THIS IS A CAPITAL CASE

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CARMAN DECK, Petitioner

v.

Paul Blair et al., Respondents

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Carlyle Parish LLC
Elizabeth Unger Carlyle*
6320 Brookside Plaza #516
Kansas City, Missouri 64113
*Counsel of Record

Kevin Louis Schriener
Law & Schriener, LLC
141 North Meramec Avenue, Suite 314
Clayton, Missouri 63105

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

978 F.3d 578
United States Court of Appeals, Eighth Circuit.

Carman L. DECK, Petitioner - Appellee
v.
Richard JENNINGS; Eric S. Schmitt, Respondents - Appellants
Linda Long Davis; Karen Long; Erica Adkins, Amici on Behalf of Appellants

No. 17-2055
|
Submitted: February 11, 2020
|
Filed: October 19, 2020
|
Rehearing and Rehearing En Banc Denied January 13, 2021*

Synopsis

Background: Following affirmance on direct appeal of petitioner's state-court convictions for first-degree murder, 994 S.W.2d 527, and his death sentences, 303 S.W.3d 527, and denial of his state-court motion for postconviction relief, 381 S.W.3d 339, he filed petition for federal habeas relief. The United States District Court for the Eastern District of Missouri, Catherine D. Perry, Senior District Judge, 249 F.Supp.3d 991, granted the petition. State appealed.

[Holding:] The Court of Appeals, Stras, Circuit Judge, held that trial counsel representing petitioner during penalty phase of capital murder trial was not ineffective.

Reversed and remanded.

West Headnotes (11)

[1] Habeas Corpus Sufficiency of Presentation; Fair Presentation

197Habeas Corpus
197IIn General

197I(D)Federal Court Review of Petitions by State Prisoners
197I(D)4Sufficiency of Presentation of Issue or Utilization of State Remedy
197k380Sufficiency of Presentation; Fair Presentation
197k380.1In general

To avoid procedural default of a federal habeas claim, a petitioner must fairly present the claim in state court before seeking habeas relief in federal court. 28 U.S.C.A. §§ 2254(a), 2254(b)(1).

[2] Habeas Corpus Cause and prejudice in general

197Habeas Corpus
197IIn General
197I(D)Federal Court Review of Petitions by State Prisoners
197I(D)5Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k404Cause and prejudice in general

Unless the petitioner can establish cause and actual prejudice to excuse a procedural default of a habeas claim, a federal habeas court cannot consider the claim. 28 U.S.C.A. §§ 2254(a), 2254(b)(1).

1 Cases that cite this headnote

[3] Habeas Corpus Ineffectiveness or want of counsel

197Habeas Corpus
197IIn General
197I(D)Federal Court Review of Petitions by State Prisoners
197I(D)5Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405Cause or Excuse
197k406Ineffectiveness or want of counsel

Ineffective assistance of state postconviction counsel does not usually provide cause to excuse a procedural default in order to permit federal habeas review. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(a), 2254(b)(1).

[4] Habeas Corpus Ineffectiveness or want of counsel

197Habeas Corpus
197IIn General
197I(D)Federal Court Review of Petitions by State Prisoners
197I(D)5Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405Cause or Excuse
197k406Ineffectiveness or want of counsel

State postconviction counsel's ineffectiveness can provide cause for excusing a procedurally defaulted claim of ineffective assistance of trial counsel in order to permit federal habeas review. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(a), 2254(b)(1).

1 Cases that cite this headnote

[5] 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

Trial counsel representing defendant in third and final penalty phase of capital murder trial did not perform deficiently, as required to support claim of ineffective assistance of counsel, by failing to raise claim that more than 10-year delay between defendant's murder convictions and his final sentencing trial deprived defendant of his ability to present mitigation evidence and rendered his final sentencing trial fundamentally unfair in violation of due process; law was, at best, unsettled, at time of defendant's final sentencing trial, as to whether such delay would violate due process. U.S. Const. Amends. 6, 14.

[6] Habeas Corpus Ineffectiveness or want of counsel

197Habeas Corpus
197IIn General
197I(D)Federal Court Review of Petitions by State Prisoners

197I(D)5Availability of Remedy Despite Procedural Default or Want of Exhaustion
197k405Cause or Excuse
197k406Ineffectiveness or want of counsel

In determining whether state postconviction counsel's ineffectiveness in failing to raise a state-court claim of ineffective assistance of trial counsel is sufficient to provide cause to excuse procedural default and permit federal habeas review of the claim of ineffective assistance of trial counsel, the federal court must determine whether the ineffective-assistance-of-trial-counsel claim was substantial enough that the failure to raise it on postconviction review was itself ineffective. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(a), 2254(b)(1).

2 Cases that cite this headnote

[7] Criminal Law Particular Cases and Issues

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1890In general

Failing to make an argument that would require the resolution of unsettled legal questions is generally not outside the wide range of professionally competent assistance, as necessary to support a claim of ineffective assistance of counsel. U.S. Const. Amend. 6.

[8] Criminal Law Adequacy of Representation

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1870In general

A court must evaluate a claim of ineffective assistance of counsel using a freeze frame, that is, focusing on when the alleged poor performance occurred, not sometime later when the law may have changed. U.S. Const. Amend. 6.

[9] Criminal Law Raising of Particular Defense or Contention

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1908Raising of Particular Defense or Contention
110k1909In general

Competent performance, as will establish effective assistance of defense counsel, does not require counsel to recognize and raise every conceivable constitutional claim. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[10] Criminal Law Raising of Particular Defense or Contention

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1908Raising of Particular Defense or Contention
110k1909In general

Declining to raise a claim is not deficient performance, as required to support a claim of ineffective assistance of counsel, unless that unraised claim was plainly stronger than those actually presented. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[11] Habeas Corpus Determination

197Habeas Corpus
197IIn General
197I(D)Federal Court Review of Petitions by State Prisoners

197I(D)7Determination
197k431In general

An evidentiary hearing to establish cause to excuse federal habeas relief based on ineffective assistance of counsel is only available when the ineffective assistance claim is substantial or potentially meritorious. U.S. Const. Amend. 6; 28 U.S.C.A. §§ 2254(a), 2254(b)(1).

***580** Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant and appeared on the brief was Katharine Dolin, AAG, of Jefferson City, MO.

Counsel who presented argument on behalf of the appellee was Elizabeth Unger Carlyle, of Kansas City, MO. The following attorney also appeared on the appellee brief; Kevin L. Schriener, of Saint Louis, MO.

The following attorneys appeared on the amicus brief; Kent S. Scheidegger, of Sacramento, CA., Kymberlee C. Stapleton, of Sacramento, CA.

Before SMITH, Chief Judge, COLLOTON and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

After Carman Deck killed an elderly couple in their home, a Missouri jury convicted him of several offenses, including two counts of first-degree murder. He received the death penalty on both counts, twice successfully appealed, and 10 years after he was first convicted, received the same sentence for a third time. He now claims in a petition for a writ of habeas corpus that counsel at his third penalty-phase trial was ineffective for failing to argue that the passage of time had undermined his mitigation case. Although the district court granted relief, we reverse because Deck has no excuse for his failure to raise this claim in state court.

I.

During a robbery in the summer of 1996, Deck killed James and Zelma Long. Deck waited until after dark, knocked on their door, and asked for directions. After the Longs offered to help and invited him inside, Deck pulled out a .22-caliber pistol and ordered the couple to lie face down on their bed. He told Mrs. Long to retrieve money and valuables from another room. Then, for about 10 minutes, Deck considered his options. Ultimately, he put the gun to Mr. Long's head and fired twice. Mrs. Long suffered the same fate. Neither survived.

A Missouri jury found Deck guilty of two counts of first-degree murder, among other crimes. He received two death sentences, one for each murder, and the Supreme Court of Missouri affirmed. *See State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999). Deck received a new penalty-phase trial, however, after he filed a postconviction petition claiming that counsel had been ineffective by offering "faulty instructions" on mitigation. *Deck v. State*, 68 S.W.3d 418, 429 (Mo. banc 2002).

The second penalty-phase trial started just over a year later, and Deck once again received two death sentences. *See State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004). This time, the Supreme Court of the United States reversed on the ground that the jury should not have seen Deck in shackles. *See Deck v. Missouri*, 544 U.S. 622, 632–35, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005).

***581** Following a series of continuances, Deck's third penalty-phase trial did not begin until almost three-and-a-half years later—over 10 years since a Missouri jury had found him guilty of murder. Yet again, Deck received two death sentences, one for each murder count. The Supreme Court of Missouri affirmed the sentence, and later, the denial of postconviction relief. *See State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010); *Deck v. State*, 381 S.W.3d 339 (Mo. banc 2012).

Not long after, Deck filed a petition for a writ of habeas corpus in federal district court. *See* 28 U.S.C. § 2254. Of the 32 claims in the petition, the court granted relief on only two, each related to the lengthy delay between Deck's conviction and the third penalty-phase trial.[1] The first was that the delay violated due process and amounted to cruel and unusual punishment. *See* U.S. Const. amends. VIII, XIV. The other was that trial counsel had been ineffective for failing to raise the argument. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The only remedy for these constitutional violations, at least in the court's view, was to "vacate[ ]" the "death penalty" and impose a sentence of "life in prison without the possibility of parole."

II.

[1]Before a federal court can consider a claim that a state prisoner "is in custody in violation of the Constitution," all available state-court remedies must be exhausted. 28 U.S.C. § 2254(a), (b)(1). To avoid "procedural default," in other words, a "petitioner must fairly present" the claim in state court before seeking habeas relief in federal court. *Morris v. Norris*, 83 F.3d 268, 270 (8th Cir. 1996).

[2]Here, although Deck advanced a number of arguments in state postconviction proceedings, the two constitutional claims based on the 10-year delay were not among them. The upshot is that, unless Deck can establish "cause for the default and actual prejudice," we cannot consider either one. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).[2] Applying de-novo review, we agree with Missouri that he has not done so. *See Murphy v. King*, 652 F.3d 845, 848 (8th Cir. 2011) (applying de-novo review); *Becht v. United States*, 403 F.3d 541, 545 (8th Cir. 2005) (requiring the petitioner to establish "cause" and "prejudice").

A.

The district court, however, thought Deck had established both. The "cause" was state postconviction counsel's failure to raise a substantial claim that trial counsel provided ineffective assistance by not objecting to the long delay, which "prejudice[d]" Deck because there was a reasonable ***582** probability that the argument would have succeeded had postconviction counsel raised it. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546.

1.

[3] [4]Ineffective assistance of state postconviction counsel does not usually provide cause for a procedural default, *id.* at 755, 111 S.Ct. 2546, except for one "narrow exception," *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). In *Martinez*, the Supreme Court

held that postconviction counsel's ineffectiveness can provide "cause" for excusing a defaulted ineffective-assistance-of-trial-counsel claim. *See id.* at 14, 132 S.Ct. 1309; *see also Trevino v. Thaler*, 569 U.S. 413, 429, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013) (explaining that the claim must also be "substantial," and that the state judicial system must not have provided a "meaningful opportunity to raise" it on direct appeal (quotation marks omitted)).

The district court held that Deck's case fell squarely under the *Martinez* exception. In its view, the defaulted claim was substantial, because counsel at Deck's third penalty-phase trial had a difficult time mounting a mitigation case because of the passage of time. Specifically, some of Deck's witnesses from the first two penalty-phase trials were unable or unwilling to provide in-person testimony the third time around. In light of this difficulty, the court believed it was obvious that counsel should have raised Eighth and Fourteenth Amendment objections before the trial began. It was so obvious, in fact, that postconviction counsel was ineffective for failing to recognize it later.

The district court then took the cause analysis one step further. Relying on *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000), it concluded that the newly excused ineffective-assistance-of-trial-counsel claim provided cause for the default of the underlying Eighth and Fourteenth Amendment claims. *See id.* at 453, 120 S.Ct. 1587 (leaving open the possibility that a petitioner who can overcome the default of an ineffective-assistance claim can use it to show cause for the default of *another* claim). This *Martinez*-plus-*Edwards* approach allowed the court to grant habeas relief for *both* the ineffective-assistance-of-trial-counsel claim *and* the underlying constitutional claims, even though Deck never raised them in state court.

2.

[5]Every step in this analysis, however, still depends on getting through the *Martinez* gateway first. This means that the key question is whether postconviction counsel was ineffective. If not, there is no excuse for the failure to raise trial counsel's ineffectiveness during state postconviction proceedings. *See Martinez*, 566 U.S. at 14, 132 S.Ct. 1309. And if trial counsel's ineffectiveness is defaulted without excuse, then so are Deck's underlying Eighth and Fourteenth Amendment claims. *See Edwards*, 529 U.S. at 452–53, 120 S.Ct. 1587. Without *Martinez*, Deck never gets to *Edwards*.

[6]Focusing on the narrow question of postconviction counsel's performance, as *Martinez* instructs us to do, we must determine whether the ineffective-assistance-of-trial-counsel claim was "substantial enough" that the failure to raise it on postconviction review was itself ineffective.

Dansby, 766 F.3d at 838. Notwithstanding the district court's contrary conclusion, we do not believe that Deck's claim of ineffective assistance of trial counsel is "substantial enough" to excuse his procedural default.

***583** [7]As we have explained, failing to make an argument that would "require the resolution of unsettled legal questions" is generally not "outside the wide range of professionally competent assistance." *Id.* at 836 (quotation marks omitted); *see Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999) (explaining that it is not objectively unreasonable for counsel to "fail[ ] to anticipate a change in the law"). When postconviction counsel filed Deck's petition in 2010, the law was far from settled that a 10-year delay between conviction and sentencing would give rise to a constitutional claim, much less that trial counsel was ineffective for failing to raise the argument two years earlier.[3] *See New v. United States*, 652 F.3d 949, 953 (8th Cir. 2011) (concluding that the absence of "controlling authority" supporting a legal argument doomed an ineffective-assistance claim).

