5] 466 U.S. at 693, 104 S.Ct. 2052. Therefore, the two tests are not equivalents. To the extent that the cases relied on by the State and other Missouri cases apply a different standard, they are inconsistent with *Strickland* and should no longer be followed.

D. Reasons for the Distinction in Applicable Standards of Review.

[11] [12] [13] [14] [15] The reason why the standards of review of preserved and unpreserved error on direct appeal are different from each other, and why both are in turn different from the standard for review of a post-conviction motion, is explained by the very different focuses of the inquiries under each standard. On direct appeal, the issue is whether the trial court erred in its rulings at trial. Appellate review of preserved error is "for prejudice, not mere error, and [it] will reverse only if the error is so prejudicial that it deprived the defendant of a fair trial." *State v. Tokar,* 918 S.W.2d 753, 761 (Mo. banc 1996). If no objection was made or the error was otherwise not preserved, then the trial court cannot normally be accused of error in its rulings, much less prejudicial error. In order to serve the need for accuracy in the outcome of a trial, appellate courts have ***428** the discretion to nonetheless review for plain error if manifest injustice would otherwise result. Rule 30.20; *State v. Johnson,* 968 S.W.2d 123, 127 (Mo. banc 1998). But, both of these standards presuppose "that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

[16] [17] By contrast, when a post-conviction motion is filed alleging ineffective assistance of counsel, defendant is asserting "the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id.* The ultimate determination thus, is not the propriety of the trial court's actions with regard to an alleged error, but whether defendant has suffered a genuine deprivation of his right to effective assistance of counsel, such that this Court's confidence in the fairness of the proceeding is undermined. *Cf. Wilson v. State,* 813 S.W.2d 833, 834 (Mo. banc 1991); *Walker v. State,* 698 S.W.2d 871, 875 (Mo.App. W.D.1985).

Of course, as *Strickland* recognized, 466 U.S. at 694, 697, 104 S.Ct 2052 this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland* test. Nonetheless, *Strickland* cautions that the distinction in the standards of review is important because there are a small number of cases in which the application of the two tests will produce different results. *Id.* at 697, 104 S.Ct 2052.

This is borne out in the several Missouri cases that have found a basis for post-conviction relief, or

recognized that such a basis could exist, despite finding no plain error on direct appeal. For instance, in *Kenner v. State,* 709 S.W.2d 536 (Mo.App. E.D.1986), the court noted that on direct appeal it had held that the trial court did not commit plain error in admitting evidence of other crimes committed by defendant, where counsel did not object to admission of this evidence. *Id.* at 539. There, as here, the State argued that claims rejected on direct appeal are not cognizable in his post-conviction motion. *Id.* at 540. *Kenner* rejected this argument based on the distinction between the issues before a court on direct appeal and on post-conviction review, stating:

> In reviewing the trial court's decision on movant's Rule 27.26 motion *we are not determining the propriety of the admittance into evidence of testimony and photographs ... We are determining whether defense counsel's failure to timely and properly object to this evidence constitutes ineffective assistance of counsel thereby prejudicing movant.* We find that the untimeliness ... was highly prejudicial and is grounds for granting movant[']s Rule 27.26 motion.

Id. (emphasis added). Other opinions recognize that the two inquiries are different and that denial of a plain error claim is not dispositive of the question whether counsel was ineffective in failing to preserve the issue as to which plain error was not found. *See, e.g., State v. Sublett,* 887 S.W.2d 618, 620 (Mo.App. W.D.1994) (court found no plain error, said it "could not say" how it might have ruled were the issue preserved, and remanded for determination of the separate issue whether counsel would be found ineffective under ***429** Rule 29.15 for failing to object).[6]

III. APPLICATION OF STRICKLAND TEST TO MITIGATION ISSUES

The remaining question is whether the instant case falls within this limited range of cases in which plain error did not exist, but *Strickland* prejudice is present because "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686, 104 S.Ct. 2052.

A. First Prong of Strickland: Ineffective Assistance.

[18] To meet the first prong of *Strickland,* Mr. Deck was required to show by a preponderance of the evidence that his trial counsel was ineffective in offering instructions that omitted the two paragraphs from MAI–CR3d 313.44A that told the jurors they must consider circumstances in mitigation of punishment and need not be unanimous.[7] At the hearing, counsel acknowledged that she had thought the omitted paragraphs were in the instructions and that she had a responsibility to see that they were. She also agreed that mitigation was crucial to her defense, and that she wanted the court to give correct mitigation instructions and to define mitigation, but just failed to make a record of this. Indeed, while her own view of her effectiveness is not determinative, it is noteworthy that she testified, "We... copied the wrong version of 313.44," "I'm willing to accept

the blame for that," "I'm the first one to raise my hand and say I should've caught it and I didn't," and "I was ineffective not realizing that the instructions were incomplete." And, this was not a situation in which objection would have been futile. The missing paragraphs were actually required by MAI–CR3d 313.44A; a presumption of error would have arisen had they been requested but not given. Rule 28.02(c), (f).

[19] Although counsel's actions should be judged by her overall performance, the right to effective assistance of counsel "may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). The submission of faulty instructions on the critical issue of mitigation was a "sufficiently egregious" error that it deprived Mr. Deck of "reasonably effective assistance" of counsel. *See also, Strickland,* 466 U.S. at 693–696, 104 S.Ct. 2052.

B. Second Prong of Strickland: Counsel's Deficient Performance Prejudices Defense.

[20] The second prong of *Strickland* requires a determination whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. 2052.

***430** [21] [22] In deciding this issue, the Court is mindful of the fact that this case involves capital punishment, and that the penalty of death cannot be imposed in an arbitrary and capricious manner. *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). To assist in channeling the jury's discretion in deciding whether to impose a death sentence, the legislature has directed that the jurors must examine the circumstances in both aggravation and mitigation of punishment. *State v. Smith,* 649 S.W.2d 417, 430 (Mo. banc 1983), *cert. denied,* 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983). It is to further this purpose that a series of jury instructions has been promulgated that guide the jury through these critical determinations, including MAI–CR3d 313.44A. Where an applicable MAI–CR instruction exists, it must be given to the exclusion of any other instruction. Rule 28.02(c); *State v. Ervin,* 979 S.W.2d 149, 158 (Mo. banc 1998).

[23] [24] This is particularly important where, as here, the issue is the consideration of mitigating circumstances in a death penalty case, for the jury is never required to impose the death penalty, no matter how egregious the crime. *Storey,* 986 S.W.2d at 464. Moreover, as the Supreme Court said in *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), "there is a significant constitutional difference between the death penalty and lesser punishments." *Id.* at 637, 100 S.Ct. 2382. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 638, n. 13, 100 S.Ct. 2382 *quoting, Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (opinion of Stewart, Powell and Stevens, JJ.).

Therefore, even where, as here, counsel failed to object to a failure to follow an applicable MAI–CR3d instruction, because the missing paragraphs would have guided the jury as to how to determine whether to impose death, it is all the more important to exercise care in deciding whether the prejudice prong of *Strickland* is met. Here, there are multiple circumstances that cause this Court to conclude that there is a reasonable probability that counsel's errors prejudiced the defense and affected the outcome of the trial.

The major focus of Mr. Deck's defense to the State's request for the death penalty was the existence of mitigating circumstances. The defense presented substantial evidence concerning the abuse Mr. Deck suffered as a child, the lack of parental love and his continual move from one foster home to another. It presented evidence that, despite all this, he continued to love and care for his younger siblings, scrounging for food for them and bathing them while his mother was out at clubs or with boyfriends. It showed how the Pucketts wanted to adopt him and give him a chance to grow up in a loving family, but he was instead returned to his mother and further abuse.

The missing paragraphs of the instruction told the jury about the need to balance this mitigating evidence with the aggravating circumstances focused on by the State, and what evidence the jury could consider in deciding mitigation. These paragraphs were thus central to the pivotal defense offered by Mr. Deck. But the jurors never heard them. Moreover, most of the jurors never heard an explanation of the concept of mitigation during voir dire, for defense counsel failed to give them one. While she was not required to do so, in the absence of such an explanation, the jurors were more dependent on the instructions.

***431** Most tellingly, the jurors themselves indicated that they were confused about the very issue of mitigation. They sent the judge a note stating they were confused about what mitigation meant in Instruction 8 and asking for a legal definition of the term and, later, requesting a dictionary so they could look up the term themselves. While the court's denial of their requests was proper, the requests show that the jury was focusing on the issue of mitigation and may have been confused by what it meant as used in the instructions.

It is the jurors' focus on mitigation and their apparent confusion about it when considering whether to impose the death penalty that causes this Court to conclude that this case belongs in that small group of cases in which the *Strickland* standard of review leads to a different outcome than does the heightened standard applied on plain error review. For this reason, this Court holds that in this case defense counsel's professional incompetence in failing to include the two mitigation paragraphs or to object to their absence was so egregious as to entitle Mr. Deck to a new penalty phase trial.

In so holding, this Court does not suggest that the failure to give these two paragraphs is so inherently erroneous that it will always result in prejudice under the *Strickland* standard. Each case must be decided on its own facts. *State v. Beeler,* 12 S.W.3d 294, 299 n. 3 (Mo. banc 2000). But, on the particular facts of this case in which substantial mitigating evidence was offered,

counsel's errors have so undermined this Court's confidence in the outcome of the trial that the Court concludes there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[8]

IV. OTHER ERRORS

[25] Mr. Deck contends the trial court erred in denying his Rule 29.15 motion as to the guilt phase of the trial because his appellate counsel failed to raise the trial court's error in overruling his pre-trial motion to disqualify the prosecutor's office due to an alleged conflict of interest. He says a conflict arose because an assistant prosecutor who was *not* involved in his prosecution had represented him on an *unrelated* burglary charge three years earlier. Mr. Deck's claim must fail because the earlier case in which his counsel was associated is not substantially related to the instant case and there is no claim that any confidential information was transmitted to the prosecutor in this case or that his former counsel had any involvement in this case. The cases to which Mr. Deck cites, *State v. Ross,* 829 S.W.2d 948, 949 (Mo. banc 1992), and *State v. Reinschmidt,* 984 S.W.2d 189, 192 (Mo.App. S.D.1998), are inapposite because in each of those cases defendant's counsel became associated in the prosecution of a former client after actually representing him in the same or a related matter.

[26] Mr. Deck also claims the motion court clearly erred in ruling that Rule 29.15 is not unconstitutional because the rule's 90–day time limit is an unreasonably short time limit in violation of the Due Process Clause of the 14th Amendment. He admits this issue has been repeatedly rejected by this Court. This Court agrees; it is "a time-worn and oft-rejected charge." *State v. Ervin,* 835 S.W.2d 905, 929 (Mo. banc 1992). *See also* ***432** *Duvall v. Purkett,* 15 F.3d 745, 748 n. 6 (8th Cir.1994). He asks for reconsideration of the issue in light of the Anti–Terrorism and Effective Death Penalty Act, but he does not have standing to raise this issue because he asserts it only hypothetically, in that he timely filed his post-conviction motion. *See State v. Kerr,* 905 S.W.2d 514, 515 (Mo. banc 1995) (there is no standing to raise "hypothetical instances in which the statute might be unconstitutionally applied").

V. CONCLUSION

For the reasons set out above, this Court reverses the judgment to the extent it denies a new penalty phase trial. In all other respects the judgment is affirmed. The case is remanded.

All concur.

Footnotes

1 Further details regarding the crimes underlying Mr. Deck's convictions and regarding the guilt and penalty phase trial are set out in this Court's opinion on direct appeal, *Deck,* 994 S.W.2d 527, and will not be repeated here.

2 Instruction 14 was identical except that it referred to Count III.

3 *Clemmons v. State,* 785 S.W.2d 524, 530 (Mo. banc 1990) ("Although Clemmons attempts to distinguish these claims because they were reviewed for plain error by this Court on direct appeal, [*Sidebottom*] held that the basis for this Court's finding of no manifest injustice on direct appeal served to establish a finding of no prejudice under the *Strickland* test."); *State v. Nolan,* 872 S.W.2d 99, 104 (Mo. banc 1994) ("[A]s in *Sidebottom,* .... the basis for finding no manifest injustice defeats a finding of prejudice under the *Strickland* test for failure to preserve the claim of error....").

4 *See, e.g., Hamilton v. State,* 31 S.W.3d 124, 127 (Mo.App.W.D.2000); *State v. Kelley,* 953 S.W.2d 73, 91, 93 (Mo.App. S.D.1997); *State v. Williams,* 945 S.W.2d 575, 583 (Mo.App. W.D.1997); *State v. Suter,* 931 S.W.2d 856, 868 (Mo.App. W.D.1996); *State v. Clark,* 913 S.W.2d 399, 406 (Mo.App. W.D.1996); *State v. Chapman,* 936 S.W.2d 135, 141–42 (Mo.App. E.D.1996); *State v. Davis,* 936 S.W.2d 838, 842 (Mo.App. W.D.1996); *State v. Leady,* 879 S.W.2d 644, 649 (Mo.App. W.D.1994); *State v. Anderson,* 862 S.W.2d 425, 437 (Mo.App. E.D.1993); *State v. McKee,* 856 S.W.2d 685, 693 (Mo.App.S.D.1993); *Hanes v. State,* 825 S.W.2d 633, 635 (Mo.App. E.D.1992).

5 Later cases may have misconstrued *Sidebottom* 's citation to *O'Neal v. State,* 766 S.W.2d 91, 92 (Mo. banc 1989), for the proposition that issues decided in the direct appeal "cannot be relitigated on a theory of ineffective assistance of counsel in a post-conviction proceeding." *Sidebottom,* 781 S.W.2d at 796. *O'Neal,* however, concerned a post-conviction claim based on an alleged error that had been preserved at trial but that, on direct appeal, had been determined not to be prejudicial. The standard for finding prejudice in the context of preserved error is lower than the standard for finding error under *Strickland,* and both are lower than the plain error standard.

6 *See also State v. Storey,* 901 S.W.2d 886, 897–98, 900–03 (Mo. banc 1995); *State v. Meanor,* 863 S.W.2d 884, 892 (Mo. banc 1993) (in both Robertson, J., concurring in part and dissenting in part, and recognizing distinction between inquiries); *State v. Butler,* 24 S.W.3d 21, 44–45 (Mo.App. W.D. banc 2000) (concurring opinion of Judge Breckenridge finding no plain error but indicating issue presented serious question for post-conviction motion as to ineffectiveness of counsel in failing to timely object).

7 Of course, if this failure were part of a reasonable trial strategy, even if unsuccessful, it would not support a claim of ineffective assistance. *Rodden v. State,* 795 S.W.2d 393, 397 (Mo. banc 1990). But, counsel does not claim that the omission was a part of her trial strategy, and the record would not support such a claim.

8 Because of the resolution of this issue, the other alleged errors raised by Mr. Deck as to the penalty phase of his trial itself or the alleged error in refusing to allow his counsel to interview jurors about their penalty phase deliberations in order to support his Rule 29.15 motion for a new penalty phase trial are not reached.

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125 S.Ct. 2007
Supreme Court of the United States

Carman L. DECK, Petitioner,
v.
MISSOURI.

No. 04–5293.
|
Argued March 1, 2005.
|
Decided May 23, 2005.

Synopsis
Background: Defendant was convicted in the Circuit Court, Jefferson County, Missouri, Gary P. Kramer, J., of first-degree murder and related offenses, and sentenced to death. The Supreme Court of Missouri affirmed, 994 S.W.2d 527. On postconviction relief motion, following remand for resentencing, 68 S.W.3d 418, second penalty phase was held during which defendant was shackled in leg irons, handcuffs and belly chain, and death penalty was again imposed. The Supreme Court of Missouri affirmed, 136 S.W.3d 481. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Breyer, held that:

[1] Due Process Clause prohibits routine use of physical restraints visible to jury during guilt phase of criminal trial;

[2] courts also may not routinely place defendants in visible restraints during penalty phase of capital proceedings;

[3] shackling in instant case was not shown to be specifically justified by circumstances, and thus offended due process; and

[4] no showing of prejudice is required to make out due process violation from routine use of visible shackles.

Reversed and remanded.

Justice Thomas filed dissenting opinion joined by Justice Scalia.

West Headnotes (5)

[1] **Constitutional Law**⇨Custody and restraint
Criminal Law⇨Grounds and circumstances affecting use of restraints in general

92Constitutional Law
92XXVIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)4Proceedings and Trial
92k4613Presence and Appearance of Defendant and Counsel
92k4616Custody and restraint
(Formerly 92k268(2.1))
110Criminal Law
110XXTrial
110XX(B)Course and Conduct of Trial in General
110k637Custody and Restraint of Accused
110k637.4Grounds and circumstances affecting use of restraints in general
(Formerly 110k637)

Due Process Clause prohibits routine use, during guilt phase of criminal trial, of physical restraints visible to jury; use of restraints requires trial court's determination, in exercise of its discretion, that they are justified by state interest specific to particular trial. U.S.C.A. Const.Amends. 5, 14.

509 Cases that cite this headnote

[2] **Criminal Law**⇨Grounds and circumstances affecting use of restraints in general

110Criminal Law
110XXTrial
110XX(B)Course and Conduct of Trial in General
110k637Custody and Restraint of Accused
110k637.4Grounds and circumstances affecting use of restraints in general
(Formerly 110k637)

Factors in whether circumstances permit use, during guilt phase of criminal trial, of physical restraints visible to jury, include factors traditionally relied on in gauging

potential security problems and risk of escape at trial.

250 Cases that cite this headnote

[3] **Constitutional Law**⇐Proceedings
Sentencing and Punishment⇐Conduct of Hearing

92Constitutional Law
92XXVIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)6Judgment and Sentence
92k4741Capital Punishment; Death Penalty
92k4745Proceedings
(Formerly 92k268(2.1))
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(1)In general

Courts may not, consistent with Due Process Clause, routinely place defendants in shackles or other physical restraints visible to jury during penalty phase of capital proceedings; any discretionary determination by judge that circumstances warrant shackling must be case-specific, i.e. must reflect particular concerns related to that defendant such as security needs or escape risks. U.S.C.A. Const.Amends. 5, 14.

421 Cases that cite this headnote

[4] **Constitutional Law**⇐Proceedings
Sentencing and Punishment⇐Conduct of Hearing

92Constitutional Law
92XXVIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)6Judgment and Sentence
92k4741Capital Punishment; Death Penalty
92k4745Proceedings
(Formerly 92k268(2.1))
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings

350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(1)In general

State trial court's visible shackling of capital murder defendant during penalty phase of trial, in leg irons, handcuffs and belly chain, was not shown to be specifically justified by circumstances of case, as required by Due Process Clause; there was no indication that court considered use of shackles as discretionary rather than as routine procedure, nor was there any explanation for need for visible shackles as opposed to invisible ones used in guilt phase. U.S.C.A. Const.Amend 14.

375 Cases that cite this headnote

[5] **Constitutional Law**⇨Custody and restraint
Criminal Law⇨Custody and Restraint of Accused

92Constitutional Law
92XXVIIDue Process
92XXVII(H)Criminal Law
92XXVII(H)4Proceedings and Trial
92k4613Presence and Appearance of Defendant and Counsel
92k4616Custody and restraint
(Formerly 92k268(2.1))
110Criminal Law
110XXTrial
110XX(B)Course and Conduct of Trial in General
110k637Custody and Restraint of Accused
110k637.1In general
(Formerly 110k637)

Where court, without adequate justification, orders defendant to wear shackles that will be seen by jury, defendant need not demonstrate actual prejudice to make out due process violation; instead, state must prove beyond reasonable doubt that shackling error did not contribute to verdict obtained. U.S.C.A. Const.Amends. 5, 14.

377 Cases that cite this headnote

****2008 *622** *Syllabus*[*]

Petitioner Deck was convicted of capital murder and sentenced to death, but the Missouri

Supreme Court set aside the sentence. At his new sentencing proceeding, he was shackled with leg irons, handcuffs, and a belly chain. The trial court overruled counsel's objections to the shackles, and Deck was again sentenced to death. Affirming, the State Supreme Court rejected Deck's claim that his shackling violated, *inter alia,* the Federal Constitution.

Held: The Constitution forbids the use of visible shackles during a capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest"—such as courtroom security—specific to the defendant on trial. *Holbrook v. Flynn,* 475 U.S. 560, 568–569, 106 S.Ct. 1340, 89 L.Ed.2d 525. Pp. 2010–2015.

(a) The law has long forbidden routine use of visible shackles during a capital trial's guilt phase, permitting shackling only in the presence of a special need. In light of *Holbrook, Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, early English cases, and lower court shackling doctrine dating back to the 19th century, it is now clear that this is a basic element of due process protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit using physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that restraints are justified by a state interest specific to the particular defendant on trial. Pp. 2010–2012.

(b) If the reasons motivating the guilt phase constitutional rule—the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings—apply with like force at the penalty phase, the same rule will apply there. The latter two considerations obviously apply. As for the first, while the defendant's conviction means that the presumption of innocence no longer applies, shackles at the penalty phase threaten related concerns. The jury, though no longer deciding between guilt and innocence, is deciding between life and death, which, given the sanction's severity and finality, is no less important, *Monge v. California,* 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615. Nor is accuracy in making that decision any less critical. Yet, the offender's appearance in shackles almost inevitably implies to a jury that court authorities consider him a danger to the community (which is often a statutory aggravator and always a relevant factor); almost inevitably affects adversely the jury's perception ***623** of the defendant's character; and thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations when determining whether the defendant deserves death. The constitutional rule that courts cannot routinely place defendants in shackles or other restraints visible to the jury during the penalty phase is not absolute. In the judge's discretion, account may be taken of ****2009** special circumstances in the case at hand, including security concerns, that may call for shackling in order to accommodate the important need to protect the courtroom and its occupants. Pp. 2012–2015.