[8]It is no answer to rely, as the district court did, on *Betterman v. Montana*, —— U.S. ——, 136 S. Ct. 1609, 194 L.Ed.2d 723 (2016), which was not decided until six years after Deck filed his postconviction petition. We evaluate ineffective assistance of counsel using a freeze frame—when the alleged poor performance occurred, not sometime later when the law finally gets settled. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (holding that we must "evaluate the conduct from counsel's perspective *at the time*" (emphasis added)); *Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) ("We do not evaluate counsel's performance using the clarity of hindsight, but in light of the facts and circumstances at the time of trial." (internal quotation marks omitted)). Moreover, *Betterman* itself hardly settles the question. It says only that the Due Process Clause *might* provide for "tailored relief" from "exorbitant" sentencing delays, not that it necessarily *does*. 136 S. Ct. at 1612, 1617.

Examining the state of the law in 2010, Deck cannot identify any "controlling authority" from either the Supreme Court of the United States or the Supreme Court of Missouri that had recognized a Due Process claim under these or similar circumstances. *New*, 652 F.3d at 953; *see also Pollard v. United States*, 352 U.S. 354, 361–62, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957) (assuming without deciding that the Speedy Trial Clause applied to sentencing delays and concluding that a petitioner was not entitled to relief); *State v. Haslip*, 583 S.W.2d 225, 228–29 (Mo. Ct. App. 1979) (explaining that periods of up to 29 months between conviction and sentencing were not "violative" of a defendant's Sixth Amendment rights). The law, in other words, was at best "unsettled" at the time. *New*, 652 F.3d at 952.

It is true that other courts had suggested that a constitutional claim like this one could work. *See, e.g.*, *United States v. Yelverton*, 197 F.3d 531, 536 & n.5 (D.C. Cir. 1999) (collecting cases). But these cases were not controlling; did not reflect a single unified framework; and largely relied on the Sixth Amendment's Speedy Trial Clause, not the Fourteenth Amendment's Due Process Clause. *Compare Betterman*, 136 S. Ct. at 1618 (making clear that "[t]he ***584** Sixth Amendment

speedy[-]trial right ... does not extend beyond conviction"), *with United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996) (applying the *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), factors to a speedy-sentencing claim), *and United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006) (adopting a due-process framework). "Given th[e] split of authority" elsewhere, and the lack of controlling authority here, we cannot say that postconviction counsel's "performance fell [outside] 'the wide range of professionally competent assistance.' " *Fields v. United States*, 201 F.3d 1025, 1027–28 (8th Cir. 2000) (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052).

[9]At the time of Deck's postconviction proceedings in 2010, there was even less reason to believe that an Eighth Amendment claim would succeed. There is no question, as Deck points out, that capital defendants have a constitutional right to present mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). But none of the cases establishing this principle involved situations in which a long delay was allegedly responsible for a shortage of mitigating evidence. *See, e.g.*, *Skipper v. South Carolina*, 476 U.S. 1, 3, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (exclusion of evidence by the trial court); *Eddings*, 455 U.S. at 108–09, 102 S.Ct. 869 (refusal of the trial court to consider admitted evidence); *Woodson v. North Carolina*, 428 U.S. 280, 286, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (exclusion by state statute). So postconviction counsel was faced with the prospect of arguing that trial counsel was ineffective for failing to raise a "novel argument." *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir. 2005). However, "competent" performance does not require counsel to "recognize and raise every conceivable constitutional claim." *Id.* (quotation marks omitted).

[10]Moreover, "[d]eclining to raise a claim ... is not deficient performance unless that claim was plainly stronger than those actually presented." *Davila v. Davis*, —— U.S. ——, 137 S. Ct. 2058, 2067, 198 L.Ed.2d 603 (2017). Postconviction counsel raised a number of other claims, including that trial counsel should have presented more mitigating evidence at the third trial. Although none of these claims proved successful, there was a well-established legal basis for them, and counsel could have reasonably concluded that an ineffective-assistance claim focused exclusively on the delay would have only detracted from other, stronger arguments.

* * *

In sum, postconviction counsel's performance was reasonable. It follows that the *Martinez* exception—the only conceivable basis for excusing Deck's procedural default—is unavailable to him.

B.

[11]Deck nevertheless insists, in the alternative, that he is entitled to an evidentiary hearing to establish cause for the default. We have, to be sure, remanded to allow a district court to hold an evidentiary hearing to evaluate whether a petitioner has an excuse under *Martinez*. *See, e.g.*, *Sasser v. Hobbs*, 735 F.3d 833, 851, 853–54 (8th Cir. 2013). But we have also been clear that a remand is only available when the ineffective-assistance-of-trial-counsel claim is "substantial or potentially meritorious." *Dansby*, 766 F.3d at 834 (internal quotation marks omitted). And here, for the reasons we have already stated, Deck's claim is not.

***585** III.

We accordingly reverse and remand for the entry of judgment denying Deck's petition in full.

All Citations

978 F.3d 578

Footnotes

* Judge Gruender and Judge Benton did not participate in the consideration or decision of this matter.

1 Deck appears to seek reconsideration of our decision to deny a certificate of appealability on two other claims, labeled as 19 and 20 in his habeas petition. After carefully reviewing the arguments in his brief, we decline to expand the certificate of appealability or otherwise grant relief on these claims. *See Jennings v. Stephens*, 574 U.S. 271, 282–83, 135 S.Ct. 793, 190 L.Ed.2d 662 (2015) (explaining that "a certificate of appealability" is not required when the petitioner seeks to "defen[d] [the] judgment on alternative grounds"); *see also Dansby v. Hobbs*, 766 F.3d 809, 825 (8th Cir. 2014) (stating that "we reexamine the action of a prior panel" on an application for a certificate of appealability "with caution").

2 Deck does not argue that we should excuse the default because a "failure to consider his claims [would] result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 751, 111 S.Ct. 2546; *see also Sweet v. Delo*, 125 F.3d 1144, 1151–52 (8th Cir. 1997).

3 We further note that it is doubtful that Deck has made a "substantial" claim that he was prejudiced, even if trial counsel's performance had been objectively unreasonable. He suggests that the passage of time deprived him of mitigating evidence, including from certain witnesses who were unavailable to testify at his third trial. Even so, we doubt that there is "a reasonable probability that" the trial court would have done anything different had it faced a timely objection from Deck's trial counsel. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. After all, much of the missing testimony was cumulative to other evidence or did not add much to Deck's mitigation case.

End of Document

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CARMAN L. DECK,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:12 CV 1527 CDP
	)	
TROY STEELE, et al.,	)	
	)	
Respondents.	)	

MEMORANDUM AND ORDER

Petitioner Carman L. Deck is currently on death row at the Potosi Correctional Center in Mineral Point, Missouri, for the murders of James and Zelma Long. Deck was convicted by a jury in the Circuit Court of Jefferson County, Missouri, and was sentenced to death for each of the two murders. He is also serving two concurrent life sentences for two counts of armed criminal action, as well as consecutive sentences of thirty years' and fifteen years' imprisonment for one count of robbery and one count of burglary, respectively. Because Deck is serving consecutive sentences, Missouri Attorney General Josh Hawley is added to this case as a proper party respondent.[1]

This action is before me now on Deck's request for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He raises numerous claims that his conviction and

[1] *See* Rule 2(b), Rules Governing Section 2254 Cases in the United States District Courts.

death sentences were obtained in violation of his constitutional rights. Because the facts underlying Deck's claims have been fully developed through the records submitted to the Court and no further development was necessary, I did not hold an evidentiary hearing on the claims. *See Sweet v. Delo*, 125 F.3d 1144, 1160 (8th Cir. 1997).

I have carefully reviewed the extensive record in this case and the arguments of the parties and find that Deck is entitled to habeas relief on his claim that he was denied a fundamentally fair penalty trial because of delay not attributable to him, and for counsel's ineffectiveness in failing to pursue this meritorious claim before the trial court. I will therefore grant his petition for writ of habeas corpus on these bases. None of Deck's other claims merit relief.

I. Factual Background

The following recitation of facts comes from the Missouri Supreme Court's opinion affirming Deck's conviction on the first direct appeal in this case:

> . . . 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.

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

> Longs' money and then drove back to St. Louis County. Based on a tip from an informant earlier that same date, 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.

State v. Deck, 994 S.W.2d 527, 531-32 (Mo. banc 1999) (*Deck I*).

II. Procedural Background

The jury returned its guilty verdicts on February 20, 1998, and recommended death for the two counts of murder. The trial court sentenced Deck on April 27, 1998, in accordance with the jury's recommendation. On June 1, 1999, the Missouri Supreme Court affirmed Deck's conviction and sentence. *Deck I*. Deck thereafter sought post-conviction relief under Missouri Supreme Court Rule 29.15, which was denied after an evidentiary hearing. On appeal of the denial of the motion, the Missouri Supreme Court found that Deck received ineffective assistance of trial counsel in relation to the submission of jury instructions on mitigation and remanded the matter for a new penalty-phase trial. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002) (*Deck II*). The court concluded that, given the particular facts of the case in which substantial mitigating evidence was offered, there was a reasonable probability that the result of the proceeding would have been different absent counsel's errors. *Id.* at 431.

A second penalty-phase trial began on April 29, 2003, and again resulted in a jury's recommendation of death for both murders. On June 30, 2003, the trial court entered judgment consistent with the recommendation. The Missouri Supreme Court affirmed the sentence on May 25, 2004. *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004). After granting certiorari, the United States Supreme Court reversed this judgment, finding that Deck's visible shackling during the second penalty proceeding violated his constitutional right to due process. *Deck v. Missouri*, 544 U.S. 622 (2005). The matter was remanded for further proceedings.

Upon remand, a third penalty-phase trial was held in September 2008, after which a jury again recommended death for the two murders, and the trial court entered judgment in accordance with the recommendation. This judgment was affirmed by the Missouri Supreme Court on January 26, 2010. *State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010) (*Deck III*). The United States Supreme Court denied certiorari on June 28, 2010. *Deck v. Missouri*, 561 U.S. 1028 (2010). Deck's motion for post-conviction relief under Missouri Supreme Court Rule 29.15 was denied after an evidentiary hearing. The Missouri Supreme Court affirmed the denial of post-conviction relief on July 3, 2012. *Deck v. State*, 381 S.W.3d 339 (Mo. banc 2012) (*Deck IV*).

Deck initiated this proceeding for federal habeas corpus relief on August 27, 2012. Upon the appointment of counsel, Deck filed his petition for writ of habeas

corpus on August 14, 2013. An amended petition was filed later that same date and is presently before the Court for determination. The respondents have responded to the claims raised in the petition, and Deck has filed a Traverse to that response. The parties also filed supplemental briefs on procedural default.

III. Grounds Raised

In his amended petition for writ of habeas corpus, Deck raises thirty-two grounds for relief:

Guilt Phase

1. That he was denied his rights under the Fourth and Fifth Amendments when his confession was admitted in evidence against him;

2. That he was denied his rights to due process, to a trial by a fair and impartial jury, to reliable sentencing, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments when he was denied a change of venue;

3. That he was denied due process and the members of the venire were denied equal protection in violation of the Fourteenth Amendment when the trial court permitted the State to exercise a peremptory strike against prospective juror 16, D.G.;

4. That he was denied his rights to due process, to a fair and impartial jury, to reliable sentencing, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments when the trial court denied his challenge for cause of prospective juror 20, S.A.;

5. That he was denied effective assistance of trial counsel at his guilt-phase trial and third penalty-phase trial when counsel failed to investigate and present evidence from an expert on false confessions,

in violation of the Sixth Amendment;

6. That he was denied effective assistance of trial counsel and due process when counsel failed to conduct an adequate investigation into his innocence and present that evidence at trial, in violation of the Sixth and Fourteenth Amendments;

7. That he was denied effective assistance of trial counsel and due process when counsel mentioned his prior convictions during voir dire, in violation of the Sixth and Fourteenth Amendments;

8. That he was denied effective assistance of trial counsel and due process when counsel failed to object to State's witness Shane Knoll's hearsay testimony about murders at the Long residence, in violation of the Sixth and Fourteenth Amendments;

9. That he was denied effective assistance of trial counsel, the right to confront and cross-examine adverse witnesses, and due process when counsel failed to object to State's witness Shane Knoll's hearsay testimony about Jim Boliek's alibi, in violation of the Sixth and Fourteenth Amendments; and

10. That he was denied effective assistance of appellate counsel in violation of the Sixth Amendment when counsel failed to raise on direct appeal a claim that the trial court erred in overruling his motion to disqualify the prosecuting attorney's office.

Penalty Phase[2]

11. That he was denied his right to due process in violation of the Fifth and Fourteenth Amendments when the trial court overruled his motion to impose two life sentences without possibility of parole and imposed two death sentences, because his prior death sentences had been held unconstitutional by the United States Supreme Court;

12. That he was denied his rights to due process, to trial by a fair and impartial jury, and to be free from cruel and unusual

[2] All penalty-phase claims relate to the third penalty-phase trial, which began in 2008 and resulted in the death sentences that Deck challenges in this petition.

punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments when the court struck two prospective jurors because they voiced reluctance to serve as foreperson but were otherwise qualified;

13. That he was denied his rights to a jury trial, to a presumption of innocence, proof beyond a reasonable doubt, due process, reliable sentencing, and freedom from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments when the trial court sentenced him to death for a crime that was never pled in the indictment;

14. That he was denied his rights to due process, to a trial before a fair and impartial jury, and to a fair and reliable sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments when the prosecution engaged in improper closing argument;

15. That he was denied his rights to due process, a fair and impartial jury, a fair sentencing trial, and freedom from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments when the trial court failed to read a mandatory instruction to the venire panel before death qualification;

16. That he was denied his rights to due process, a fair jury trial, and reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments when the trial court overruled his objections to instructions 8 and 13, which impermissibly shifted the burden of proof to him regarding mitigating evidence;

17. That he was denied proper proportionality review as required by Missouri law, in violation of his right to due process under the Fourteenth Amendment;

18. That he was denied effective assistance of trial counsel and the right to an impartial jury under the Sixth Amendment, and his right to be free from cruel and unusual punishment under the Eighth Amendment, when counsel failed to inquire of the prospective jurors whether they were willing to meaningfully consider mitigation evidence of childhood experience proffered by the defense;

19. That he was denied effective assistance of trial counsel under the Sixth Amendment, and his right to be free from cruel and unusual punishment under the Eighth Amendment, when counsel failed to investigate and call numerous witnesses who were later identified by post-conviction counsel;

20. That he was denied effective assistance of trial counsel under the Sixth Amendment when counsel failed to investigate and call numerous witnesses and present extensive records that were not later identified and presented by post-conviction counsel;

21. That he was denied effective assistance of trial counsel under the Sixth Amendment when counsel failed to develop and present evidence from a neuropsychologist;

22. That he was denied effective assistance of trial counsel and due process under the Sixth and Fourteenth Amendments when counsel failed to obtain a ruling from the court and request relief after objections to the State's improper opening statement;

23. That he was denied effective assistance of counsel under the Sixth Amendment when (a) trial counsel failed to object to the prosecutor's personal attacks upon him during cross-examination of the defense expert, and (b) appellate counsel failed to raise the issue for plain error on appeal;

24. That he was denied effective assistance of trial counsel under the Sixth Amendment, and his right to be free from cruel and unusual punishment under the Eighth Amendment, when counsel failed to object to the prosecutor's closing argument when the prosecutor (a) made statements that Deck had "prior escapes" and had helped inmates serving life sentences to escape, and (b) engaged in improper personalization;

25. That he was denied effective assistance of trial counsel and his right to a fair and impartial jury under the Sixth Amendment when counsel failed to question jurors G.H. and R.E. regarding their jury questionnaire responses;

26. That he was denied effective assistance of appellate counsel and due process under the Sixth and Fourteenth Amendments when counsel failed to raise a claim on appeal that the prosecutor made an improper opening statement;

27. That he was denied due process and the right to be free from cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments when the trial court improperly responded to a jury note during deliberations;

28. That he was denied effective assistance of appellate counsel under the Sixth Amendment when counsel failed to raise a claim on appeal that the trial court improperly responded to a jury note during deliberations;

29. That he was denied effective assistance of trial counsel under the Sixth Amendment when counsel failed to object to the trial court's failure to give a mandatory instruction before jury selection;

30. That his right to be free from cruel and unusual punishment under the Eighth Amendment will be violated if he is executed according to the execution protocol promulgated by the Missouri Department of Corrections on August 2, 2013;

31. That he was denied due process and the right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments because numerous errors not attributable to him resulted in reversals and delays, which made it impossible to afford him a fair penalty phase proceeding in 2008 and from now on; and

32. That he was denied effective assistance of counsel under the Sixth Amendment when (a) trial counsel failed to move for preclusion of the death penalty given the length of time and the number of prior proceedings that made it impossible for him to receive a fair trial, and (b) appellate counsel failed to raise the issue on appeal.

IV. Standard of Review

Federal habeas relief is available to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). *See also Williams-Bey v. Trickey*, 894 F.2d 314, 317 (8th Cir. 1990).

In order to obtain federal habeas review of a claim raised in a § 2254 petition, the petitioner must have first raised the federal constitutional dimensions of the claim in State court in accordance with State procedural rules. *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam); *Beaulieu v. Minnesota*, 583 F.3d 570, 573 (8th Cir. 2009) (quoting *Gilmore v. Armontrout*, 861 F.2d 1061, 1065 (8th Cir. 1988)). If the petitioner failed to properly present the claim in State court, and no adequate non-futile remedy is currently available by which he may bring the claim in that forum, the claim is deemed procedurally defaulted and cannot be reviewed by the federal habeas court "unless the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Martinez v. Ryan*, 566 U.S. 1, 10-11 (2012).

Where the State court adjudicated a claim on the merits, federal habeas relief can be granted on the claim only if the State court adjudication "resulted in a

decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). *See Williams v. Taylor*, 529 U.S. 362, 379 (2000). The federal law must be clearly established at the time petitioner's State conviction became final, and the source of doctrine for such law is limited to the United States Supreme Court. *Williams*, 529 U.S. at 380-83.

A State court's decision is "contrary to" clearly established Supreme Court precedent when it is opposite to the Supreme Court's conclusion on a question of law or different than the Supreme Court's conclusion on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 412-13; *Carter v. Kemna*, 255 F.3d 589, 591 (8th Cir. 2001). A State court's decision is an "unreasonable application" of Supreme Court precedent if it "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. Merely erroneous or incorrect application of clearly established federal law does not suffice to support a grant of habeas relief. Instead, the State court's application of the law must be objectively unreasonable. *Id.* at 409-11; *Jackson v. Norris*, 651 F.3d 923, 925 (8th Cir. 2011). Finally, when reviewing whether a State court decision involves an

"unreasonable determination of the facts" in light of the evidence presented in the State court proceedings, State court findings of basic, primary, or historical facts are presumed correct unless the petitioner rebuts the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Rice v. Collins*, 546 U.S. 333, 338-39 (2006); *Collier v. Norris*, 485 F.3d 415, 423 (8th Cir. 2007). Erroneous findings of fact do not *ipso facto* ensure the grant of habeas relief, however. Instead, the determination of these facts must be unreasonable in light of the evidence of record. *Collier*, 485 F.3d at 423; *Weaver v. Bowersox*, 241 F.3d 1024, 1030 (8th Cir. 2001).

The federal court is "bound by the AEDPA [Antiterrorism and Effective Death Penalty Act] to exercise only limited and deferential review of underlying State court decisions." *Lomholt v. Iowa*, 327 F.3d 748, 751 (8th Cir. 2003). To obtain habeas relief from a federal court, the petitioner must show that the challenged State court ruling "rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786-87 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)). This standard is difficult to meet. *Id.* at 1786.

In circumstances where the State court does not address a federal claim that was fairly presented to that court, the court's lack of analysis "does not mean that

[the petitioner] is necessarily entitled to habeas relief[.]" *Huss v. Graves*, 252 F.3d 952, 956 (8th Cir. 2001). Relief may be granted only if the decision of the State court is "substantially different" from what the decision would have been if that court had used the appropriate legal standard as established by the United States Supreme Court. *Id.* (quoting *Williams*, 529 U.S. at 405). Accordingly, in those circumstances, I must apply established Supreme Court precedent to the facts of this case to determine whether Deck is entitled to relief on the claim. *Id.*

Deck's claims in this habeas petition must be addressed under a number of complex legal standards. He raises claims that are not cognizable in federal habeas proceedings; he raises claims that were defaulted at varying stages of the State court proceedings; and he raises claims that were determined on the merits in State court and therefore must be examined by me on the merits. I will address Deck's claims according to the legal standard under which they must be determined.

V. Non-Cognizable Claims

A. Ground 1 – Admission of Confession

In his first ground for relief, Deck claims that his confession was obtained as a result of his unlawful arrest and subsequent search and should have been suppressed as fruit of the poisonous tree. Deck claims that the initial constitutional violation that led to his confession was his unlawful arrest in violation of the

Fourth Amendment.[3]

Verbal statements obtained as a result of a Fourth Amendment violation are subject to the exclusionary rule. *United States v. Yousif*, 308 F.3d 820, 832 (8th Cir. 2002) (citing *Wong Sun v. United States*, 371 U.S. 471, 485 (1963)); *see also Brown v. Illinois*, 422 U.S. 590 (1975). However, a State prisoner is precluded from asserting a Fourth Amendment claim as a basis for federal habeas relief unless he can demonstrate that the State courts did not afford him a full and fair opportunity to litigate the claim. *Stone v. Powell*, 428 U.S. 465, 494 (1976); *Palmer v. Clarke*, 408 F.3d 423, 437 (8th Cir. 2005); *Willett v. Lockhart*, 37 F.3d 1265, 1270 (8th Cir. 1994) (en banc).

The Eighth Circuit has set forth a two-part test to determine whether a habeas petitioner has had an opportunity for a full and fair litigation of a Fourth Amendment claim in State courts. *Willett*, 37 F.3d at 1273. A Fourth Amendment claim is barred from federal habeas review under *Stone v. Powell* unless: 1) the State provided no procedure by which the petitioner could raise his Fourth Amendment claim, or 2) the petitioner was foreclosed from using that procedure because of an unconscionable breakdown in the system. *Willett*, 37 F.3d at 1273.

The first prong of the *Willett* test is satisfied here in that the State of

[3] Although Deck cites to the Fifth Amendment in this claim, he does not allege any impropriety in the interrogation that gave rise to the confession, which would make his claim cognizable under the Fifth Amendment. *Cf. New York v. Harris*, 495 U.S 14, 20 (1990).

Missouri has a procedure by which Deck could raise his Fourth Amendment claim. *Willett*, 37 F.3d at 1272 (Eighth Circuit unaware of any State that does not have such a procedure). As to the second prong, there is no evidence before me showing that an unconscionable breakdown in the system prevented Deck from raising the claim. Indeed, Deck himself avers that he moved for the trial court to suppress his confession on the basis urged here, that the trial court considered evidence on the motion, and that the court's denial of the motion was reviewed by the Missouri Supreme Court. (Amd. Petn., ECF#30 at 25.) *See also Deck I*, 994 S.W.2d at 534-36. Deck renewed his motion to suppress at the third penalty-phase trial (Resp. Exh. LL at 545), and the Missouri Supreme Court again reviewed the trial court's denial of the motion. *Deck III*, 303 S.W.3d at 544-45. Accordingly, the State provided Deck the opportunity for full and fair litigation of his Fourth Amendment claim, and he availed himself of this opportunity to conclusion.

Deck does not argue that the State denied him an opportunity to fully and fairly litigate his Fourth Amendment claim. Instead, he contends that *Stone v. Powell* should not apply in a death penalty case. Deck cites no legal authority to support this position, and I am aware of none.

Because the State afforded Deck a full and fair opportunity to litigate his Fourth Amendment claim, and indeed he took full advantage of this opportunity, the claim raised in Ground 1 of the petition is not cognizable in this habeas

proceeding and will be denied.

B. Ground 30 – Lethal Injection Protocol

In Ground 30, Deck claims that his Eighth Amendment right to be free from cruel and unusual punishment would be violated if he is executed according to the "current execution protocol promulgated by the Missouri Department of Corrections on August 2, 2013," arguing that use of the drug propofol at the dosage prescribed in the protocol is known to cause pain. (Amd. Petn., ECF #30 at 101.) Deck admits in his Traverse that the State no longer uses the protocol (Traverse, ECF #67 at 124) but argues that the current protocol also violates the Eighth Amendment.

Because this claim does not challenge the validity of Deck's conviction or the duration of his sentence but instead challenges the lethal injection *procedure* promulgated by the State of Missouri, the claim is not cognizable in this habeas corpus action. Instead, "a method-of-execution claim must be brought under [42 U.S.C.] § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015) (citing *Hill v. McDonough*, 547 U.S. 573, 579-80 (2006)).

The claim raised in Ground 30 challenging Missouri's lethal injection protocol is not cognizable in this habeas proceeding and will be denied.

VI. Procedurally Defaulted Claims

A. Plain Error Claims

Deck raised a number of claims on appeal to the Missouri Supreme Court that were not preserved for appellate review. Citing Missouri law, the supreme court reviewed these claims for plain error and found none. Deck raises some of these claims in Grounds 14 and 15 of this petition. Because they were not preserved for appellate review in the State court and were analyzed by the Missouri Supreme Court for plain error, they are subject to procedural default analysis. *Clark v. Bertsch*, 780 F.3d 873 (8th Cir. 2015) (applying the rule set out in *Hayes v. Lockhart*, 766 F.2d 1247 (8th Cir. 1985)).

I invited the parties, including Deck, to address the extent to which some claims may be defaulted under the holdings of *Clark* and *Hayes*. In response, Deck argues that there is no procedural bar here – and thus no need for cause and prejudice analysis – because 1) the Eighth Circuit wrongly decided *Clark*, 2) United States Supreme Court decisions have since superseded the Eighth Circuit's *Hayes* decision, and 3) *Deck III*'s substantive discussion of Deck's unpreserved claims permits me to address the substance of the claims. I reject each of these arguments.

First, Deck's argument that *Clark* was wrongly decided is unavailing. While Deck contends that two Eighth Circuit cases decided before *Hayes* permit federal

habeas relief on claims subject to only plain error review, Deck misapprehends the decisions in these cases. One cannot argue with Deck's position that, as stated in *Dietz v. Solem*, 640 F.2d 126 (8th Cir. 1991), habeas relief is not barred by a petitioner's mere failure to preserve a claim for review. Instead, as applied in *Dietz* and reinforced in *Clark*, habeas relief may be available if the petitioner shows cause and prejudice for what is otherwise a procedurally defaulted claim. In *Brouillette v. Wood*, 636 F.2d 215 (8th Cir. 1980), the other case Deck relies on, the issue there was found by the Eighth Circuit to have been properly submitted to the State supreme court. The Eighth Circuit therefore did not address the plain error/procedural default issue we face here. Accordingly, I do not accept Deck's argument that the Eighth Circuit's pre-*Hayes* decisions of *Dietz* and *Brouillette* stand for the proposition that there is no procedural default when a Missouri court addresses a claim for plain error.

Nor do the United States Supreme Court's decisions of *Harris v. Reed*,[4] *Ylst v. Nunnemaker*,[5] and *Coleman v. Thompson*,[6] change the effect of *Hayes*. *Harris* held that procedural default does not bar federal habeas relief unless the last State court to address the claim clearly and expressly states that its decision rests on a State procedural bar. *Ylst* held that a federal habeas court must look through an

[4] 489 U.S. 255 (1989).
[5] 501 U.S. 797 (1991).
[6] 501 U.S. 722 (1991).

unexplained State court order to the last reasoned decision to determine the basis for the decision. And *Coleman* held that the presumption that a State court relied on federal law in making its judgment applies only when the federal court has good reason to question whether there is an independent and adequate state ground for the decision. None of these circumstances apply here. The claims raised in Grounds 14 and 15 were raised on direct appeal for plain error review, and the Missouri Supreme Court clearly and expressly stated in all relevant respects that it was reviewing Deck's unpreserved claims for plain error. *Deck III* is not an unexplained order, nor does it leave me questioning the basis of its decision.