(c) Missouri's arguments that its high court's decision in this case meets the Constitution's requirements are unconvincing. The first—that that court properly concluded that there was no evidence that the jury saw the restraints—is inconsistent with the record, which shows that the jury was aware of them, and overstates what the court actually said, which was that trial counsel

made no record of the *extent* of the jury's awareness of the shackles. The second—that the trial court acted within its discretion—founders on the record, which does not clearly indicate that the judge weighted the particular circumstances of the case. The judge did not refer to an escape risk or threat to courtroom security or explain why, if shackles were necessary, he did not provide nonvisible ones as was apparently done during the guilt phase of this case. The third—that Deck suffered no prejudice—fails to take account of *Holbrook's* statement that shackling is "inherently prejudicial," 475 U.S., at 568, 106 S.Ct. 1340, a view rooted in this Court's belief that the practice will often have negative effects that "cannot be shown from a trial transcript," *Riggins v. Nevada,* 504 U.S. 127, 137, 112 S.Ct. 1810, 118 L.Ed.2d 479. Thus, where a court, without adequate justification, orders the defendant to wear shackles visible to the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705. Pp. 2015–2016.

136 S.W.3d 481, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 2016.

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Opinion

Justice BREYER delivered the opinion of the Court.

***624** We here consider whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution. We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is "justified by an essential state interest"—such as the interest in courtroom security—specific to the defendant on trial. *Holbrook v. Flynn,* 475 U.S. 560, 568–569, 106

S.Ct. 1340, 89 L.Ed.2d 525 (1986); see also *Illinois v. Allen,* 397 U.S. 337, 343–344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

I

In July 1996, petitioner Carman Deck robbed, shot, and killed an elderly couple. In 1998, the State of Missouri tried Deck ****2010** for the murders and the robbery. At trial, state authorities required Deck to wear leg braces that apparently were not visible to the jury. App. 5; Tr. of Oral Arg. 21, 25, ***625** 29. Deck was convicted and sentenced to death. The State Supreme Court upheld Deck's conviction but set aside the sentence. 68 S.W.3d 418, 432 (2002) (en banc). The State then held a new sentencing proceeding.

From the first day of the new proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain. App. 58. Before the jury *voir dire* began, Deck's counsel objected to the shackles. The objection was overruled. *Ibid.*; see also *id.,* at 41–55. During the *voir dire,* Deck's counsel renewed the objection. The objection was again overruled, the court stating that Deck "has been convicted and will remain in leg irons and a belly chain." *Id.,* at 58. After the *voir dire,* Deck's counsel once again objected, moving to strike the jury panel "because of the fact that Mr. Deck is shackled in front of the jury and makes them think that he is ... violent today." *Id.,* at 58–59. The objection was again overruled, the court stating that his "being shackled takes any fear out of their minds." *Id.,* at 59. The penalty phase then proceeded with Deck in shackles. Deck was again sentenced to death. 136 S.W.3d 481, 485 (Mo.2004) (en banc).

On appeal, Deck claimed that his shackling violated both Missouri law and the Federal Constitution. The Missouri Supreme Court rejected these claims, writing that there was "no record of the extent of the jury's awareness of the restraints"; there was no "claim that the restraints impeded" Deck "from participating in the proceedings"; and there was "evidence" of "a risk" that Deck "might flee in that he was a repeat offender" who may have "killed his two victims to avoid being returned to custody." *Ibid.* Thus, there was "sufficient evidence in the record to support the trial court's exercise of its discretion" to require shackles, and in any event Deck "has not demonstrated that the outcome of his trial was prejudiced.... 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." ***626** *Ibid.* The court rejected Deck's other claims of error and affirmed the sentence.

We granted certiorari to review Deck's claim that his shackling violated the Federal Constitution.

II

[1] We first consider whether, as a general matter, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. The answer is clear: The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.

This rule has deep roots in the common law. In the 18th century, Blackstone wrote that "it is laid down in our antient books, that, though under an indictment of the highest nature," a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnote omitted); see also 3 E. Coke, Institutes of the Laws of England *34 ("If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"). Blackstone and other English authorities recognized that the rule did not apply at "the time of arraignment," or like proceedings before the judge. Blackstone, *supra,* at 317; see also *Trial of Christopher* **2011 *Layer,* 16 How. St. Tr. 94, 99 (K.B.1722). It was meant to protect defendants appearing at trial before a jury. See *King v. Waite,* 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B.1743) ("[B]eing put upon his trial, the Court immediately ordered [the defendant's] fetters to be knocked off").

American courts have traditionally followed Blackstone's "ancient" English rule, while making clear that "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles *627 may be retained." 1 J. Bishop, New Criminal Procedure § 955, p. 573 (4th ed. 1895); see also *id.,* at 572–573 ("[O]ne at the trial should have the unrestrained use of his reason, and all advantages, to clear his innocence. Our American courts adhere pretty closely to this doctrine" (internal quotation marks omitted)); *State v. Roberts,* 86 N.J.Super. 159, 163–165, 206 A.2d 200, 203 (App.Div.1965); *French v. State,* 377 P.2d 501, 502–504 (Okla.Crim.App.1962); *Eaddy v. People,* 115 Colo. 488, 490, 174 P.2d 717, 718 (1946) (en banc); *State v. McKay,* 63 Nev. 118, 153–158, 165 P.2d 389, 405–406 (1946); *Blaine v. United States,* 136 F.2d 284, 285 (CADC 1943) *(per curiam); Blair v. Commonwealth,* 171 Ky. 319, 327–329, 188 S.W. 390, 393 (App.1916); *Hauser v. People,* 210 Ill. 253, 264–267, 71 N.E. 416, 421 (1904); *Parker v. Territory,* 5 Ariz. 283, 287, 52 P. 361, 363 (1898); *State v. Williams,* 18 Wash. 47, 48–50, 50 P. 580, 581 (1897); *Rainey v. State,* 20 Tex.App. 455, 472–473, 1886 WL 4636 (1886) (opinion of White, P. J.); *State v. Smith,* 11 Ore. 205, 8 P. 343 (1883); *Poe v. State,* 78 Tenn. 673, 674–678 (1882); *State v. Kring,* 64 Mo. 591,

592 (1877); *People v. Harrington,* 42 Cal. 165, 167, 1871 WL 1466 (1871); see also F. Wharton, Criminal Pleading and Practice § 540*a,* p. 369 (8th ed. 1880); 12 Cyclopedia of Law and Procedure 529 (1904). While these earlier courts disagreed about the degree of discretion to be afforded trial judges, see *post,* at 2020–2023 (THOMAS, J., dissenting), they settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so.

More recently, this Court has suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments' due process guarantee. Thirty-five years ago, when considering the trial of an unusually obstreperous criminal defendant, the Court held that the Constitution sometimes permitted special measures, including physical restraints. *Allen,* 397 U.S., at 343–344, 90 S.Ct. 1057. The Court wrote that "binding ***628** and gagging might possibly be the fairest and most reasonable way to handle" such a defendant. *Id.,* at 344, 90 S.Ct. 1057. But the Court immediately added that "even to contemplate such a technique ... arouses a feeling that no person should be tried while shackled and gagged except as a last resort." *Ibid.*

Sixteen years later, the Court considered a special courtroom security arrangement that involved having uniformed security personnel sit in the first row of the courtroom's spectator section. The Court held that the Constitution allowed the arrangement, stating that the deployment of security personnel during trial is not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook,* 475 U.S., at 568–569, 106 S.Ct. 1340. See also *Estelle v. Williams,* 425 U.S. 501, 503, 505, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy").

****2012** Lower courts have treated these statements as setting forth a constitutional standard that embodies Blackstone's rule. Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum. See, *e.g., Dyas v. Poole,* 309 F.3d 586, 588–589 (C.A.9 2002) *(per curiam); Harrell v. Israel,* 672 F.2d 632, 635 (C.A.7 1982) *(per curiam); State v. Herrick,* 324 Mont. 76, 78–82, 101 P.3d 755, 757–759 (2004); *Hill v. Commonwealth,* 125 S.W.3d 221, 233–234 (Ky.2004); *State v. Turner,* 143 Wash.2d 715, 723–727, 23 P.3d 499, 504–505 (2001) (en banc); *Myers v. State,* 2000 OK CR 25, ¶ 19, 17 P.3d 1021, 1033; *State v. Shoen,* 598 N.W.2d 370, 374–377 (Minn.1999); ***629** *Lovell v. State,* 347 Md. 623, 635–645, 702 A.2d 261, 268–272 (1997); *People v. Jackson,* 14 Cal.App.4th 1818, 1822–1830, 18 Cal.Rptr.2d 586, 588–594 (1993); *Cooks v. State,* 844 S.W.2d 697, 722 (Tex.Crim.App.1992) (en banc); *State v. Tweedy,* 219 Conn. 489, 504–508, 594 A.2d 906, 914–915 (1991); *State v. Crawford,* 99 Idaho 87, 93–98, 577 P.2d 1135, 1141–1146 (1978); *People v. Brown,* 45 Ill.App.3d 24, 26–28, 3 Ill.Dec. 677, 358 N.E.2d 1362, 1363–1364 (1977); *State v. Tolley,* 290

N.C. 349, 362–371, 226 S.E.2d 353, 365–369 (1976); see also 21A Am.Jur.2d, Criminal Law §§ 1016, 1019 (1998); see generally Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis U.L.J. 351 (1970–1971); ABA Standards for Criminal Justice: Discovery and Trial by Jury 15–3.2, pp. 188–191 (3d ed.1996).

[2] Lower courts have disagreed about the specific procedural steps a trial court must take prior to shackling, about the amount and type of evidence needed to justify restraints, and about what forms of prejudice might warrant a new trial, but they have not questioned the basic principle. They have emphasized the importance of preserving trial court discretion (reversing only in cases of clear abuse), but they have applied the limits on that discretion described in *Holbrook, Allen,* and the early English cases. In light of this precedent, and of a lower court consensus disapproving routine shackling dating back to the 19th century, it is clear that this Court's prior statements gave voice to a principle deeply embedded in the law. We now conclude that those statements identify a basic element of the "due process of law" protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

*630 III

We here consider shackling not during the guilt phase of an ordinary criminal trial, but during the punishment phase of a capital case. And we must decide whether that change of circumstance makes a constitutional difference. To do so, we examine the reasons that motivate the guilt-phase constitutional rule and determine whether they apply with similar force in this context.

A

Judicial hostility to shackling may once primarily have reflected concern for the **2013 suffering—the "tortures" and "torments"—that "very painful" chains could cause. Krauskopf, *supra,* at 351, 353 (internal quotation marks omitted); see also *Riggins v. Nevada,* 504 U.S. 127,

154, n. 4, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (THOMAS, J., dissenting) (citing English cases curbing the use of restraints). More recently, this Court's opinions have not stressed the need to prevent physical suffering (for not all modern physical restraints are painful). Instead they have emphasized the importance of giving effect to three fundamental legal principles.

First, the criminal process presumes that the defendant is innocent until proved guilty. *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) (presumption of innocence "lies at the foundation of the administration of our criminal law"). Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. Cf. *Estelle, supra,* at 503, 96 S.Ct. 1691. It suggests to the jury that the justice system itself sees a "need to separate a defendant from the community at large." *Holbrook, supra,* at 569, 106 S.Ct. 1340; cf. *State v. Roberts,* 86 N.J.Super., at 162, 206 A.2d, at 202 ("[A] defendant 'ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach ... unless there be some Danger of a Rescous [rescue] or Escape' " (quoting 2 W. Hawkins, Pleas ***631** of the Crown, ch. 28, § 1, p. 308 (1716–1721) (section on arraignments))).

Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. See, *e.g.,* Amdt. 6; *Gideon v. Wainwright,* 372 U.S. 335, 340–341, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his lawyer. *Allen,* 397 U.S., at 344, 90 S.Ct. 1057. Indeed, they can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf. Cf. *Cranburne's Case,* 13 How. St. Tr. 222 (K.B.1696) ("Look you, keeper, you should take off the prisoners irons when they are at the bar, for they should stand at their ease when they are tried" (footnote omitted)); *People v. Harrington,* 42 Cal., at 168 (shackles "impos [e] physical burdens, pains, and restraints ..., ... ten[d] to confuse and embarrass" defendants' "mental faculties," and thereby tend "materially to abridge and prejudicially affect his constitutional rights").

Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen, supra,* at 344, 90 S.Ct. 1057; see also *Trial of Christopher Layer,* 16 How. St. Tr., at 99 (statement of Mr. Hungerford) ("[T]o have a man plead for his life" in shackles before ***632** "a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present," undermines the "dignity of the Court").

**2014 There will be cases, of course, where these perils of shackling are unavoidable. See *Allen, supra,* at 344, 90 S.Ct. 1057. We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.

B

[3] The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. This is obviously so in respect to the latter two considerations mentioned, securing a meaningful defense and maintaining dignified proceedings. It is less obviously so in respect to the first consideration mentioned, for the defendant's conviction means that the presumption of innocence no longer applies. Hence shackles do not undermine the jury's effort to apply that presumption.

Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the " 'severity' " and " 'finality' " of the sanction, is no less important than the decision about guilt. *Monge v. California,* 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (quoting *Gardner v. Florida,* 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)).

Neither is accuracy in making that decision any less critical. The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. *Monge, supra,* at 732, 118 S.Ct. 2246 (citing *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) *633 plurality opinion)). The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. Cf. Brief for Respondent 25–27. It also almost inevitably affects adversely the jury's perception of the character of the defendant. See *Zant v. Stephens,* 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (REHNQUIST, J., concurring in judgment) (character and propensities of the defendant are part of a "unique, individualized judgment regarding the punishment that a particular person deserves"). And it thereby inevitably undermines the jury's

ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." *Sochor v. Florida,* 504 U.S. 527, 532, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (internal quotation marks omitted); see also *Riggins,* 504 U.S., at 142, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment) (through control of a defendant's appearance, the State can exert a "powerful influence on the outcome of the trial").

Given the presence of similarly weighty considerations, we must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It **2015 permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

*634 IV

[4] Missouri claims that the decision of its high court meets the Constitution's requirements in this case. It argues that the Missouri Supreme Court properly found: (1) that the record lacks evidence that the jury saw the restraints; (2) that the trial court acted within its discretion; and, in any event, (3) that the defendant suffered no prejudice. We find these arguments unconvincing.

The first argument is inconsistent with the record in this case, which makes clear that the jury was aware of the shackles. See App. 58–59 (Deck's attorney stated on the record that "Mr. Deck [was] shackled *in front of the jury* " (emphasis added)); *id.,* at 59 (trial court responded that "him being shackled takes any fear out of their minds"). The argument also overstates the Missouri Supreme Court's holding. The court said: "Trial counsel made no record *of the extent* of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings." 136 S.W.3d, at 485 (emphasis added). This statement does not suggest that the jury was unaware of the restraints. Rather, it refers to the degree of the jury's awareness, and hence to the kinds of prejudice that might have occurred.

The second argument—that the trial court acted within its discretion—founders on the record's failure to indicate that the trial judge saw the matter as one calling for discretion. The record

contains no formal or informal findings. Cf. *supra,* at 2014 (requiring a case-by-case determination). The judge did not refer to a risk of escape—a risk the State has raised in this Court, see Tr. of Oral Arg. 36–37—or a threat to courtroom security. Rather, he gave as his reason for imposing the shackles the fact that Deck already "has been convicted." App. 58. While he also said that the shackles would "tak[e] any fear out of" the juror's "minds," he nowhere explained any special reason for fear. *Id.,* at 59. Nor did he explain why, if shackles were necessary, he chose ***635** not to provide for shackles that the jury could not see—apparently the arrangement used at trial. If there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one.

[5] The third argument fails to take account of this Court's statement in *Holbrook* that shackling is "inherently prejudicial." 475 U.S., at 568, 106 S.Ct. 1340. That statement is rooted in our belief that the practice will often have negative effects, but—like "the consequences of compelling a defendant to wear prison clothing" or of forcing him to stand trial while medicated—those effects "cannot be shown from a trial transcript." *Riggins, supra,* at 137, 112 S.Ct. 1810. Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." ****2016** *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

V

For these reasons, the judgment of the Missouri Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, dissenting.

Carman Deck was convicted of murdering and robbing an elderly couple. He stood before the sentencing jury not as an innocent man, but as a convicted double murderer and robber. Today this Court holds that Deck's due process rights were violated when he appeared at sentencing in leg irons, handcuffs, and a belly chain. The Court holds that such restraints may only be used

where the use is " 'justified by an essential state interest' " that is "specific to the defendant *636 on trial," *ante,* at 2009, and that is supported by specific findings by the trial court. Tradition—either at English common law or among the States—does not support this conclusion. To reach its result, the Court resurrects an old rule the basis for which no longer exists. It then needlessly extends the rule from trials to sentencing. In doing so, the Court pays only superficial heed to the practice of States and gives conclusive force to errant dicta sprinkled in a trio of this Court's cases. The Court's holding defies common sense and all but ignores the serious security issues facing our courts. I therefore respectfully dissent.

I

Carman Deck and his sister went to the home of Zelma and James Long on a summer evening in 1996. After waiting for nightfall, Deck and his sister knocked on the door of the Longs' home, and when Mrs. Long answered, they asked for directions. Mrs. Long invited them in, and she and Mr. Long assisted them with directions. When Deck moved toward the door to leave, he drew a pistol, pointed it at the Longs, and ordered them to lie face down on their bed. The Longs did so, offering up money and valuables throughout the house and all the while begging that he not harm them.

After Deck finished robbing their house, he stood at the edge of their bed, deliberating for 10 minutes over whether to spare them. He ignored their pleas and shot them each twice in the head. Deck later told police that he shot the Longs because he thought that they would be able to recognize him.

Deck was convicted of the murders and robbery of the Longs and sentenced to death. The death sentence was overturned on appeal. Deck then had another sentencing hearing, at which he appeared in leg irons, a belly chain, and handcuffs. At the hearing, the jury heard evidence of Deck's numerous burglary and theft convictions and his assistance in a jailbreak by two prisoners.

*637 On resentencing, the jury unanimously found six aggravating factors: Deck committed the murders while engaged in the commission of another unlawful homicide; Deck murdered each victim for the purpose of pecuniary gain; each murder involved depravity of mind; each murder was committed for the purpose of avoiding a lawful arrest; each murder was committed while Deck was engaged in a burglary; and each murder was committed while Deck was engaged in a robbery. The jury recommended, and the trial court imposed, two death sentences.

Deck sought postconviction relief from his sentence, asserting, among other ****2017** things, that his due process and equal protection rights were violated by the trial court's requirement that he appear in shackles. The Missouri Supreme Court rejected that claim. 136 S.W.3d 481 (2004) (en banc). The court reasoned that "there was a risk that [Deck] might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody," and thus it could not conclude that the trial court had abused its discretion. *Id.,* at 485.

II

My legal obligation is not to determine the wisdom or the desirability of shackling defendants, but to decide a purely legal question: Does the Due Process Clause of the Fourteenth Amendment preclude the visible shackling of a defendant? Therefore, I examine whether there is a deeply rooted legal principle that bars that practice. *Medina v. California,* 505 U.S. 437, 446, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992); *Apprendi v. New Jersey,* 530 U.S. 466, 500, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (THOMAS, J., concurring); see also *Chicago v. Morales,* 527 U.S. 41, 102–106, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (THOMAS, J., dissenting). As I explain below, although the English common law had a rule against trying a defendant in irons, the basis for the rule makes clear that it should not be extended by rote to modern restraints, which are dissimilar in certain essential respects to the irons that gave rise to ***638** the rule. Despite the existence of a rule at common law, state courts did not even begin to address the use of physical restraints until the 1870's, and the vast majority of state courts would not take up this issue until the 20th century, well after the ratification of the Fourteenth Amendment. Neither the earliest case nor the more modern cases reflect a consensus that would inform our understanding of the requirements of due process. I therefore find this evidence inconclusive.

A

English common law in the 17th and 18th centuries recognized a rule against bringing the defendant in irons to the bar for trial. See, *e.g.,* 4 W. Blackstone, Commentaries on the Laws of

England 317 (1769); 3 Coke, Institutes of the Laws of England *34 (hereinafter Coke). This rule stemmed from none of the concerns to which the Court points, *ante,* at 2012–2015—the presumption of innocence, the right to counsel, concerns about decorum, or accuracy in decisionmaking. Instead, the rule ensured that a defendant was not so distracted by physical pain during his trial that he could not defend himself. As one source states, the rule prevented prisoners from "any Torture while they ma[de] their defence, be their Crime never so great." J. Kelyng, A Report of Divers Cases in Pleas of the Crown 10 (1708).[1] This concern was understandable, for the irons of that period were heavy and painful. In fact, leather strips often lined the irons to prevent them from rubbing away a defendant's ***639** skin. T. Gross, Manacles of the World: A Collector's Guide to International Handcuffs, Leg Irons and other Miscellaneous Shackles and Restraints 25 ****2018** (1997). Despite Coke's admonition that "[i]t [was] an abuse that prisoners be chained with irons, or put to any pain before they be attained," Coke *34, suspected criminals often wore irons during pretrial confinement, J. Langbein, The Origins of Adversary Criminal Trial 50, and n. 197 (2003) (hereinafter Langbein). For example, prior to his trial in 1722 for treason, Christopher Layer spent his confinement in irons. Layer's counsel urged that his irons be struck off, for they allowed him to "sleep but in one posture." *Trial of Christopher Layer,* 16 How. St. Tr. 94, 98 (K.B.1722).