Finally, *Deck III*'s substantive discussion of Deck's unpreserved claims does not itself lift the procedural bar given that the court's discussion was merely in conjunction with its plain error review. *See Hayes*, 766 F.2d at 1252; *see also Pollard v. Delo*, 28 F.3d 887, 889 (8th Cir. 1994) (State court's consideration of merits of claim "as a matter of grace" does not erase fact that claim is defaulted because of petitioner's failure to comply with State's procedural rule).

Accordingly, contrary to Deck's assertion, the claims raised in this petition that were addressed by the Missouri Supreme Court only for plain error are subject to procedural default analysis.

1. *Ground 14 – Prosecutorial Misconduct, Improper Closing Argument*

In his fourteenth ground for relief, Deck argues that the prosecutor engaged

in improper closing argument at the third penalty-phase trial when he 1) appealed to the jurors to return the death penalty based on their accountability to the Longs' grandchildren and great-grandchildren; 2) improperly personalized the argument by urging the jurors to place themselves in the victims' shoes; 3) misstated the evidence by analogizing the jurors to sheepdogs, the victims and society to sheep, and Deck to a wolf, and that the jurors would be responsible for Deck's future victims – including prison guards and other inmates – if he were not sentenced to death; and 4) misstated the evidence by arguing that Deck had had prior escapes from prison and had helped prisoners serving life sentences to escape. Deck acknowledges that only the accountability claim was preserved and addressed by the Missouri Supreme Court on appeal, and that the court "did not find that the trial court plainly erred in allowing [the other arguments]." (*See* Amd. Petn., ECF #30 at 57.)

As discussed above, I am bound by the Eighth Circuit's holding in *Clark* that a federal habeas court cannot reach an unpreserved and procedurally defaulted claim merely because a reviewing State court analyzed that claim for plain error. *Clark*, 780 F.3d at 874. Instead, I may review the merits of the claim only if Deck shows cause for the default and actual prejudice resulting from the alleged constitutional violation, or that a fundamental miscarriage of justice would occur if I were not to address the claim. *Coleman*, 501 U.S. at 750. Here, all but Deck's

first claim of improper closing argument are procedurally defaulted given that they were unpreserved under Missouri law and were reviewed by the State court only for plain error. Deck asserts no cause for or prejudice resulting from this procedural default. Nor does he claim that a fundamental miscarriage of justice would occur if I were not to address the merits of the claims.

Accordingly, to the extent Deck claims in Ground 14 that the prosecutor improperly urged the jurors to place themselves in the victims' shoes, argued that the jurors would be responsible for Deck's future victims if he were not sentenced to death, and stated that Deck had had prior escapes from prison and had helped prisoners serving life sentences to escape, the claims are procedurally barred from federal habeas review and will be denied. Deck's claim that the prosecutor improperly argued that the jurors were accountable to the victims' family is the only part of Ground 14 that is not procedurally barred, and it is addressed on its merits later in this opinion.

2. *Ground 15 – Jury Instruction Error*

In Ground 15, Deck claims that the trial court erred when it failed to read a mandatory instruction under the Missouri Approved Instructions before death qualification of the venire panel. Although Deck raised this claim on direct appeal of his final penalty-phase trial, the Missouri Supreme Court reviewed the claim only for plain error because it was not preserved for appeal. *Deck III*, 303 S.W.3d

at 545-47. Deck acknowledges this circumstance. (*See* Amd. Petn., ECF #30 at 59.) Given the unpreserved and procedurally defaulted nature of the claim, *Clark*, 780 F.3d at 874, I may review its merits only if Deck shows cause for the default and actual prejudice resulting from the alleged constitutional violation, or that a fundamental miscarriage of justice would occur if I were not to address the claim. *Coleman*, 501 U.S. at 750. Deck asserts no cause for or prejudice resulting from this procedural default. Nor does he claim that a fundamental miscarriage of justice would result if I were not to address the merits of the claim.

Accordingly, the claim raised in Ground 15 of the petition is procedurally barred from federal habeas review and will be denied.

B. Ineffective Assistance of Counsel Claims Subject to *Martinez* Analysis

In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17. Accordingly, under *Martinez*, a petitioner may claim ineffective assistance of post-conviction counsel to establish "cause" for procedural default of a habeas claim of ineffective assistance of trial counsel. To establish cause in this manner, the petitioner must show that post-conviction counsel's assistance was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), and further

demonstrate that his underlying claim of ineffective assistance of trial counsel is a "substantial" one, that is, that the claim has some merit. *Martinez*, 566 U.S. at 14. If the State demonstrates that the underlying claim of ineffective assistance of trial counsel is unsubstantial or non-meritorious, the petitioner cannot establish that post-conviction counsel was ineffective and thus cannot show cause for default of the underlying claim. *Id.* at 15-16. Likewise, if post-conviction counsel did not perform below constitutional standards, no cause is shown for default. *Id.*

In this habeas petition, Deck raises numerous claims of ineffective assistance of trial counsel that were not raised in any post-conviction proceeding and thus are subject to procedural default. For each claim, Deck invokes *Martinez* and argues that ineffective assistance of post-conviction counsel caused his default. Although respondents contend that this "new rule" of *Martinez* may not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), I note that when Deck filed this habeas action in August 2012, *Martinez* permitted habeas review of such claims. I will therefore apply *Martinez* in this case. *See Buck v. Davis*, 137 S. Ct. 759, 779-80 (2017). However, because the following defaulted claims of trial counsel error are not substantial, post-conviction counsel did not render ineffective assistance by failing to raise the claims.

GUILT PHASE

1. *Ground 5 – Expert on False Confessions*

In his fifth ground for relief, Deck claims that trial counsel was ineffective for failing to investigate and present evidence from an expert on false confessions at both the guilt-phase trial and third penalty-phase trial. Deck contends that such an expert would have aided defense counsel in trial preparation and would have provided trial testimony aiding the jury in assessing factors relevant to the truthfulness of confessions.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland*, 466 U.S. at 686. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that 1) his counsel's performance was deficient, and 2) the deficient performance prejudiced his defense. *Id.* at 687. In evaluating counsel's performance, the basic inquiry is "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688. The petitioner bears a heavy burden in overcoming "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To establish prejudice, the petitioner "must show that 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."

Strickland, 466 U.S. at 694.

A presumption exists that counsel's conduct "might be considered sound trial strategy." *Strickland*, 466 U.S. at 688. However, "the strength of the presumption turns on the adequacy of counsel's investigation[.]" *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

Although Deck raised claims of ineffective assistance of trial counsel in State court, he did not pursue a claim on the theory presented here, that is, that counsel was ineffective for failing to investigate and call an expert witness regarding false confessions. For the following reasons, post-conviction counsel was not ineffective in their failure to bring the claim in post-conviction proceedings.

Generally, in Missouri, expert testimony is not admissible if it relates to witness credibility because it invades the province of the jury. *State v. Wright*, 247 S.W.3d 161, 166 (Mo. Ct. App. 2008) (citing *State v. Link*, 25 S.W.3d 136, 143 (Mo. banc 2000)). Testimony from experts relating to factors that lead people to make false confessions and opinions that certain of those factors are present in the circumstances of the case "clearly . . . invade the province of the jury" because they relate to the credibility of a defendant's confession. *Id.* at 168. "'To allow such expert testimony invades the jury's proper realm.'" *Id.* (quoting *State v. Davis*, 32 S.W.3d 603, 609 (Mo. Ct. App. 2000)). Because the trial court most likely would have concluded that testimony from an expert on false confessions would be inadmissible, it cannot be said that trial counsel's conduct in failing to pursue this strategy in Deck's case was deficient. *See Dearstyne v. Mazzuca*, 48 F. Supp. 3d 222, 307-08 (N.D.N.Y. 2011).

Nor can it be said that trial counsel rendered ineffective assistance by failing to secure such an expert to aid them in pursuing motions to suppress, strategizing for jury selection, and planning the examination of witnesses. A review of the record shows counsel to have ably and thoroughly litigated the issue of Deck's confession, as demonstrated by the pretrial suppression motion and hearing,[7]

[7] Resp. Exh. C at 153-71, 190-98.

counsel's opening statement,[8] vigorous and sustained cross-examination designed to call into question the events leading to Deck's confession and the interrogation itself,[9] as well as closing argument to the jury regarding the credibility of the confession.[10] *See Dearstyne*, 48 F. Supp. 3d at 308; *Davis*, 32 S.W.3d at 609. In addition, the jury was instructed concerning Deck's statements, including what factors to consider in determining what weight, if any, to give the statements.[11] Other than Deck's speculation that a confessions expert would have provided additional assistance to counsel, nothing before the Court shows a reasonable probability that such additional assistance would have affected the outcome of the case, especially in light of counsel's conduct in ably pursuing a false confessions defense.

Nor can Deck show that this evidence would have been admitted at the third penalty-phase trial. Deck's guilt was no longer at issue and could not be relitigated. Given that testimony from a confessions expert would likely not have been admitted at the third penalty-phase trial because of its lack of relevance, penalty-phase counsel cannot be said to be ineffective for failing to secure such a witness.

Accordingly, given the likelihood that the trial court would have disallowed

[8] Resp. Exh. E at 551-53.
[9] Resp. Exh. F at 770-89.
[10] Resp. Exh. G at 826-30.
[11] Resp. Exh. B at 207.

expert testimony on false confessions, and Deck's failure to show a reasonable probability that assistance from such an expert would have changed the outcome of the proceedings, it cannot be said that Deck's underlying claim of ineffective assistance of trial counsel was so substantial that post-conviction counsel was ineffective for failing to raise the claim during post-conviction proceedings. Deck has thus failed to show adequate cause to excuse his default of the claim raised in Ground 5 of the instant petition. *Martinez*, 566 U.S. at 15-16. Deck's failure to show cause for his procedural default makes a determination of prejudice unnecessary. *Cagle v. Norris*, 474 F.3d 1090, 1099 (8th Cir. 2007).

Nor has Deck shown that a fundamental miscarriage of justice would result if I were not to address the merits of his underlying claim. To invoke the "fundamental miscarriage of justice" exception to showing cause and prejudice for a defaulted claim, Deck must "present new evidence that affirmatively demonstrates that he is innocent of the crime for which he was convicted." *Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006); *see also Brownlow v. Groose*, 66 F.3d 997, 999 (8th Cir. 1995). "[A] claim of 'actual innocence' is . . . a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Mansfield v. Dormire*, 202 F.3d 1018, 1024 (8th Cir. 2000). To successfully pursue a claim of actual innocence, Deck must show 1) new reliable evidence not available at trial; and 2) that, more

likely than not, no reasonable juror would have convicted him in light of the new evidence. *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001); *see also Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011); *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010). Here, Deck presents no new reliable evidence of his actual innocence. *Schlup v. Delo*, 513 U.S. 298, 316 (1995) ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim."); *Weeks v. Bowersox*, 119 F.3d 1342, 1352-53 (8th Cir. 1997) (en banc) (bare, conclusory assertion that a petitioner is actually innocent insufficient to excuse a procedural default). Deck has failed to present any evidence of actual innocence. He has thus failed to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *See Weeks*, 119 F.3d at 1352-53.

Ground 5 is therefore procedurally barred from federal habeas review and will be denied.

2. *Ground 6 – Failure to Conduct Adequate Investigation into Innocence*

In his sixth ground for relief, Deck claims that trial counsel was ineffective for failing to investigate and present at trial evidence regarding his innocence. Specifically, Deck contends that counsel should have investigated the following witnesses, averring that they would have provided testimony supporting his

innocence and theory of false confession: 1) Elaine Gunther, 2) James Boliek, 3) Kathy Brewster, 4) Michael Deck, 5) William Boliek, 6) Tonia Cummings, 7) Sheila Francis, 8) Unknown Jefferson Memorial Hospital Staff, and 9) himself – Carman Deck, Jr. Deck also contends that counsel should have pursued DNA testing of physical evidence seized from the victims' home and from his car to determine whether the evidence was connected to the victims.

"[A] reasoned decision not to call a witness is a virtually unchallengeable decision of trial strategy." *Rodela-Aguilar v. United States*, 596 F.3d 457, 464 (8th Cir. 2010) (internal citation and quotation marks omitted). However, failing to interview witnesses or discover mitigating evidence may be a basis for finding counsel ineffective within the meaning of the Sixth Amendment right to counsel if the petitioner can "make a substantial showing that, but for counsel's failure to interview . . . the witnesses in question, there is a reasonable probability that the result of his trial would have been different." *Kramer v. Kemna*, 21 F.3d 305, 309 (8th Cir. 1994). For the following reasons, Deck has not made the substantial showing required of him in this case.

There is no per se rule that failure to interview witnesses constitutes ineffective assistance because such claims turn on their individual facts. *Sanders v. Trickey*, 875 F.2d 205, 209 (8th Cir. 1989). To succeed on a claim that counsel was ineffective for failing to investigate, Deck may not base his claim on

conclusory allegations but rather must allege what information his attorney failed to discover. *See id.* at 210. A habeas petitioner who offers only speculation that he was prejudiced by counsel's failure to investigate fails to show ineffective assistance of counsel. *Id.*; *see also Redeemer v. State*, 979 S.W.2d 565, 569 (Mo. Ct. App. 1998).

James Boliek

A review of the trial transcript in its entirety shows that Deck's strategy at trial was to implicate James Boliek in the murders of James and Zelda Long. Indeed, Deck adduced evidence consistent with this theory and argued this theory to the jury. Evidence was also adduced, however, that the criminal investigation into James Boliek's involvement in the murders did not proceed beyond its initial stages because of alibi evidence considered by the investigators to be sufficient to remove suspicion from Boliek. Deck now claims that trial counsel was ineffective for failing to investigate and call Boliek to testify at trial regarding Deck's innocence.