The concern that felony defendants not be in severe pain at trial was acute because, before the 1730's, defendants were not permitted to have the assistance of counsel at trial, with an early exception made for those charged with treason. Langbein 170–172. Instead, the trial was an " 'accused speaks' " trial, at which the accused defended himself. The accused was compelled to respond to the witnesses, making him the primary source of information at trial. *Id.,* at 48; see also *Faretta v. California,* 422 U.S. 806, 823–824, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). As the Court acknowledges, *ante,* at 2010, the rule against shackling did not extend to arraignment.[2] A defendant remained in irons at arraignment because "he [was] only called upon to plead by *advice of his counsel*"; he was not on trial, ***640** where he would play the main role in defending himself. *Trial of Christopher Layer, supra,* at 100 (emphasis added).

A modern-day defendant does not spend his pretrial confinement wearing restraints. The belly chain and handcuffs are of modest, if not insignificant, weight. Neither they nor the leg irons cause pain or suffering, let alone pain or suffering that would interfere with a defendant's ability to assist in his defense at trial. And they need not interfere with a defendant's ability to assist his counsel—a defendant remains free to talk with counsel during trial, and restraints can be employed so as to ensure that a defendant can write to his counsel during the trial. Restraints can also easily be removed when a defendant testifies, so that any concerns about testifying can be ameliorated. Modern restraints are therefore unlike those that gave rise to the traditional rule.

The Court concedes that modern restraints are nothing like the restraints of long ago, *ante,* at 2012–2013, and even that the rule at common law did not rest on any of the "three fundamental legal principles" the Court posits to support its new rule, *ibid.* Yet the Court treats old and modern restraints as similar for constitutional purposes merely because they are both types of

physical restraints. This logical leap ignores that modern restraints do not violate the principle animating the common-law rule. In making this leap, the Court strays from the appropriate legal inquiry of examining common-law traditions to inform our understanding of the Due Process Clause.

B

In the absence of a common-law rule that applies to modern-day restraints, state practice is also relevant to determining **2019 whether a deeply rooted tradition supports the conclusion that the Fourteenth Amendment's Due Process Clause limits shackling. See *Morales,* 527 U.S., at 102–106, 119 S.Ct. 1849 (THOMAS, J., dissenting). The practice among the States, however, does not support, let alone require, the conclusion *641 that shackling can be done only where "particular concerns ... related to the defendant on trial" are articulated as findings in the record. *Ante,* at 2015. First, state practice is of modern, not longstanding, vintage. The vast majority of States did not address the issue of physical restraints on defendants during trial until the 20th century. Second, the state cases—both the earliest to address shackling and even the later cases—reflect substantial differences that undermine the contention that the Due Process Clause so limits the use of physical restraints. Third, state- and lower federal-court cases decided after *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), are not evidence of a current consensus about the use of physical restraints. Such cases are but a reflection of the dicta contained in *Allen, Estelle,* and *Holbrook.*

1

State practice against shackling defendants was established in the 20th century. In 35 States, no recorded state-court decision on the issue appears until the 20th century.[3] *642 Of those 35 States, 21 States have no recorded decision on the question until the 1950's or later.[4] The 14 state (including then-territorial) courts that addressed **2020 the matter before the 20th century only began to do so in the 1870's.[5] The *643 California Supreme Court's decision in *People v. Harrington,* 42 Cal. 165 (1871), "seems to have been the first case in this country where this

ancient rule of the common law was considered and enforced." *State v. Smith,* 11 Ore. 205, 208, 8 P. 343 (1883). The practice in the United States is thus of contemporary vintage. State practice that was only nascent in the late 19th century is not evidence of a consistent unbroken tradition dating to the common law, as the Court suggests. *Ante,* at 2010–2011. The Court does not even attempt to account for the century of virtual silence between the practice established at English common law and the emergence of the rule in the United States. Moreover, the belated and varied state practice is insufficient to warrant the conclusion that shackling of a defendant violates his due process rights. See *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 159, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000) (where no history of a right to appeal much before the 20th century, no historical support for a right to self-representation on appeal).

2

The earliest state cases reveal courts' divergent views of visible shackling, undermining the notion that due process cabins shackling to cases in which "particular concerns ... related to the defendant on trial" are supported by findings on the record. *Ante,* at 2015.

The Supreme Court of the New Mexico Territory held that great deference was to be accorded the trial court's decision to put the defendant in shackles, permitting a reviewing court to presume that there had been a basis for doing so if the record lay silent. *Territory v. Kelly,* 2 N.M. 292, 304–306 (1882). Only if the record "affirmatively" showed "no ***644** reason whatever" for shackling was the decision to shackle a defendant erroneous. *Ibid.;* see *State v. Allen,* 45 W.Va. 65, 68–70, 30 S.E. 209, 211 (1898) (following *Kelly*), overruled in relevant part, *State v. Brewster,* 164 W.Va. 173, 182, 261 S.E.2d 77, 82 (1979). The Alabama Supreme Court also left the issue to the trial court's discretion and went so far as to bar any appeal from the trial court's decision to restrain the defendant. *Faire v. State,* 58 Ala. 74, 80–81 (1877); see *Poe v. State,* 78 Tenn. 673, 677 (1882) (decision to manacle a defendant during trial "left to the sound discretion of the trial court" and subject to abuse-of-discretion standard of review). Mississippi concluded that the decision to shackle a defendant ****2021** "may be safely committed to courts and sheriffs, whose acts are alike open to review in the courts and at the ballot box."[6] *Lee v. State,* 51 Miss. 566, 574, 1875 WL 4718 *6 (1875), overruled on other grounds, *Wingo v. State,* 62 Miss. 311 (1884).

By contrast, California, Missouri, Washington, and Oregon adopted more restrictive approaches. In *People v. Harrington, supra,* the California Supreme Court held that shackling a defendant "without evident necessity" of any kind violated the common-law rule as well as state law and

was prejudicial to the defendant. *Id.,* at 168–169. A few years later, the Missouri courts took an even more restrictive view, concluding that the use of shackles or other such restraints was permitted only if warranted by the defendant's conduct "at the time of the trial." *State v. Kring,* 64 Mo. 591, 593 (1877); see *State v. Smith, supra,* at 207–208, 8 P., at 343 (following *Kring* and *Harrington* without discussion); *State v. Williams,* 18 Wash. 47, 50–51, 50 P. 580, 581–582 (1897) (adopting *Kring*'s test).

***645** Texas took an intermediate position. The Texas Court of Appeals relied on *Kring,* and at the same time deferred to the decision made by the sheriff to bring the defendant into the courtroom in shackles. See *Rainey v. State,* 20 Tex. Ct.App. 455, 472 (1886); see also *Parker v. Territory,* 5 Ariz. 283, 287–288, 52 P. 361, 363 (1898) (following *Harrington* but permitting the shackling of a defendant at arraignment based on the crime for which he had been arrested as well as the reward that had been offered for his recapture).

Thus, in the late 19th century States agreed that generally defendants ought to come to trial unfettered, but they disagreed over the breadth of discretion to be afforded trial courts. A bare majority of States required that trial courts and even jailers be given great leeway in determining when a defendant should be restrained; a minority of States severely constrained such discretion, in some instances by limiting the information that could be considered; and an even smaller set of States took an intermediate position. While the most restrictive view adopted by States is perhaps consistent with the rule Deck seeks, the majority view is flatly inconsistent with requiring a State to show, and for a trial court to set forth, findings of an " 'essential state interest' " "specific to the defendant on trial" before shackling a defendant. *Ante,* at 2009. In short, there was no consensus that supports elevating the rule against shackling to a federal constitutional command.

3

The modern cases provide no more warrant for the Court's approach than do the earliest cases. The practice in the 20th century did not resolve the divisions among States that emerged in the 19th century. As more States addressed the issue, they continued to express a general preference that defendants be brought to trial without shackles. They continued, however, to disagree about the latitude to be given trial courts. Many deferred to the judgment of the trial ***646** court,[7] and ****2022** some to the views of those responsible for guarding the defendant.[8] States also continued to disagree over whether the use of shackles was inherently prejudicial.[9] Moreover, States differed over the information that could ***647** be considered in deciding to shackle the

defendant and the certainty of the risk that had to be established, with a small minority limiting the use of shackles to instances arising from conduct specific to the particular trial or otherwise requiring an imminent threat.[10] The remaining States permitted courts to consider a range of information outside the trial, including past escape,[11] prior convictions,[12] the nature of the crime for which **2023 the defendant was on trial,[13] conduct prior to trial while in prison,[14] any prior disposition toward *648 violence,[15] and physical attributes of the defendant, such as his size, physical strength, and age.[16]

The majority permits courts to continue to rely on these factors, which are undeniably probative of the need for shackling, as a basis for shackling a defendant both at trial and at sentencing. *Ante,* at 2012. In accepting these traditional factors, the Court rejects what has been adopted by few States—that courts may consider only a defendant's conduct at the trial itself or other information demonstrating that it is a relative certainty that the defendant will engage in disruptive or threatening conduct at his trial. See *State v. Coursolle,* 255 Minn. 384, 389, 97 N.W.2d 472, 477 (1959) (defining "immediate necessity" to be demonstrated only by the defendant's conduct "at the time of the trial"); *State v. Finch,* 137 Wash.2d 792, 850, 975 P.2d 967, 1001 (1999) (en banc); *Blair v. Commonwealth,* 171 Ky. 319, 327–328, 188 S.W. 390, 393 (1916); *State v. Temple,* 194 Mo. 237, 247–248, 92 S.W. 869, 872 (1906); but see 136 S.W.3d, at 485 (case below) (appearing to have abandoned this test).

A number of those traditional factors were present in this case. Here, Deck killed two people to avoid arrest, a fact to which he had confessed. Evidence was presented that Deck had aided prisoners in an escape attempt. Moreover, a jury *649 had found Deck guilty of two murders, the facts of which not only make this crime heinous but also demonstrate a propensity for violence. On this record, and with facts found by a jury, the Court says that it needs more. Since the Court embraces reliance on the traditional factors supporting the use of visible restraints, its only basis for reversing is the requirement of specific on-the-record findings by the trial judge. This requirement is, however, inconsistent with the traditional discretion afforded to trial courts and is unsupported by state practice. This additional requirement of on-the-record findings about that which is obvious from the record makes little sense to me.

4

In recent years, more of a consensus regarding the use of shackling has developed, **2024 with many courts concluding that shackling is inherently prejudicial. But rather than being firmly grounded in deeply rooted principles, that consensus stems from a series of ill-considered dicta

in *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

In *Allen,* the trial court had removed the defendant from the courtroom until the court felt he could conform his conduct to basic standards befitting a court proceeding. 397 U.S., at 340–341, 90 S.Ct. 1057. This Court held that removing the defendant did not violate his due process right to be present for his trial. In dicta, the Court suggested alternatives to removal, such as citing the defendant for contempt or binding and gagging him. *Id.,* at 344, 90 S.Ct. 1057. The Court, however, did express some revulsion at the notion of binding and gagging a defendant. *Ibid.* *Estelle* and *Holbrook* repeated *Allen's* dicta. *Estelle, supra,* at 505, 96 S.Ct. 1691; *Holbrook, supra,* at 568, 106 S.Ct. 1340. The Court in *Holbrook* went one step further than it had in *Allen,* describing shackling as well as binding and gagging in dicta as "inherently prejudicial." 475 U.S., at 568, 106 S.Ct. 1340.

***650** The current consensus that the Court describes is one of its own making. *Ante,* at 2011. It depends almost exclusively on the dicta in this Court's opinions in *Holbrook, Estelle,* and *Allen.* Every lower court opinion the Court cites as evidence of this consensus traces its reasoning back to one or more of these decisions.[17] These ****2025** lower courts were interpreting ***651** this Court's dicta, not reaching their own independent consensus about the content of the Due Process Clause. More important, these decisions represent recent practice, which does not determine whether the Fourteenth Amendment, as properly and traditionally interpreted, *i.e.,* as a statement of law, not policy preferences, embodies a right to be free from visible, painless physical restraints at trial.

III

Wholly apart from the propriety of shackling a defendant at *trial,* due process does not require that a defendant remain free from visible restraints at the penalty phase of a capital trial. Such a requirement has no basis in tradition or even modern state practice. Treating shackling at sentencing as inherently prejudicial ignores the commonsense distinction between a defendant who stands accused and a defendant who stands convicted.

A

There is no tradition barring the use of shackles or other restraints at sentencing. Even many modern courts have concluded that the rule against visible shackling does not apply to sentencing. See, *e.g., State v. Young,* 853 P.2d 327, 350 (Utah 1993); *Duckett v. State,* 104 Nev. 6, 11, 752 P.2d 752, 755 (1988) *(per curiam); State v. Franklin,* 97 Ohio St.3d 1, 18–19, 776 N.E.2d 26, 46–47 (2002); but see *Bello v. State,* 547 So.2d 914, 918 (Fla.1989) (applying rule against shackling at sentencing, but suggesting that "lesser showing of necessity" may be appropriate). These courts have rejected the suggestion that due process imposes such limits because they have understood the difference between a man ***652** accused and a man convicted. See, *e.g., Young, supra,* at 350; *Duckett, supra,* at 11, 752 P.2d, at 755.

This same understanding is reflected even in the guilt-innocence phase. In instances in which the jury knows that the defendant is an inmate, though not yet convicted of the crime for which he is on trial, courts have frequently held that the defendant's status as inmate ameliorates any prejudice that might have flowed from the jury seeing him in handcuffs.[18] The Court's decision shuns such common sense.

****2026** B

In the absence of a consensus with regard to the use of visible physical restraints even in modern practice, we should not forsake common sense in determining what due process requires. Capital sentencing jurors know that the defendant has been convicted of a dangerous crime. It ***653** strains credulity to think that they are surprised at the sight of restraints. Here, the jury had already concluded that there was a need to separate Deck from the community at large by convicting him of double murder and robbery. Deck's jury was surely aware that Deck was jailed; jurors know that convicted capital murderers are not left to roam the streets. It blinks reality to think that seeing a convicted capital murderer in shackles in the courtroom could import any prejudice beyond that inevitable knowledge.

Jurors no doubt also understand that it makes sense for a capital defendant to be restrained at sentencing. By sentencing, a defendant's situation is at its most dire. He no longer may prove himself innocent, and he faces either life without liberty or death. Confronted with this reality, a defendant no longer has much to lose—should he attempt escape and fail, it is still lengthy imprisonment or death that awaits him. For any person in these circumstances, the reasons to attempt escape are at their apex. A defendant's best opportunity to do so is in the courtroom, for

he is otherwise in jail or restraints. See Westman, Handling the Problem Criminal Defendant in the Courtroom: The Use of Physical Restraints and Expulsion in the Modern Era, 2 San Diego Justice J. 507, 526–527 (1994) (hereinafter Westman).

In addition, having been convicted, a defendant may be angry. He could turn that ire on his own counsel, who has failed in defending his innocence. See, *e.g., State v. Forrest,* 168 N.C.App. 614, 626, 609 S.E.2d 241, 248–249 (2005) (defendant brutally attacked his counsel at sentencing). Or, for that matter, he could turn on a witness testifying at his hearing or the court reporter. See, *e.g., People v. Byrnes,* 33 N.Y.2d 343, 350, 352 N.Y.S.2d 913, 917, 308 N.E.2d 435, 438 (1974) (defendant lunged at witness during trial); *State v. Harkness,* 252 Kan. 510, 516, 847 P.2d 1191, 1197 (1993) (defendant attacked court reporter at arraignment). Such thoughts could well enter the mind of any defendant in these circumstances, from the most dangerous to the most docile. That a defendant now ***654** convicted of his crimes appears before the jury in shackles thus would be unremarkable to the jury. To presume that such a defendant suffers prejudice by appearing in handcuffs at sentencing does not comport with reality.

IV

The modern rationales proffered by the Court for its newly minted rule likewise fail to warrant the conclusion that due process precludes shackling at sentencing. Moreover, though the Court purports to be mindful of the tragedy that can take place in a courtroom, the stringent rule it adopts leaves no real room for ensuring the safety of the courtroom.

A

Although the Court offers the presumption of innocence as a rationale for the modern rule against shackling at trial, it concedes the presumption has no application at sentencing. *Ante,* at 2014. The Court is forced to turn to the far more amorphous need for "accuracy" in sentencing. *Ibid.* It is true that this Court's cases demand reliability in the factfinding that precedes the imposition of a sentence of death. ****2027** *Monge v. California,* 524 U.S. 721, 732, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998). But shackles may undermine the factfinding process only if

seeing a convicted murderer in them is prejudicial. As I have explained, this farfetched conjecture defies the reality of sentencing.

The Court baldly asserts that visible physical restraints could interfere with a defendant's ability to participate in his defense. *Ante,* at 2013. I certainly agree that shackles would be impermissible if they were to seriously impair a defendant's ability to assist in his defense, *Riggins v. Nevada,* 504 U.S. 127, 154, n. 4, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (THOMAS, J., dissenting), but there is no evidence that shackles do so. Deck does not argue that the shackles caused him pain or impaired his mental faculties. Nor does he argue that the shackles prevented him from communicating with his counsel during trial. ***655** Counsel sat next to him; he remained fully capable of speaking with counsel. Likewise, Deck does not claim that he was unable to write down any information he wished to convey to counsel during the course of the trial. Had the shackles impaired him in that way, Deck could have sought to have at least one of his hands free to make it easier for him to write. Courts have permitted such arrangements. See, *e.g., People v. Alvarez,* 14 Cal.4th 155, 191, 58 Cal.Rptr.2d 385, 926 P.2d 365, 386 (1996); *State v. Jimerson,* 820 S.W.2d 500, 502 (Mo.App.1991).

The Court further expresses concern that physical restraints might keep a defendant from taking the stand on his own behalf in seeking the jury's mercy. *Ante,* at 2013. But this concern is, again, entirely hypothetical. Deck makes no claim that, but for the physical restraints, he would have taken the witness stand to plead for his life. And under the rule the Court adopts, Deck and others like him need make no such assertion, for prejudice is presumed absent a showing by the government to the contrary. Even assuming this concern is real rather than imagined, it could be ameliorated by removing the restraints if the defendant wishes to take the stand. See, *e.g., De Wolf v. State,* 96 Okla. Cr. 382, 383, 256 P.2d 191, 193 (App.1953) (leg irons removed from defendant in capital case when he took the witness stand). Instead, the Court says, the concern requires a categorical rule that the use of visible physical restraints violates the Due Process Clause absent a demanding showing. The Court's solution is overinclusive.

The Court also asserts the rule it adopts is necessary to protect courtroom decorum, which the use of shackles would offend. *Ante,* at 2013. This courtroom decorum rationale misunderstands this Court's precedent. No decision of this Court has ever intimated, let alone held, that the protection of the "courtroom's formal dignity," *ibid.,* is an individual right enforceable by criminal defendants. Certainly, courts have always had the inherent power to ensure that both those who appear before them and those who observetheir ***656** proceedings conduct themselves appropriately. See, *e.g., Estes v. Texas,* 381 U.S. 532, 540–541, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

The power of the courts to maintain order, however, is not a right personal to the defendant, much less one of constitutional proportions. Far from viewing the need for decorum as a right the defendant can invoke, this Court has relied on it to *limit* the conduct of defendants, even when their constitutional rights are implicated. This is why a defendant who proves himself

incapable of abiding by the most basic rules of the court is not entitled to defend himself, *Faretta v. California,* 422 U.S., at 834–835, n. 46, 95 S.Ct. 2525, or to remain in the courtroom, see *Allen,* 397 U.S., at 343, 90 S.Ct. 1057. The concern for courtroom ****2028** decorum is not a concern about defendants, let alone their right to due process. It is a concern about society's need for courts to operate effectively.

Wholly apart from the unwarranted status the Court accords "courtroom decorum," the Court fails to explain the affront to the dignity of the courts that the sight of physical restraints poses. I cannot understand the indignity in having a convicted double murderer and robber appear before the court in visible physical restraints. Our Nation's judges and juries are exposed to accounts of heinous acts daily, like the brutal murders Deck committed in this case. Even outside the courtroom, prisoners walk through courthouse halls wearing visible restraints. Courthouses are thus places in which members of the judiciary and the public come into frequent contact with defendants in restraints. Yet, the Court says, the appearance of a convicted criminal in a belly chain and handcuffs at a sentencing hearing offends the sensibilities of our courts. The courts of this Nation do not have such delicate constitutions.

Finally, the Court claims that "[t]he appearance of the offender during the penalty phase in shackles ... almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a ***657** relevant factor in jury decisionmaking." *Ante,* at 2014. This argument is flawed. It ignores the fact that only relatively recently have the penalty and guilt phases been conducted separately. That the historical evidence reveals no consensus prohibiting visible modern-day shackles during capital trials suggests that there is similarly no consensus prohibiting shackling during capital sentencing. Moreover, concerns about a defendant's dangerousness exist at the guilt phase just as they exist at the penalty phase—jurors will surely be more likely to convict a seemingly violent defendant of murder than a seemingly placid one. If neither common law nor modern state cases support the Court's position with respect to the guilt phase, I see no reason why the fact that a defendant may be perceived as a future danger would support the Court's position with respect to the penalty phase.