As an initial matter, I find it unlikely that Boliek would have testified to Deck's innocence inasmuch as, in order to do so consistent with Deck's theory of defense, he would have had to essentially confess to his own involvement in the crime. Nevertheless, Deck has failed to present any independent evidence as to what Boliek would have allegedly said had he been interviewed or called to testify.

He has provided no affidavits or any other information that would support his claim that Boliek would have testified to his innocence. Instead, Deck provides only speculation about what Boliek's potential testimony would have been. Recognizing the deferential standard when reviewing the conduct of counsel, I decline to find prejudice in this situation when there is no evidence other than speculation to support the finding. *See Sanders*, 875 F.2d at 210.

Because Deck cannot satisfy both prongs of the *Strickland* analysis, he cannot succeed on his claim of ineffective assistance of trial counsel for failing to investigate and call James Boliek to testify at trial. Post-conviction counsel was not ineffective for failing to raise this unsubstantial claim on post-conviction review.

Elaine Gunther and William Boliek

Deck avers that Elaine Gunther (James Boliek's neighbor) and William Boliek (James Boliek's father) had information relating to James Boliek's alibi and would have testified regarding Deck's innocence. As with James Boliek, however, Deck offers only general speculation that these individuals would have provided information and would have testified as to his innocence. Deck does not indicate what information would have been obtained, the content of any potential testimony, or any independent support for his claim that investigation of these individuals would have had an effect on the outcome of his case. Because Deck

offers nothing more than speculation, he has failed to show that he was prejudiced by counsel's failure to further investigate these potential witnesses and thus cannot show ineffective assistance of trial counsel with respect to Ms. Gunther and William Boliek. *See Saunders v. United States*, 236 F.3d 950, 952-53 (8th Cir. 2001) (with lack of specificity as to content of proposed testimony, petitioner cannot show how outcome of trial would have been different); *Sanders*, 875 F.2d at 210. *See also Redeemer*, 979 S.W.2d at 569.

Post-conviction counsel was not ineffective for failing to pursue this unsubstantial claim on post-conviction review.

Nurse Francis and Unknown Staff of Jefferson Memorial Hospital

Deck avers that investigation of these individuals would have shown that he arrived at the hospital with his sister before the time the murders were committed and left after they were committed. Although Deck contends that these persons would have testified to such matters at trial, he has provided no affidavits or any other information that would support this claim. Deck provides only speculation.

Nevertheless, evidence adduced before the trial court showed that Deck arrived at the Long residence on July 8, 1996, shortly after 9:00 p.m. and was there for ten to fifteen minutes. (Resp. Exh. F at 763-64; Exh. M at 336.) Additional evidence before the trial court showed Jefferson Memorial Hospital to be located about six to eight miles from the Long residence and that this distance could be

traveled in ten minutes. (Resp. Exh. F at 770.) As such, Nurse Francis's and the hospital staff's proposed testimony that Deck was present at the hospital at 10:10 p.m. (*see* Resp. Exh. L at 169) would have done nothing to support Deck's claim that he was present at the hospital when the murders occurred. Deck has thus failed to show a reasonable probability that the outcome of his trial would have been different had such testimony been adduced.

Because Deck cannot show that counsel's failure to investigate and/or call Nurse Francis and the hospital staff to testify at trial prejudiced his defense, he cannot demonstrate that counsel was ineffective by this failure. Post-conviction counsel cannot be ineffective for failing to pursue a non-meritorious claim.

Michael Deck

Deck avers that his brother, Michael Deck, had information regarding Boliek's alibi and would have testified to Deck's innocence. No independent information has been presented to this Court to support these speculative averments. On this basis alone, Deck's claim of ineffective assistance of trial counsel with respect to counsel's conduct involving Michael Deck fails.

I also note, however, that Michael Deck testified at the first penalty-phase trial, which was conducted immediately upon the jury's initial finding of guilt. The substance of Michael Deck's testimony involved Deck's upbringing and the relationship he had with his family. At the post-conviction motion hearing, Deck's

trial counsel testified that Michael Deck was in the military during the relevant time and was not in the State of Missouri at the time trial began. Counsel testified that the defense team interviewed Michael Deck by telephone and determined that he would be an effective mitigation witness during the penalty phase. (Resp. Exh. N at 134-35.) This testimony belies Deck's contention that counsel failed to investigate Michael Deck as a potential witness.

To the extent Deck argues that counsel should have investigated Michael Deck and presented his testimony at the guilt phase of the trial given his purported information regarding Boliek's alibi and Deck's innocence, Deck offers nothing but speculation that Michael Deck had such information and would have provided this testimony. Prejudice cannot be found on speculation alone. Because Deck could not succeed on a claim that trial counsel was ineffective for failing to investigate and call Michael Deck to testify at the guilt phase of his trial, post-conviction counsel was not ineffective for failing to bring this unsubstantial claim on post-conviction review.

Kathy Brewster

Deck avers that his mother, Kathy Brewster, had information relating to Boliek's alibi and would have testified to Deck's innocence. Because Deck presents nothing other than speculation to support this averment, he cannot succeed on his claim that counsel was ineffective in relation to their conduct involving Ms.

Brewster. Nevertheless, I find counsel's failure to call Ms. Brewster to testify to be a matter of sound trial strategy. Deck's claim of ineffective assistance of counsel in this regard thus fails.

At Deck's post-conviction hearing, trial counsel testified that they or members of the defense team met and/or spoke with Brewster on numerous occasions prior to trial. Counsel's impression from these meetings was that Brewster was more concerned with her daughter, Tonia Cummings, than with Deck. Counsel specifically testified that they determined not to call Brewster to testify at the penalty phase of the trial because she appeared not to be "wholeheartedly behind her son" and was not "trust[ed] . . . to testify on behalf of her son." (Resp. Exh. N at 91, 112, 115, 137-39.) There is no indication that Brewster's demeanor or focus would have been different during the guilt phase of the trial, and Deck has presented nothing so indicating.

The decision to call family members as witnesses is a strategic decision. *Walls v. Bowersox*, 151 F.3d 827, 834 (8th Cir. 1998). The failure to present witness testimony that could be detrimental to the defense is not unreasonable under *Strickland*. *See Johns v. Bowersox*, 203 F.3d 538, 546 (8th Cir. 2000); *see also Haley v. Armontrout*, 924 F.2d 735, 740 (8th Cir. 1991) (counsel did not render ineffective assistance by failing to use witness testimony that would not have benefitted petitioner and may have had significant detrimental effect).

Counsel's reasons not to call Brewster to testify at the penalty phase of the trial apply equally to the guilt phase of the trial. Because counsel reasonably determined that Brewster's testimony could be more detrimental to Deck than beneficial, Deck cannot overcome the strong presumption that counsel's failure to call her to testify at the guilt phase of the trial was sound trial strategy. *See Walls*, 151 F.3d at 834 (not ineffective assistance in failing to call family members to testify when such testimony would have revealed their total lack of support). Further, Deck's unsupported contention that counsel failed to properly conduct an investigation with respect to Brewster is belied by the record and without merit.

Post-conviction counsel is not ineffective for failing to bring a non-meritorious claim of ineffective assistance of trial counsel.

Tonia Cummings

Deck's sister, Tonia Cummings, was a co-defendant in the underlying criminal action and was likewise charged with two counts of murder first degree and armed criminal action, burglary, and stealing in relation to the Long murders. (Resp. Exh. N at 22.) Deck avers that Cummings would have given testimony regarding his innocence and her fear of James Boliek that caused her to implicate herself and Deck in the Long murders.

At the hearing on Deck's motion for post-conviction relief, Cummings' trial counsel testified that she would have advised Cummings not to testify at Deck's

trial because of the possibility that she could incriminate herself, thereby causing harm to herself. (Resp. Exh. N at 27.) Deck's trial counsel testified that they attempted but were unable to speak with Cummings prior to trial and were told by Cummings' attorney that she was a "basket case." (*Id.* at 98, 140.) Counsel cannot be considered ineffective for failing to secure testimony from a witness unavailable to testify on the advice of her own counsel. *See Weaver v. United States*, 793 F.3d 857 (8th Cir. 2015).

Further, a review of the evidence adduced at the post-conviction proceedings shows that evidence from Cummings would have likely had a detrimental effect on Deck's defense. During the post-conviction proceedings, Cummings submitted an affidavit attesting that she and Deck drove to the Long residence on July 8, 1996; that Deck was at the residence for ten to fifteen minutes; that she did not see Deck with a gun while he was at the residence; and that Deck had earlier bragged about burglarizing a home that had a safe. Cummings also attested to other persons' fear of James Boliek and to other persons' beliefs that he committed the murders. (Resp. Exh. M at 7-8.) These matters to which Cummings attested are damaging to Deck and would not have exonerated him. In light of these sworn statements that are damaging to Deck, it cannot be said that a reasonable probability exists that Deck's trial would have had a different result had counsel called Cummings to testify. The failure to present witness testimony that could be detrimental to the

defense is not unreasonable under *Strickland*. *See Johns*, 203 F.3d at 546. Post-conviction counsel was therefore not ineffective for failing to bring this unsubstantial claim on post-conviction review.

Petitioner Carman Deck

Deck contends that if he had been permitted to testify at trial, he would have testified that he was innocent, that his confession was false and given in response to abusive interrogation, and that he feared James Boliek.

As an initial matter, I note that Deck raised a claim in his *pro se* post-conviction motion that trial counsel was ineffective for disagreeing with him on the issue of testifying on his own behalf. (Resp. Exh. L at 10.) This claim was not raised in the amended motion filed by appointed counsel. (Resp. Exh. O at 233-34.) At the post-conviction hearing, the trial court provided Deck the opportunity to pursue the claim; but Deck, speaking on his own behalf, informed the court that he did not want to pursue it. (*See id.* at 231-34.) I question how post-conviction counsel can be ineffective for failing to raise a claim of ineffective assistance of trial counsel that Deck himself told the court he did not want to pursue. Nevertheless, the record before the post-conviction motion court shows trial counsel did not act unreasonably with respect to Deck's ability to testify on his own behalf.

A criminal defendant has the ultimate authority to decide whether to testify

on his own behalf. *Whitfield v. Bowersox*, 324 F.3d 1009, 1013 (8th Cir.), *vacated in part on other grounds*, 343 F.3d 950 (8th Cir. 2003). Counsel may advise a defendant not to testify, however, as a matter of reasonable trial strategy. *Id.* at 1016-17. At the hearing on Deck's post-conviction motion, counsel testified that no issue arose with respect to Deck's right to testify and, further, that during the course of the trial, counsel came to believe that having Deck testify would have a detrimental effect.

> A. [W]e had discussed various times during our representation and our preparation of whether or not Carman would testify. We had never made any hard and fast rule about Carman testifying or not testifying. When we actually got into trial I think Carman was sufficiently nervous that he never pushed the issue about testifying and after all was said and done I certainly didn't want to put him on the stand and have him cross-examined about his statements that he'd given to the police upon his arrest. Didn't want to have him go through that again. It was very damaging. So I felt it was in his best interest to keep him off the stand and that was never a big point that we had to argue.
>
> Q. You felt that would highlight his testimony about his confession?
>
> A. Right.
>
> Q. By having to go through it again?
>
> A. Yes.
>
> Q. And you felt that -- We're talking about both guilt and penalty phase?
>
> A. Right.

(Resp. Exh. O at 230.)

Deck does not assert that counsel overbore his will to testify, and the record shows that the issue never arose between him and counsel given his nervousness at trial and counsel's belief that his testimony would actually serve to do more harm than good. Deck makes no argument nor presents any evidence that his testimony, if adduced, would have made a difference to the jury. Counsel cannot be found to be ineffective for determining, for sound strategic reasons, that Deck should not testify and for not pursuing the issue where none existed.

Accordingly, Deck has not shown that his trial counsel's performance was deficient or that he suffered any prejudice on account of counsel's assistance regarding his right to testify, *Whitfield*, 324 F.3d at 1017, and post-conviction counsel was not ineffective for failing to pursue this claim.

DNA Evidence

Deck contends that trial counsel was ineffective for failing to investigate whether physical evidence seized at the Longs' home and from his car could be connected to the Longs through DNA testing. Deck does not specify what physical evidence should have been tested, nor does he identify the purpose for such testing other than "to exclude physical evidence belonging to the Longs." (Traverse, ECF #67 at 54.) Nor does he explain how information obtained through DNA testing

would have aided him such that a reasonable probability exists that the outcome of his trial would have been different. By failing to provide any specifics, Deck has failed to demonstrate either deficient performance or any prejudice from counsel's conduct. *Forest v. Delo*, 52 F.3d 716, 722 (8th Cir. 1995).

Nevertheless, testimony adduced at trial showed that items seized from Deck's car yielded no blood evidence; and testing of Deck's clothing yielded no trace evidence, such as blood, hair, or fibers from the crime scene. (Resp. Exh. F at 660-61, 681-82, 688-89.) In addition, various items from the Long residence, as well as the decorative tin and the gun seized from Deck's car, were dusted for fingerprints (*id.* at 656-58, 694-95), but, as stipulated by the parties at trial, the fingerprint evidence had no evidentiary value – it could not be compared to either Deck's or the victims' fingerprints. (*Id.* at 694.) Given that evidence and testimony adduced at trial showed no forensic link between the physical evidence seized and the Longs' belongings, I am unable to conclude that counsel rendered ineffective assistance for failing to investigate or adduce additional evidence for the purpose of excluding such a link. The failure to present cumulative evidence does not result in prejudice sufficient to give rise to a claim of ineffective assistance of counsel. *Winfield v. Roper*, 460 F.3d 1026, 1034 (8th Cir. 2006). Post-conviction counsel was therefore not ineffective for failing to raise this unsubstantial claim.