B

The Court expresses concern for courtroom security, but its concern rings hollow in light of the rule it adopts. The need for security is real. Judges face the possibility that a defendant or his confederates might smuggle a weapon into court and harm those present, or attack with his bare

hands. For example, in 1999, in Berks County, Pennsylvania, a "defendant forced his way to the bench and beat the judge unconscious." Calhoun, Violence Toward Judicial Officials, 576 Annals of the American Academy of Political and Social Science 54, 61 (2001). One study of Pennsylvania judges projected that over a 20–year career, district justices had a 31 percent probability of being physically assaulted one or more times. See Harris, Kirschner, Rozek, & Weiner, Violence in the Judicial Workplace: One State's Experience, 576 Annals of the American Academy of Political and Social Science 38, 42 (2001). Judges are not the only ones who face the risk of violence. Sheriffs and courtroom bailiffs face the second highest rate of homicide in the workplace, a rate which is 15 times higher than the national average. Faust & Raffo, ***658** Local Trial Court Response to Courthouse Safety, 576 Annals of the American Academy of Political and Social Science 91, 93–94 (2001); Weiner et al., Safe and Secure: Protecting Judicial Officials, 36 Court Review 26, 27 (Winter 2000).

****2029** The problem of security may only be worsening. According to the General Accounting Office (GAO), the nature of the prisoners in the federal system has changed: "[T]here are more 'hard-core tough guys' and more multiple-defendant cases," making the work of the federal marshals increasingly difficult. GAO, Federal Judicial Security: Comprehensive Risk–Based Program Should Be Fully Implemented 21 (July 1994). Security issues are particularly acute in state systems, in which limited manpower and resources often leave judges to act as their own security. See Harris, *supra,* at 46. Those resources further vary between rural and urban areas, with many rural areas able to supply only minimal security. Security may even be at its weakest in the courtroom itself, for there the defendant is the least restrained. Westman 526.

In the face of this real danger to courtroom officials and bystanders, the Court limits the use of visible physical restraints to circumstances "specific to a particular trial," *ante,* at 2012, *i.e.,* "particular concerns ... related to the defendant on trial," *ante,* at 2015. Confining the analysis to trial-specific circumstances precludes consideration of limits on the security resources of courts. Under that test, the particulars of a given courthouse (being nonspecific to any particular defendant) are irrelevant, even if the judge himself is the only security, or if a courthouse has few on-duty officers standing guard at any given time, or multiple exits. Forbidding courts from considering such circumstances fails to accommodate the unfortunately dire security situation faced by this Nation's courts.

* * *

***659** The Court's decision risks the lives of courtroom personnel, with little corresponding

benefit to defendants. This is a risk that due process does not require. I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 See Coke *34 ("If felons come in judgement to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"); *Cranburne's Case,* 13 How. St. Tr. 222 (K.B.1696) (prisoners "should stand at their ease when they are tried"); The Conductor Generalis 403 (J. Parker ed. 1801) (reciting same); cf. *ibid.* ("[t]hat where the law requires that a prisoner should be kept in *salva & arcta custodia,* yet that must be without pain or torment to the prisoner").

2 When arraignment and trial occurred on separate occasions, the defendant could be brought to his arraignment in irons. *Trial of Christopher Layer,* 16 How. St. Tr. 94, 97 (K.B.1722) (defendant arraigned in irons); *King v. Waite,* 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K.B.1743) (fetters could not be removed until the defendant had pleaded); but cf. R. Burns, Abridgment, or the American Justice 37 (1792) ("The prisoner on his arraignment ... must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons").

3 *State v. Mitchell,* 824 P.2d 469, 473–474 (Utah App.1991); *Smith v. State,* 773 P.2d 139, 140–141 (Wyo.1989); *Frye v. Commonwealth,* 231 Va. 370, 381–382, 345 S.E.2d 267, 276 (1986); *State v. White,* 456 A.2d 13, 15 (Me.1983); *State v. Baugh,* 174 Mont. 456, 462–463, 571 P.2d 779, 782–783 (1977); *Brookins v. State,* 354 A.2d 422, 425 (Del.1976); *State v. Phifer,* 290 N.C. 203, 219, 225 S.E.2d 786, 797 (1976); *State v. Lemire,* 115 N.H. 526, 531, 345 A.2d 906, 910 (1975); *Anthony v. State,* 521 P.2d 486, 496 (Alaska 1974); *State v. Palmigiano,* 112 R.I. 348, 357–358, 309 A.2d 855, 861 (1973); *Jones v. State,* 11 Md.App. 686, 693–694, 276 A.2d 666, 670 (1971); *State v. Polidor,* 130 Vt. 34, 39, 285 A.2d 770, 773 (1971); *State v. Moen,* 94 Idaho 477, 479–480, 491 P.2d 858, 860–861 (1971); *State v. Yurk,* 203 Kan. 629, 631, 456 P.2d 11, 13–14 (1969); *People v. Thomas,* 1 Mich.App. 118, 126, 134 N.W.2d 352, 357 (1965); *State v. Nutley,* 24 Wis.2d 527, 564–565, 129 N.W.2d 155, 171 (1964), overruled on other grounds by *State v. Stevens,* 26 Wis.2d 451, 463, 132 N.W.2d 502, 508 (1965); *State v. Brooks,* 44 Haw. 82, 84–86, 352 P.2d 611, 613–614 (1960); *State v. Coursolle,* 255 Minn. 384, 389, 97 N.W.2d 472, 476–477 (1959) (handcuffing of witnesses); *Allbright v. State,* 92 Ga.App. 251, 252–253, 88 S.E.2d 468, 469–470 (1955); *State v. Roscus,* 16 N.J. 415, 428, 109 A.2d 1, 8 (1954); *People v. Snyder,* 305 N.Y. 790, 791, 113 N.E.2d 302 (1953); *Eaddy v. People,* 115 Colo. 488, 491, 174 P.2d 717, 718 (1946) (en banc); *State v. McKay,* 63 Nev. 118, 161–163, 165 P.2d 389, 408–409 (1946) (also discussing a 1929 Nevada statute that limited the use of restraints prior to conviction); *Rayburn v. State,* 200 Ark. 914, 920–922, 141 S.W.2d 532, 535–536 (1940); *Shultz v. State,* 131 Fla. 757, 758, 179 So. 764, 765 (1938); *Commonwealth v. Millen,* 289 Mass. 441, 477–478, 194 N.E. 463, 480 (1935); *Pierpont v. State,* 49 Ohio App. 77, 83–84, 195 N.E. 264, 266–267 (1934); *Corey v. State,* 126 Conn. 41, 42–43, 9 A.2d 283, 283–284 (1939); *Bradbury v. State,* 51 Okla. Cr. 56, 59–61, 299 P. 510, 512 (App.1931); *State v. Hanrahan,* 49 S.D. 434, 435–437, 207 N.W. 224, 225 (1926); *South v. State,* 111 Neb. 383, 384–386, 196 N.W. 684, 685–686 (1923); *Blair v. Commonwealth,* 171 Ky. 319, 327, 188 S.W. 390, 393 (1916); *McPherson v. State,* 178 Ind. 583, 584–585, 99 N.E. 984, 985 (1912); *State v. Kenny,* 77 S.C. 236, 240–241, 57 S.E. 859, 861 (1907); *State v. Bone,* 114 Iowa 537, 541–543, 87 N.W. 507, 509 (1901). The North Dakota courts have yet to pass upon the question in any reported decision.

4 See n. 3, *supra.* It bears noting, however, that in 1817 Georgia enacted a statute limiting the use of physical restraints on defendants at trial, long before any decision was reported in the Georgia courts. Prince's Digest of the Laws of the State of Georgia § 21, p. 372 (1822). Its courts did not address shackling until 1955. *Allbright v. State, supra,* at 252–253, 88 S.E.2d, at 469–470.

5 *Parker v. Territory,* 5 Ariz. 283, 287–288, 52 P. 361, 363 (1898); *State v. Allen,* 45 W.Va. 65, 68–70, 30 S.E. 209, 210–211 (1898), overruled in relevant part, *State v. Brewster,* 164 W.Va. 173, 182, 261 S.E.2d 77, 82 (1979) (relying on *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), and *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)); *State v. Williams,* 18 Wash. 47, 50–51, 50 P. 580, 581–582 (1897); *Commonwealth v. Weber,* 167 Pa. 153, 165–166, 31 A. 481, 484 (1895); *Rainey v. State,* 20 Tex. Ct.App. 455, 472 (1886); *Upstone v. People,* 109 Ill. 169, 179 (1883); *State v. Thomas,* 35 La. Ann. 24, 26 (1883); *State v. Smith,* 11 Ore. 205, 208, 8 P. 343 (1883); *Territory v. Kelly,* 2 N.M. 292, 304–306 (1882); *Poe v. State,*

78 Tenn. 673, 677–678 (1882); *Faire v. State,* 58 Ala. 74, 80–81 (1877); *State v. Kring,* 1 Mo.App. 438, 441–442 (1876); *Lee v. State,* 51 Miss. 566, 569–574 (1875), overruled on other grounds, *Wingo v. State,* 62 Miss. 311, 315–316 (1884); *People v. Harrington,* 42 Cal. 165, 168–169 (1871).

6 Pennsylvania first addressed the question of the shackling of a defendant in the context of a grand jury proceeding. It too concluded that deference was required, finding that the appropriate security for the defendant's transport was best left to the officers guarding him. *Commonwealth v. Weber, supra,* at 165, 31 A., at 484.

7 See, *e.g., State v. Franklin,* 97 Ohio St.3d 1, 18–19, 776 N.E.2d 26, 46 (2002) (decision to shackle a defendant is left to the sound discretion of a trial court); *Commonwealth v. Agiasottelis,* 336 Mass. 12, 16, 142 N.E.2d 386, 389 (1957) ("[A] judge properly should be reluctant to interfere with reasonable precautions which a sheriff deems necessary to keep secure prisoners for whose custody he is responsible and, if a judge fails to require removal of shackles, his exercise of a sound discretion will be sustained"); *Rayburn v. State,* 200 Ark., at 920–921, 141 S.W.2d, at 536 ("Trial Courts must be allowed a discretion as to the precautions which they will permit officers ... to take to prevent the prisoner's escape, or to prevent him from harming any person connected with the trial, or from being harmed"); *State v. Hanrahan,* 49 S.D., at 436, 207 N.W., at 225 ("It is the universal rule that while no unreasonable restraint may be exercised over the defendant during his trial, yet it is within the discretion of the trial court to determine what is and what is not reasonable restraint"); *McPherson v. State,* 178 Ind., at 585, 99 N.E., at 985 ("[W]hether it is necessary for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge").

8 See, *e.g., Commonwealth v. Millen,* 289 Mass., at 477–478, 194 N.E., at 477–478.

9 See, *e.g., Smith v. State,* 773 P.2d, at 141 ("The general law applicable in situations where jurors see a handcuffed defendant is that, absent a showing of prejudice, their observations do not constitute grounds for a mistrial"); *People v. Martin,* 670 P.2d 22, 25 (Colo.App.1983) (shackling is not inherently prejudical); *State v. Gilbert,* 121 N.H. 305, 310, 429 A.2d 323, 327 (1981) (shackling is not inherently prejudicial); *State v. Moore,* 45 Ore.App. 837, 840, 609 P.2d 866, 867 (1980) ("[A]bsent a strongly persuasive showing of prejudice to the defendant and that the court abused its discretion, we will not second guess [the trial court's] assessment of its security needs"); *State v. Palmigiano,* 112 R.I., at 358, 309 A.2d, at 861; *State v. Polidor,* 130 Vt., at 39, 285 A.2d, at 773; *State v. Norman,* 8 N.C.App. 239, 242, 174 S.E.2d 41, 44 (1970); *State v. Brooks,* 44 Haw., at 84–86, 352 P.2d, at 613–614; *State v. Brewer,* 218 Iowa 1287, 1299, 254 N.W. 834, 840 (1934) ("[T]his court cannot presume that the defendant was prejudiced because he was handcuffed"), overruled by *State v. Wilson,* 406 N.W.2d 442, 449, and n. 1 (Iowa 1987); but see *State v. Coursolle,* 255 Minn., at 389, 97 N.W.2d, at 476–477 (shackling is inherently prejudicial).

10 See, *e.g., ibid.* (defining "immediate necessity" as "some reason based on the conduct of the prisoner at the time of the trial"); *Blair v. Commonwealth,* 171 Ky., at 327–328, 188 S.W., at 393; *State v. Temple,* 194 Mo. 237, 247, 92 S.W. 869, 872 (1906) (citing *State v. Kring,* 64 Mo. 591, 592–593 (1877)).

11 See, *e.g., Commonwealth v. Chase,* 350 Mass. 738, 740, 217 N.E.2d 195, 197 (1966) (attempted escape on two prior occasions, plus the serious nature of the offense for which defendant was being tried supported use of restraints); *People v. Thomas,* 1 Mich.App., at 126, 134 N.W.2d, at 357 (prison escape for which defendant was on trial sufficed to permit use of shackles); *People v. Bryant,* 5 Misc.2d 446, 448, 166 N.Y.S.2d 59, 61 (1957) (attempts to escape "on prior occasions while in custody," among other things, supported the use of restraints).

12 See, *e.g., State v. Roberts,* 86 N.J.Super. 159, 165, 206 A.2d 200, 204 (App.Div.1965) ("In addition to a defendant's conduct *at the time of trial,* ... defendant's reputation, *his known criminal record,* his character, and the nature of the case must all be weighed" in deciding whether to shackle a defendant (second emphasis added)); *State v. Moen,* 94 Idaho, at 480–481, 491 P.2d, at 861–862 (that three defendants were on trial for escape, had been convicted of burglary two days before their trial for escape, and were being tried together sufficed to uphold trial court's shackling him); *State v. McKay,* 63 Nev., at 164, 165 P.2d, at 409 (prior conviction for burglary and conviction by army court-martial for desertion, among other things, taken into account); *People v. Deveny,* 112 Cal.App.2d 767, 770, 247 P.2d 128, 130 (1952) (defendant previously convicted of escape from prison); *State v. Franklin, supra,* at 19, 776 N.E.2d, at 46–47 (defendant just convicted of three brutal murders).

13 See, *e.g., State v. Roberts, supra,* at 165–167, 206 A.2d, at 204.

14 See, *e.g., State v. Franklin, supra,* at 18–20, 776 N.E.2d, at 46–47 (defendant "had stabbed a fellow inmate with a pen six times in a dispute over turning out a light").

15 See, *e.g., Frye v. Commonwealth,* 231 Va., at 381, 345 S.E.2d, at 276 (permitting consideration of a "defendant's temperament"); *De Wolf v. State,* 95 Okla. Cr. 287, 293–294, 245 P.2d 107, 114–115 (App.1952) (permitting consideration of both the defendant's

"character" and "disposition toward being a violent and dangerous person, both to the court, the public and to the defendant himself").

16 See, *e.g., Frye v. Commonwealth, supra,* at 381–382, 345 S.E.2d, at 276 ("A trial court may consider various factors in determining whether a defendant should be restrained" including his "physical attributes"); *State v. Dennis,* 250 La. 125, 137–138, 194 So.2d 720, 724 (1967) (no prejudice from "defendant's appearance in prisoner garb, handcuffs and leg-irons before the jury venire" where it was a " 'prison inmate case' " and "defendant is a vigorous man of twenty-eight or twenty-nine years of age, about six feet tall, and weighing approximately two hundred and twenty to two hundred and twenty-five pounds").

17 *Dyas v. Poole,* 309 F.3d 586, 588–589 (C.A.9 2002) *(per curiam)* (relying on *Holbrook*), amended and superseded by 317 F.3d 934 (2003) *(per curiam); Harrell v. Israel,* 672 F.2d 632, 635 (C.A.7 1982) *(per curiam)* (relying on *Allen* and *Estelle*); *State v. Herrick,* 324 Mont. 76, 80–81, 101 P.3d 755, 758–759 (2004) (relying on *Allen* and *Holbrook*); *Hill v. Commonwealth,* 125 S.W.3d 221, 233 (Ky.2004) (relying on *Holbrook*); *State v. Turner,* 143 Wash.2d 715, 724–727, 23 P.3d 499, 504–505 (2001) (en banc) (relying on *State v. Finch,* 137 Wash.2d 792, 842, 975 P.2d 967, 997–999 (1999) (en banc), which relies on *Allen, Estelle,* and *Holbrook*); *Myers v. State,* 2000 OK CR 25, ¶¶ 46–47, 17 P.3d 1021, 1033 (relying on *Owens v. State,* 1982 OK CR 1, 187, ¶¶ 4–6, 654 P.2d 657, 658–659, which relies on *Estelle*); *State v. Shoen,* 598 N.W.2d 370, 375–376 (Minn.1999) (relying on *Allen, Estelle,* and *Holbrook*); *Lovell v. State,* 347 Md. 623, 638–639, 702 A.2d 261, 268–269 (1997) (same); *People v. Jackson,* 14 Cal.App.4th 1818, 1829–1830, 18 Cal.Rptr.2d 586, 593–594 (1993) (relying on *People v. Duran,* 16 Cal.3d 282, 290–291, 127 Cal.Rptr. 618, 623, 545 P.2d 1322, 1327 (1976) (in bank), which relies on *Allen*); *Cooks v. State,* 844 S.W.2d 697, 722 (Tex.Crim.App.1992) (en banc) (relying on *Marquez v. State,* 725 S.W.2d 217, 230 (Tex.Crim.App.1987) (en banc), overruled on other grounds, *Moody v. State,* 827 S.W.2d 875, 892 (Tex.Crim.App.1992) (en banc), which relies on *Holbrook*); *State v. Tweedy,* 219 Conn. 489, 505, 508, 594 A.2d 906, 914, 916 (1991) (relying on *Estelle* and *Holbrook*); *State v. Crawford,* 99 Idaho 87, 95–96, 577 P.2d 1135, 1143–1144 (1978) (relying on *Allen* and *Estelle*); *People v. Brown,* 45 Ill.App.3d 24, 26, 3 Ill.Dec. 677, 358 N.E.2d 1362, 1363 (1977) (same); *State v. Tolley,* 290 N.C. 349, 367, 226 S.E.2d 353, 367 (1976) (same). See also, *e.g., Anthony v. State,* 521 P.2d, at 496, and n. 33 (relying on *Allen* for the proposition that manacles, shackles, and other physical restraints must be avoided unless necessary to protect some manifest necessity); *State v. Brewster,* 164 W.Va., at 180–181, 261 S.E.2d, at 81–82 (relying on *Allen* and *Estelle* to overrule prior decision permitting reviewing court to presume that the trial court reasonably exercised its discretion even where the trial court had not made findings supporting the use of restraints); *Asch v. State,* 62 P.3d 945, 963–964 (Wyo.2003) (relying on *Holbrook* and *Estelle* to conclude that shackling is inherently prejudicial, and on *Allen* to conclude that shackling offends the dignity and decorum of judicial proceedings); *State v. Wilson,* 406 N.W.2d, at 449, n. 1 (relying in part on *Holbrook* to hold that visible shackling is inherently prejudicial, overruling prior decision that refused to presume prejudice); *State v. Madsen,* 57 P.3d 1134, 1136 (Utah App.2002) (relying on *Holbrook* for the proposition that shackling is inherently prejudicial).

18 See, *e.g., Harlow v. State,* 105 P.3d 1049, 1060 (Wyo.2005) (where jury knew that the prisoner and two witnesses were all inmates, no prejudice from seeing them in shackles); *Hill v. Commonwealth,* 125 S.W.3d, at 236 ("The trial court's admonition and the fact that the jury already knew Appellant was a convicted criminal and a prisoner in a penitentiary mitigated the prejudice naturally attendant to such restraint"); *State v. Woodard,* 121 N.H. 970, 974, 437 A.2d 273, 275 (1981) (where jury already aware that the defendant was confined, any prejudice was diminished); see also *Payne v. Commonwealth,* 233 Va. 460, 466, 357 S.E.2d 500, 504 (1987) (no error for inmate-witnesses to be handcuffed where jurors were aware that they "were ... convicted felons and that the crime took place inside a penal institution"); *State v. Moss,* 192 Neb. 405, 407, 222 N.W.2d 111, 113 (1974) (where defendant was an inmate, his appearance at arraignment in leg irons did not prejudice him); *Jessup v. State,* 256 Ind. 409, 413, 269 N.E.2d 374, 376 (1971) ("It would be unrealistic indeed ... to hold that it was reversible error for jurors to observe the transportation of an inmate of a penal institution through a public hall in a shackled condition"); *People v. Chacon,* 69 Cal.2d 765, 778, 73 Cal.Rptr. 10, 447 P.2d 106, 115 (1968) (in bank) (where defendant was charged with attacking another inmate, "the use of handcuffs was not unreasonable"); *State v. Dennis,* 250 La., at 138, 194 So.2d, at 724 (no prejudice where defendant of considerable size appeared in prisoner garb, leg irons, and handcuffs before the jury where it was a " 'prison inmate case' ").

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