Accordingly, it cannot be said that Deck's underlying claim of ineffective assistance of trial counsel with regard to the above-named witnesses and evidence was so substantial that post-conviction counsel was ineffective for failing to raise the claim during post-conviction proceedings. Deck has thus failed to show adequate cause to excuse his default of the claim raised in Ground 6 of the petition, *Martinez*, 566 U.S. at 15-16, thereby making a determination of prejudice unnecessary. *Cagle*, 474 F.3d at 1099. Nor has Deck shown that a fundamental miscarriage of justice would result if I were not to address the merits of his underlying claim.

Accordingly, because the claim raised in Ground 6 of the petition is procedurally barred, it will be denied.

3. *Ground 7 – Introduction of Prior Convictions During Voir Dire*

The venire panel from which jurors were selected to determine Deck's guilt underwent voir dire examination in relation to the guilt phase of the trial as well as in relation to a potential penalty phase. The petit jury that found Deck guilty proceeded to determine his penalty at the first penalty-phase trial and ultimately recommended the death sentence for the Long murders. During the voir dire examination, Deck's trial counsel stated to the venire that, if the matter were to proceed to the penalty phase, they may hear evidence that Deck had some prior criminal convictions for non-violent offenses. Because of this, the petit jury

selected from this venire – and who determined Deck's guilt – had knowledge during the guilt phase of the trial that Deck had prior convictions. Deck argues here that trial counsel was ineffective for informing the jury of his prior convictions and that this deficient performance prejudiced his defense in that the jury was more likely to find him guilty of the offenses charged given his known history of criminal conduct.

Counsel's actions during voir dire are considered matters of trial strategy. *See Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001); *see also, e.g.*, *Knese v. Roper*, No. 4:03CV1082 CEJ (TIA), 2006 WL 2506005, at *6-8 (E.D. Mo. Aug. 28, 2006) (method of voir dire matter of trial strategy). In conducting voir dire examination for a capital case, defense counsel's informing the venire panel that the defendant has prior convictions does not *per se* constitute ineffective assistance of counsel under *Strickland*. *See Brown v. Luebbers*, 344 F.3d 770, 781-82 (8th Cir. 2003) (noting the jury "surely would find out about it" since prosecution intended to argue prior conviction as aggravating factor; matter of trial strategy); *Caldwell v. Steele*, No. 4:06CV394 RWS, 2009 WL 90352, at *11 (E.D. Mo. Jan. 14, 2009) (no deficient performance when, as matter of trial strategy, counsel informed venire of petitioner's prior record in order to remove potential jurors who would negatively assess petitioner's testimony based thereon); *State v. Moore*, 930 S.W.2d 464, 469 (Mo. Ct. App. 1996) (no prejudice from defense counsel

revealing two prior convictions to venire where State introduced strong evidence of guilt at trial). *Cf. Barnett v. Roper*, No. 4:03CV00614 ERW, 2006 WL 2475036, at *41-44 (E.D. Mo. Aug. 24, 2006) (no ineffective assistance where, as a matter of trial strategy, counsel did *not* inform venire of petitioner's prior convictions because counsel knew petitioner would not testify during guilt phase of trial).

Viewing the voir dire examination in context here, defense counsel informed the venire panel that evidence may show that Deck had prior convictions of a non-violent nature. Counsel then asked the panel if this circumstance would prevent any potential jurors from fully considering evidence offered on behalf of Deck during a possible penalty trial. (Resp. Exh. E at 452.) It thus appears that counsel was attempting to weed out those potential jurors who would not be able to fully consider mitigating evidence favorable to Deck on account of prior convictions. This is reasonable strategy. *State v. Johnson*, 901 S.W.2d 60, 62 (Mo. banc 1995).

In the circumstances of this case, it cannot be said that trial counsel's challenged conduct during voir dire was deficient. Because counsel's conduct was not deficient, Deck cannot establish ineffective assistance of counsel. *Brown*, 344 F.3d at 782. Because Deck's claim of ineffective assistance of trial counsel is not substantial, post-conviction counsel was not ineffective for failing to raise the claim during post-conviction proceedings. Deck has thus failed to show adequate cause to excuse his default of the claim raised in Ground 7 of the petition.

Martinez, 566 U.S. at 15-16. Nor has Deck shown that a fundamental miscarriage of justice would occur if I were not to review the claim. The claim raised in Ground 7 will therefore be denied.

4. *Ground 8 – Testimony from Witness Knoll re Long Residence*

In his eighth ground for relief, Deck contends that trial counsel was ineffective for failing to object to certain portions of testimony provided by State witness Shane Knoll, arguing that the testimony was inadmissible hearsay and thus its introduction violated his right to confront witnesses as guaranteed by the Sixth Amendment.

During the guilt phase of the trial, Detective Shane Knoll of the Jefferson County Sheriff's Department provided the following testimony regarding his interrogation of Deck after Deck was taken into custody on July 8, 1996: During the course of the interrogation, Deck made statements both orally and in writing. On the morning of July 9, Detective Knoll asked Deck "what happened," and Deck provided a statement that Jim Boliek approached him and Tonia and wanted them to follow Boliek to DeSoto; that when they did, they parked on a side road, and Boliek told them he would be back in about ten to fifteen minutes and for them to wait for him; that when Boliek returned, he gave Deck a pistol and a can of quarters and told Deck and Tonia to follow him back to St. Louis; and that Tonia became sick on the way back to St. Louis, and he took her to the hospital. At the

time Deck gave this statement to Detective Knoll, no crime scene had yet been discovered. Detective Knoll then asked Deck where Boliek was so that an attempt could be made to determine the location of the crime scene. In response, Deck told him "to go to the fourth house on the left on Long Road." (Resp. Exh. F at 752-55.)

Detective Knoll testified that he then contacted Corporal John Dolen and told him where to go. (Resp. Exh. F at 755.) Detective Knoll testified further:

> A. . . . Probably three minutes after that I received a phone call back from Corporal Dolen, who said, in fact, that they were at the Long residence and at that time they had two people that were deceased.
>
> Q. At that time what did you do?
>
> A. Sergeant Carle started making necessary phone calls to activate other detectives because at this point we're working a double homicide. He was on the phone. I basically stayed with Carmen[12] Deck. Then once after Sergeant Carle made his phone calls Carmen was placed back in his holdover cell in the fourth precinct. We left and went to the actual crime scene on Long Road.
>
> Q. Now, did you attempt to check out his story about Jim Boliek?
>
> A. Yes, I did.

(*Id.* at 755-56.)

Deck contends that trial counsel was ineffective for failing to object to Detective Knoll's testimony regarding Corporal Dolen's out-of-court statement

[12] Throughout the trial transcript, Deck's first name is misspelled as "Carmen."

regarding two deceased persons found at the location described by Deck, arguing that the statement was hearsay and inadmissible at trial. Deck argues that if counsel had objected to this testimony, the jury would have been advised to disregard the statement, resulting in a reasonable probability that the outcome of the trial would have been different. Because Detective Knoll's testimony did not constitute hearsay, the claim fails.

The Sixth Amendment secures the right of an accused to be confronted with the witnesses against him. This protection serves to bar the introduction of testimonial hearsay. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). However, a statement offered for its effect on the listener rather than for the truth of the matter asserted is not hearsay. *United States v. Wright*, 739 F.3d 1160, 1170 (8th Cir. 2014). Such non-hearsay statements include those offered to explain the reasons for or propriety of a police investigation. *United States v. Malik*, 345 F.3d 999, 1001 (8th Cir. 2003).

Here, testimony of Corporal Dolen's out-of-court statement was offered for the purpose of explaining why Detective Knoll continued in his investigation and the manner by which he did – that is, that a crime scene had been established which was linked to Deck's account implicating Jim Boliek, and that further investigation into the scene and into Boliek needed to be conducted. *See, e.g.*, *United States v. Brooks*, 645 F.3d 971, 977 (8th Cir. 2011) (statement explained

why officers went to residence and why they would be more interested in apprehending certain individual); *Suggs v. Stanley*, 324 F.3d 672, 681-82 (8th Cir. 2003) (upholding admission of officer's statement about what dispatcher told him because it was offered to show why officer went to a specific house). Further, Deck squarely placed the propriety of the investigation into issue throughout the trial of the case, with repeated challenges to the validity of his confession and the extent to which Boliek was investigated. Statements explaining the course of a police investigation in such circumstances are allowed into evidence. *United States v. Holmes*, 620 F.3d 836, 841 (8th Cir. 2010) (citing *Malik*, 345 F.3d at 1001-02).

Because Detective Knoll's challenged testimony regarding Corporal Dolen's statement is not hearsay, counsel did not err in failing to object to it on hearsay grounds. Counsel is not ineffective for failing to raise a non-meritorious objection. *See McReynolds v. Kemna*, 208 F.3d 721, 724 (8th Cir. 2000) ("[C]ounsel did not act outside the spectrum of professionally reasonable performance in failing to urge a Confrontation Clause claim unlikely to succeed.").

Nevertheless, the admission of Corporal Dolen's statement that two deceased persons were found at the Long residence was not prejudicial to Deck given that other evidence establishing that fact was already properly before the jury. *See United States v. Bercier*, 506 F.3d 625, 632 (8th Cir. 2007); *United*

States v. Ramos-Caraballo, 375 F.3d 797, 803-04 (8th Cir. 2004) (where evidence is at most an extra helping of what jury has heard before, evidence is merely cumulative and its admission does not result in reversible error). Deck therefore cannot demonstrate how the exclusion of Corporal Dolen's statement would have had any effect on the outcome of the trial of this case. Where a petitioner cannot show prejudice on account of counsel's alleged deficient conduct, he cannot demonstrate ineffective assistance of counsel.

Because Deck cannot demonstrate that trial counsel was deficient in his failure to object to admissible evidence or that he was prejudiced by such conduct, it cannot be said that the claim of ineffective assistance of trial counsel raised in Ground 8 is so substantial that post-conviction counsel was ineffective for failing to raise the claim on post-conviction review.

Because post-conviction counsel was not ineffective for failing to raise this claim, Deck has failed to establish cause for his procedural default of the claim. Nor has Deck shown that a fundamental miscarriage of justice would occur if I were not to review the claim. Ground 8 of the petition will be denied.

5. *Ground 9 – Testimony from Witness Knoll re Boliek Alibi*

In Ground 9, Deck challenges the following testimony from Detective Knoll given in response to the prosecutor's questioning on re-direct examination regarding the investigation of Jim Boliek:

Q. How many people besides Jim Boliek gave him an alibi?

A. His –

Q. From the night before?

A. His girlfriend, which would be Carmen's mother, Ms. Brewster; his father, William Boliek; and a neighbor. Let me get her name. Elaine Gunther. All gave an alibi.

(Resp. Exh. F at 790.) Deck contends that trial counsel was ineffective for failing to object to this hearsay testimony that Jim Boliek had an alibi and that the alibi was corroborated by other people.

As discussed above, Detective Knoll had previously testified on direct examination that, once he received information about deceased persons being found at the Long residence, he followed up on Deck's statement that Jim Boliek was involved and went to investigate Boliek. Detective Knoll further testified on direct examination that during this investigation, he interviewed Boliek, Kathy Brewster, William Boliek, and Elaine Gunther regarding Boliek's whereabouts on the evening of July 8. (Resp. Exh. F at 756-57.) After conducting this investigation, Detective Knoll returned to the crime scene and then eventually returned to the sheriff's department to reinitiate contact with Deck. (*Id.* at 757.) On direct examination, Detective Knoll testified regarding this reinitiated contact:

A. I told him, I said, Carmen, I said, I spoke with James Boliek, his mother, his father and a neighbor, and I said that James Boliek couldn't have been involved in this and I said, you need to tell me

> what really happened, and he looked at me and he said, what do I do. I said, you simply tell me the truth.
>
> Q. Did you ask him or tell him why Jim Boliek couldn't be involved in it before you asked him or any other questions?
>
> A. Told him he had an alibi.
>
> Q. After he asked you what he should do and you told him to tell the truth, did you continue to ask him questions?
>
> A. Yes, I did.
>
> Q. What'd you ask him next?
>
> A. I asked him what really happened.

(*Id.* at 761.) Deck raises no challenge to this testimony or to his counsel's conduct relating thereto.

During cross examination, defense counsel questioned Detective Knoll extensively about his investigation of Jim Boliek and elicited testimony to support an inference that the investigation was incomplete and failed to consider matters that could give rise to Boliek's own guilt. Counsel specifically asked Detective Knoll about the alibi witnesses' recollection of Boliek's truck being parked outside his home on the evening of July 8 but also elicited testimony that these witnesses were not asked about the whereabouts of another car owned by Boliek. Counsel also asked Detective Knoll about his investigation regarding Boliek's firearms, whether Boliek's property was searched, or whether Boliek underwent the same

type of questioning as Deck in relation to the crime. (Resp. Exh. F at 777-79, 783-84, 789.) Upon the conclusion of this questioning by defense counsel, the prosecutor asked Detective Knoll on re-direct about the alibi witnesses, to which Detective Knoll gave the responses that Deck now challenges as hearsay. (*Id.* at 790.)

"[O]ut-of-court statements that explain subsequent police conduct are admissible for non-hearsay purposes to show why an investigation focused on a defendant." *Belford v. Roper*, No. 03CV613 RWS, 2006 WL 2850543, at *10 (E.D. Mo. Sept. 29, 2006) (internal citation and quotation marks omitted). *See also State v. Howard*, 913 S.W.2d 68, 70 (Mo. Ct. App. 1995). Here, Detective Knoll's initial testimony of Boliek's alibi explained his subsequent police conduct in focusing his investigation on Deck. This testimony was not inadmissible hearsay. *See Irons v. Dormire*, No. 4:03-CV-513 CAS, 2006 WL 2811487, at *12-13 (E.D. Mo. Sept. 28, 2006); *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991) (when viewed in context, statements explained subsequent police conduct and thus were admissible, supplying relevant background and continuity).

On cross examination, defense counsel explored the depth of Detective Knoll's investigation into Boliek's alibi in an apparent attempt to cast doubt upon the investigation itself as well as raise the possibility that Boliek was involved in the crime. This questioning of Detective Knoll is consistent with the defense

theory of the case, that is, that the criminal investigation into the crime was flawed, that Deck's confession was false and given as a result of this flawed investigation, and that Boliek was the true perpetrator of the crime. The prosecutor's follow up questioning on re-direct examination was in response to defense counsel's questioning, which itself was done in response to the already admitted and admissible testimony regarding Boliek's alibi as reported by Boliek and three other individuals.

To the extent Detective Knoll's response to the prosecutor's follow up question on re-direct constitutes hearsay testimony, Deck cannot show prejudice by its admission – and thus by counsel's failure to object to it – given that this testimony had already been corroborated by other admissible evidence, namely Detective Knoll's earlier testimony that explained why he redirected his attention to Deck in his investigation. The admission of evidence on re-direct that three persons supported Boliek's alibi was not prejudicial to Deck because other evidence establishing that fact was already properly before the jury. *Bercier*, 506 F.3d at 632; *Ramos-Caraballo*, 375 F.3d at 803-04 (where evidence is at most an extra helping of what jury has heard before, evidence is merely cumulative and its admission does not result in reversible error). Deck therefore cannot demonstrate how the exclusion of this testimony on re-direct would have had any effect on the outcome of the trial of this case. Where a petitioner cannot show prejudice on

account of counsel's alleged deficient conduct, he cannot demonstrate ineffective assistance of counsel.

Because Deck cannot demonstrate that trial counsel was deficient in his failure to object to admissible evidence or that he was prejudiced by such conduct, it cannot be said that this claim of ineffective assistance is so substantial that post-conviction counsel was ineffective for failing to raise the claim on post-conviction review.

Post-conviction counsel was not ineffective for failing to raise this claim, and Deck has failed to establish cause for his procedural default of the claim. Nor has Deck shown that a fundamental miscarriage of justice would occur if I were not to review the claim. Ground 9 of the instant petition will be denied.

PENALTY PHASE

1. *Ground 20 – Failure to Investigate and Call Mitigation Witnesses*

In Ground 20, Deck claims that trial counsel was ineffective for failing to investigate and call the following witnesses at his third penalty-phase trial: 1) Shawna Stegers, 2) Jeff Overbeck, 3) Tim Maupin, 4) Kenny Forir, 5) Gail Rector, 6) Terry Miserocchi, 7) Mary Monia, 8) Bob Georger, 9) Randy Deck, 10) Linda Speakman, and 11) Hubert Brissette. Deck raised a similar claim in his post-conviction motion, identifying eleven other witnesses whom he claimed trial counsel should have called. After an evidentiary hearing, the post-conviction

motion court denied that claim, and the Missouri Supreme Court affirmed the denial. To the extent Deck did not name the proposed witnesses specifically identified above in his post-conviction motion, he contends that post-conviction counsel was ineffective for failing to include them, thereby constituting cause to excuse his default for not raising the specific basis of this claim in State court. For the following reasons, post-conviction counsel was not ineffective.

As summarized above, Deck underwent a third penalty-phase trial in September 2008 upon remand from the United States Supreme Court. At this trial, counsel presented the live testimony of Dr. Wanda Draper, a child development expert; and Dr. Eleatha Surratt, a psychiatrist. *See Deck IV*, 381 S.W.3d at 346. In preparation for the trial, Dr. Draper studied the depositions of Deck's parents, Mike Deck (his brother), Tonia Cummings, Mary Banks (his aunt), Elvina and Norman Deck (aunt and uncle), Stacey Tesreau-Bryant (girlfriend) and her son, Major Puckett (short-term foster parent), and Carol and Art Miserocchi. Dr. Surratt interviewed Deck's parents, Mike Deck, Tonia Cummings, Latisha Deck, Mary Banks, Elvina Deck, Rita Deck, Wilma Laird, Stacey Tesreau-Bryant, and Beverly Dulinski (another aunt). She also read the depositions of D.L. Hood, Major Puckett, and the Miserocchis. In addition to the live testimony of these expert witnesses, counsel also presented at trial the videotaped depositions of Mike Deck and Mary Banks. Counsel also read aloud the depositions of Major Puckett

and Beverly Dulinski. *See id.* at 346, 348-49.

In its opinion affirming the denial of post-conviction relief, the Missouri Supreme Court thoroughly summarized the testimony and evidence heard by the jury from these witnesses and depositions, including that Deck suffered physical problems as an infant; was beaten by his mother, who was described as having an explosive temper; lacked emotional stability in his youth because of extreme neglect and abandonment; was sexually abused; was "tortured" by his stepmother (who was an alcoholic) by being forced to kneel on broomsticks; had his own fecal matter smeared on his face by his stepmother, who then took a photograph of him in this state and showed it to others; was taken to and left at the Division of Family Services on more than one occasion as a child; was separated from his siblings and placed in foster care with multiple families; and was taken from a relatively stable foster home by his mother to live with her and her abusive boyfriend, Ron Wurst. *See Deck IV*, 381 S.W.3d at 346-49. The supreme court noted Dr. Draper to have testified to her opinion that Deck "suffered an 'extreme case of a horrendous childhood' because he moved 22 times in 21 years, along with the abuse, neglect, and lack of guidance"; and that "Dr. Surratt opined that [Deck's] childhood was similar to one of the 'most extreme cases of child abuse ever described.'" *Id.* at 348.

At the post-conviction hearing, trial counsel testified regarding their

preparation, investigation, and strategies leading up to and during the third penalty-phase trial. Specifically, counsel testified that they talked to a lot of people during their investigation, which was much like finding "needles in haystacks" (Resp. Exh. UU at 136-37, 245), and that they determined not to call witnesses who would provide only cumulative evidence (*id.* at 126, 252-53). Counsel also testified that they would have liked to have had family members give live testimony, but that some witnesses were no longer available to testify or developed such hostility that counsel could not be certain that they would provide testimony that supported their defense. (*See generally id.* at 113-46, 178-94, 241-53.) Counsel therefore made the decision that evidence of Deck's abusive and neglect-filled childhood would come in through the testimony of expert witnesses. (*Id.* at 247-48.)

Against this background, I turn to Deck's current claim that trial counsel should have called the additional witnesses named above.

Shawna Stegers, Jeff Overbeck, Gail Rector

Deck avers that Stegers and Overbeck would have testified that they knew him in the late-1980's and that he was outgoing, kind, generous, responsible, and a good friend. According to Deck, Rector would have testified that Deck was her son's friend when they were teenagers and that he was a gentle person. Deck contends that this evidence of positive attributes would have countered the considerable negative evidence from which the jury may have believed that he was

irretrievably damaged and incapable of good actions.

As noted by the supreme court, the penalty phase jury heard evidence that Deck took on the primary parenting role for his brother and sisters "during periods of extreme neglect" and was the only person on whom his siblings could depend. *Deck IV*, 381 S.W.3d at 347. The jury also heard evidence that Deck developed a positive relationship with the Pucketts, a foster family with whom he lived for about a year; that he thrived while he was with them; and that he had such a good relationship with Mrs. Puckett, he began to call her "mom." Evidence also showed that Mr. Puckett believed that Deck would have been a wonderful man if he were allowed to stay with the Puckett family. *Id.* at 348. The jury also heard evidence that when Deck was in his late teens, he asked his mother to move in with him in order to protect her from her abusive boyfriend with whom she lived at the time. *Id.* Finally, evidence was adduced that when Deck was twenty-nine years old, he became engaged to a woman who had a child, with whom he had a good relationship. *Id.*

On appeal of the denial of his post-conviction motion, the supreme court found that some of the evidence Deck claimed counsel should have presented through live witness testimony was cumulative to that presented to the jury – including that witness Arturo Miserocchi would have testified that Deck was a cute little kid with a wonderful personality; that Latisha Deck would have testified that

Deck took care of her when she was little; and that Rita Deck would have testified that he was a good kid and did not give her any trouble. *Deck IV*, 381 S.W.3d at 349-50. Because "[c]ounsel is not ineffective for not presenting cumulative evidence," the court determined Deck's trial counsel not to have been ineffective for failing to offer evidence that was repetitive to the mitigating evidence heard by the jury. *Id.* at 351 (citing *Skillicorn v. State*, 22 S.W.3d 678, 683 (Mo. banc 2000)).[13]

The same reasoning applies to proposed witnesses Stegers, Overbeck, and Rector. The testimony that Deck avers would have been elicited from these witnesses is cumulative to evidence that the jury already had before it, that is, that he had positive attributes, was able to develop bonding relationships, and took care of others. The failure to present cumulative evidence does not result in prejudice sufficient to give rise to a claim of ineffective assistance of counsel. *Winfield*, 460 F.3d at 1034.

Tim Maupin and Kenny Forir

Deck avers that Maupin and Forir would have testified that he was abused by his mother's boyfriend, Ron Wurst, when he was a teenager and, further, that his mother preferred Tonia over him. Because this testimony would have been

[13] The supreme court did not address whether these proffered witnesses were available to testify at trial.

cumulative to evidence adduced at trial that Deck's mother was abusive and neglectful and that Deck lived in an abusive environment with his mother and Ron Wurst, *see Deck IV*, 381 S.W.3d at 347-48, it cannot be said that counsel's failure to adduce this cumulative evidence prejudiced Deck. Given that the jury already had before it evidence of the extensive abuse suffered by Deck at the hands of his mother and her companions, there is no reasonable probability that the third penalty-phase trial would have yielded a different result if these witnesses provided similar evidence.

Terry Miserocchi

Deck avers that he lived for a time with foster parents Arturo and Carol Miserocchi and that their daughter, Terry, lived at the house while he was there. Deck contends that Terry Miserocchi would have testified that he was an angry child and did not fit in well with the family. Because this testimony would have been cumulative to other evidence presented to the jury that Deck was with the Miserocchi family for a short time and "did not make a connection" with them, *Deck IV*, 381 S.W.3d at 348, Deck cannot show prejudice by counsel's failure to present this testimony. *Winfield*, 460 F.3d at 1034.

Further, the Missouri Supreme Court noted that counsel's failure to present live testimony from Arturo and Carol Miserocchi regarding their brief interaction with Deck in the distant past, including testimony that he did not bond with the

family and showed very little emotion, did not result in any prejudice to Deck because such testimony "was so lacking in substance that it would not have had an impact on the jury in their decision." *Deck IV*, 381 S.W.3d at 349. There is no more substance found in Terry Miserocchi's proposed testimony here. Counsel was not ineffective for failing to call her to testify at the penalty-phase trial.

Mary Monia and Bob Georger

Deck avers that Monia and Georger were his teachers and would have testified that he was a good kid and well-behaved, wore old clothes, and was not very clean. As noted above, the jury heard evidence of Deck's positive attributes when he was a child and a young man. The jury also heard evidence that he dressed "shabby" and begged for food. *Deck IV*, 381 S.W.3d at 347. Because the testimony offered by witnesses Monia and Georger would not have added anything compelling to the mitigating evidence already before the jury, Deck cannot show a reasonable probability that the jury would not have returned a verdict for the death sentence if it had been presented with this testimony.

Randy Deck

Deck avers that his cousin, Randy Deck, would have testified that he had no stability in his life.[14] A review of the supreme court's summary of the mitigating

[14] Deck also contends that Jeff Overbeck would have likewise testified that Deck did not have much stability in his life.

evidence adduced at trial shows that most of the evidence presented to the jury underscored the instability of Deck's life, from infancy through adulthood. Randy Deck's testimony would not have added any information from which it can reasonably be said that the jury would have returned a different verdict. Deck cannot show that he was prejudiced by counsel's failure to produce testimony from Randy Deck.

Linda Speakman

Deck avers that Speakman, his uncle's former wife, would have provided background information regarding his grandparents and aunts and uncles as well as information regarding Norman Deck, his uncle who sought to adopt him when he was thirteen years old. Other than this vague reference to background information, Deck does not identify what specific evidence Speakman would have provided or how it would have benefited him during the penalty phase of the trial. Because Deck provides no specificity as to the content of Speakman's proposed testimony, he cannot show how the outcome of the trial would have been different had she testified. *See Saunders*, 236 F.3d at 952-53. Deck has thus failed to establish how counsel was ineffective for failing to call Speakman to testify at the third penalty-phase trial.

Hubert Brissette

Deck avers that Hubert Brissette was an inmate at the Moberly Correctional

Center when he was incarcerated there and would have testified that Deck made poor choices in friends while in prison and was raped during his incarceration.

On post-conviction appeal, the Missouri Supreme Court addressed Deck's claim that counsel was ineffective for failing to call his former fiancée, Stacey Tesreau-Bryant, to provide testimony that, *inter alia*, Deck had shared with her that he was raped in prison. The court determined that counsel was not ineffective in failing to elicit this testimony because it would have "called attention to [Deck's] adult criminal life rather than focusing on his traumatic childhood." *Deck IV*, 381 S.W.3d at 352. There is no indication that Deck would have obtained a different result from the post-conviction motion court, including the supreme court, if post-conviction counsel had raised the same claim with regard to counsel's failure to call Hubert Brissette to testify to this same matter. Because the Missouri courts determined that counsel was not ineffective for failing to present testimony that Deck was raped in prison, it cannot be said that his current claim of ineffective assistance of trial counsel for failing to adduce the same evidence was substantial or had merit.

Prison Records

Finally, Deck argues that trial counsel should have presented complete records from the Missouri Department of Corrections at the third penalty-phase trial, averring that such records would have shown his "apparent lack of

rehabilitation despite having been in prison" and that "the trauma he endured in prison only exacerbated the effects of his childhood trauma." (Amd. Petn., ECF #30 at 85.) As noted above, the Missouri courts determined that counsel did not render ineffective assistance in failing to adduce evidence that would have highlighted Deck's adult criminal record. This evidence would not have been mitigating. Deck's complete records documenting his previous criminal offenses, sentences, incarcerations, and/or probationary periods as well as behavior, disciplinary actions, and grievances while incarcerated or on probation would instead support a finding that Deck is a criminal offender unable to be rehabilitated, and counsel cannot be considered ineffective for failing to introduce this damaging evidence.

As demonstrated above, Deck's claim of ineffective assistance of trial counsel raised in Ground 20 of this petition is not a substantial one. Therefore, post-conviction counsel was not ineffective for failing to raise the claim during post-conviction proceedings. Deck has therefore failed to establish cause for his default of the claim. To invoke the "fundamental miscarriage of justice" exception to showing cause and prejudice for a defaulted claim in the capital sentencing context, Deck must show by clear and convincing evidence that, absent the constitutional error, a reasonable juror would not have found the aggravating factors that rendered him eligible for the death penalty. *Sawyer v. Whitley*, 505

U.S. 333 (1992); *see also Dretke v. Haley*, 541 U.S. 386, 388 (2004) (acknowledging *Sawyer's* holding regarding "actual innocence" with respect to the death penalty). Here, Deck has presented no such evidence. He therefore has failed to show that failure to address his claim will result in a fundamental miscarriage of justice.

Accordingly, Ground 20 of the petition is procedurally barred and will be denied.

2. *Ground 22 – Failure to Obtain Ruling after Objection*[15]

During the prosecutor's opening statement at the third penalty-phase trial, Deck's trial counsel objected three times on the basis that the prosecutor was being argumentative. On each occasion, the trial court instructed the prosecutor not to engage in argument. The court also instructed the prosecutor to "stick to" the purpose of the opening statement:

> [PROSECUTOR]: I want you all to take a look over at this man, right here. He's sitting right there. His name's Carman Deck. And the reason the 12 – the 14 of you are here is because of July 8th, of 1996, he made a choice. He made a conscious decision to kill Zelma and James Long.
>
> [DEFENSE]: Objection; argumentative.

[15] Respondents assert that this ground fails to state a claim upon which relief can be granted because of Deck's failure to provide any reference in his petition to the purported objectionable statements made by the prosecutor. In his Traverse, Deck cites to the specific instances during the prosecutor's opening statement where he claims his counsel was ineffective. I look to these specific instances in addressing this claim.

> THE COURT: Mr. Zoellner, this is not final argument. Please stick to the opening statement.
>
> [PROSECUTOR]: And the reason you are here is because he wanted to rob them. He went into their house after getting them on their bed; after thinking for ten minutes, put a gun in his hand, standing over them, whether they should live or die. He made a choice. He decided their fate and put two in the back of the head of James Long and then he put two rounds into the back of Zelma's head. He chose to take a life of two human beings for a little bit of money. And the reason you are here and they are not is because of walking out that house –
>
> [DEFENSE]: Objection; he continues to be argumentative.
>
> THE COURT: Mr. Zoellner, this is not closing argument. Please stick to the evidence and the facts you intend to present in your case.
>
> . . .
>
> [PROSECUTOR]: . . . And when this trial is over, I'm gonna come before you, and I'm gonna ask you to consider both of those punishments. And I ask you to put aside any passion or anger you might have and look at them as calmly and coolly as Carman Deck did. And I'm gonna ask you that you –
>
> [DEFENSE]: Objection; argumentative.
>
> THE COURT: Don't argue, Mr. Zoellner.

(Resp. Exh. LL at 467-68, 479.) No further action was taken by either counsel or the trial court in response to these statements.

On another occasion during opening statement, Deck's trial counsel objected to the prosecutor's use of an exhibit that had not yet been introduced into evidence. The trial court sustained the objection. (Resp. Exh. LL at 468-69.) No further

action was taken by either counsel or the trial court.

In the claim raised in Ground 22 of this petition, Deck contends that trial counsel was ineffective for failing to secure a ruling and request relief from the trial court after these objections. Specifically, Deck argues that counsel should have requested a mistrial or, at the very least, should have requested that the court instruct the jury to disregard the statements and exhibit. This claim fails.

Immediately prior to the prosecutor's opening statement, the trial court instructed the jury that its determination of facts could be made "only from the evidence and the reasonable inferences drawn from the evidence"; that its "decision must be based on the evidence presented to you in the proceedings in this courtroom"; and that "opening statements of attorneys are not evidence." (Resp. Exh. JJ at 591, 593; Exh. LL at 467.) A jury is presumed to have followed the court's instructions, *see Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Deck has presented nothing to suggest that the jury disregarded the court's instructions here. *Cf. Abernathy v. Hobbs*, 748 F.3d 813, 818 (8th Cir. 2014) (although counsel's professional judgment underlying his opening statement was questionable, court's clarifying instruction to the jury that opening statements are not evidence served to resolve any confusion).

In *Barton v. State*, 432 S.W.3d 741 (Mo. banc 2014), the Missouri Supreme Court held that where a jury is instructed that attorneys' statements are not

evidence, a defendant is unlikely to show prejudice from his counsel's failure to object to such statements. *See id.* at 754. Here, unlike in *Barton*, defense counsel did object to the prosecutor's argumentative statements and premature use of an exhibit, and the trial court cautioned the prosecutor regarding this conduct. Considering counsel's objections together with the trial court's instruction to the jury that the attorneys' statements are not evidence, it cannot be said that Deck has shown that he was prejudiced by counsel's failure to seek additional curative relief, including a mistrial. Indeed, counsel would most likely have been met with defeat had such a request been made. Declaring a mistrial at such an early stage of the proceedings is a "drastic remedy" and must be exercised with "the greatest caution." *State v. Irving*, 559 S.W.2d 301, 309 (Mo. Ct. App. 1977). "When an objection to improper statements to the jury has been made and no further relief is sought, the courts have maintained confidence that the jury will be guided by admissible evidence." *Id.*

Further, given the evidence presented at trial, including the testimony of fifteen witnesses, the introduction of deposition testimony from three additional witnesses, the introduction of expert testimony, a trial record spanning over 450 pages, the introduction of seventy exhibits, and a jury instruction that attorneys' statements are not evidence, Deck cannot show that the prosecutor's brief comments during opening statement had any significant effect upon the jury's

verdict. Deck has thus failed to show prejudice from counsel's failure to seek and obtain additional curative relief. *See Seehan v. State of Iowa*, 72 F.3d 607, 610-12 (8th Cir. 1995).

Accordingly, in the absence of showing prejudice by counsel's conduct in failing to seek and obtain additional relief during the prosecutor's opening statement, Deck cannot establish that he received ineffective assistance of trial counsel in this regard. Post-conviction counsel was thus not ineffective for failing to raise this unsubstantial claim of ineffective assistance of trial counsel. Deck has therefore failed to establish cause for his default of the claim. Nor has he shown that a fundamental miscarriage of justice will occur if I do not address the merits of the claim. The claim raised in Ground 22 will be denied.

3. *Ground 29 – Failure to Object to Lack of Mandatory Instruction*

At the time of Deck's third penalty-phase trial, MAI-CR 3d 313.00 Supp. Notes on Use 6(A)(1)(b) required that the following instruction be read to the jury panel immediately before starting the "death qualification" phase of voir dire:

> At this stage of the jury selection process, the attorneys are permitted to question you concerning your views on punishment. Nothing that is said by the attorneys or by another prospective juror during this process is evidence, and you should not let any such statements influence you in any way.
>
> The possible punishments for the offense of murder in the first degree are imprisonment for life by the Department of Corrections without eligibility for probation or parole, or death. The purpose of

> this questioning is to discover whether or not you are able to consider both of these punishments as possible punishments.
>
> The Court will instruct the jury as to the process it must follow to reach its decision on punishment. For present purposes, you should be aware that a conviction of murder in the first degree does not automatically make the defendant eligible for the death penalty.
>
> Before the jury may consider imposing the death penalty, it must also find, unanimously and beyond a reasonable doubt, that the evidence before it establishes the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance. If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death.
>
> If the jury does find at least one statutory aggravating circumstance, it still cannot return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment, taken as a whole, warrants the death penalty, and that this evidence is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death.
>
> Counsel for the State may proceed.

MAI-CR 3d 300.03A (modified). The trial court failed to read this instruction, however, and trial counsel did not object to this failure. In Ground 29 of this petition, Deck claims that trial counsel's failure to object constituted ineffective assistance.

The failure of a trial court to give a required instruction is error. *State v. Roberts*, 948 S.W.2d 577, 587 (Mo. banc 1997). In Missouri, reversal is not mandated for this error unless the defendant suffers prejudice as a result. *Id.* "Prejudice occurs where the jury 'may have been adversely influenced . . . by the

lack of an instruction required by statute.'" *Id.* (quoting *State v. Betts*, 646 S.W.2d 94, 98 (Mo. banc 1983)). *See also State v. Anderson*, 306 S.W.3d 529, 539 (Mo. banc 2010) (reversal warranted only when instructional error so prejudicial that it deprived defendant of a fair trial). There was no adverse effect here.

Before the death qualification voir dire began, the trial court instructed the panel that, "in order to consider the death penalty, you must find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the State." *Deck III*, 303 S.W.3d at 547. Trial counsel then addressed the panel and told the venire that they would be asked specifically about life in prison without the possibility of parole or the alternative, the death penalty; and the court further advised the venire that they would be asked about their attitudes regarding these punishments, which were the only sentences available in the case, and whether they could realistically consider both punishments. *Id.* The venire was also told that before a death sentence can be considered: (1) the State must prove at least one statutory aggravating circumstance beyond a reasonable doubt, on which the jury must unanimously agree; (2) the jury must then also determine whether the aggravating circumstances as a whole justified a death sentence; and (3) the jurors must also conclude that the aggravating circumstances outweigh any mitigating circumstances. *Id.* Finally, the venire was told that a

juror is never required to vote for death and that the failure to unanimously make the required findings would automatically result in a sentence of life imprisonment without parole. *Id.*

In short, while the instruction set out in MAI-CR 3d 300.03A was not formalistically recited to the jury panel by chapter and verse, the information and law required to be given to the venire through the instruction was indeed given before death qualification voir dire began. It cannot be said, therefore, that the jury was adversely influenced by the lack of a formalistic reading of the instruction or that Deck was deprived of a fair trial on account of it.

Given that Deck was not prejudiced by the lack of a formalistic reading of the instruction, trial counsel's failure to object to the court's failure to give the instruction did not result in prejudice to Deck. In the absence of showing prejudice by counsel's conduct, Deck cannot establish that he received ineffective assistance of counsel in this regard. Accordingly, Deck's claim of ineffective assistance of trial counsel was not so substantial that post-conviction counsel was ineffective for failing to raise the claim during post-conviction proceedings. Nor has Deck shown that a fundamental miscarriage of justice would occur if I were not to address the merits of the claim.

Ground 29 is therefore procedurally barred from federal habeas review and will be denied.

C. Defaulted Claims Not Subject to *Martinez* Analysis

1. *Ground 19 – Assistance of Trial Counsel re Witness Ed Kemp*

In his nineteenth ground for relief, Deck contends that trial counsel rendered ineffective assistance by failing to investigate and call numerous mitigation witnesses to testify on his behalf at his third penalty-phase trial. Among the witnesses whom Deck claims counsel should have investigated and called is Ed Kemp. Respondents argue, however, that Deck did not properly raise this claim in State court with regard to Kemp. Deck argues to the contrary, stating that the claim was properly raised during post-conviction proceedings. For the following reasons, a review of the record shows Deck did not properly raise the claim in State court. The claim is thus procedurally defaulted.

In his motion for post-conviction relief, Deck argued that trial counsel was ineffective for failing to investigate and present the testimony of several mitigation witnesses at his third penalty-phase trial. (Resp. Exh. QQ at 29-66.) Deck did not name Ed Kemp in his motion as one of these witnesses. (*Id.*) In response to respondents' argument that the claim is defaulted as to witness Kemp, Deck contends that he presented an oral stipulation at the post-conviction motion hearing regarding Kemp's testimony and addressed the matter during counsel's hearing testimony. With this argument, Deck appears to contend that the claim is not defaulted.

Giving Deck the benefit of the doubt and assuming *arguendo* that his oral statement regarding Kemp was sufficient to raise the claim during his initial post-conviction proceeding, a review of the record shows that Deck nevertheless did not raise this claim regarding Kemp on post-conviction appeal. (*See* Resp. Exh. VV.) "Failure to raise a claim on appeal from the denial of a post-conviction motion erects a procedural bar to federal habeas review." *Jolly v. Gammon*, 28 F.3d 51, 53 (8th Cir. 1994); *see also Storey*, 603 F.3d at 523. Accordingly, I cannot review the claim in this federal habeas proceeding absent a showing of cause and prejudice, or that a fundamental miscarriage of justice would result if I were not to review the claim.

Deck does not assert any cause for failure to raise the Kemp claim on post-conviction appeal and indeed appears to argue that there is no procedural default given his stipulation regarding Kemp at the post-conviction hearing.[16] Deck's failure to show cause for his procedural default makes a determination of prejudice unnecessary. *Cagle*, 474 F.3d at 1099. Nor has Deck shown that failure to determine the merits of this procedurally defaulted claim will result in a fundamental miscarriage of justice.

[16] To the extent Deck may argue that counsel on post-conviction appeal was ineffective for failing to raise the Kemp claim on appeal, I note that ineffective assistance of post-conviction *appellate* counsel cannot constitute cause to excuse procedural default. *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012).

Accordingly, the claim raised in Ground 19 with respect to witness Ed Kemp is procedurally barred from federal habeas review and will be denied.

2. *Ground 24(b) – Assistance of Trial Counsel, Failure to Object re Improper Personalization*

In the caption of Ground 24, Deck contends that trial counsel was ineffective at the third penalty-phase trial for failing to object to the prosecutor's closing argument, including statements that Mr. Deck had "prior escapes" and had helped inmates serving life sentences to escape. In the body of this claim, however, Deck raises an additional factual basis to support his argument that counsel was ineffective, and specifically, that counsel failed to object to the prosecutor's improper personalization during closing argument when the prosecutor urged the jurors to place themselves in the victims' shoes. Although Deck raised both factual bases of this claim in his post-conviction motion, he did not raise on post-conviction appeal that part of his claim challenging counsel's failure to object to the prosecutor's improper personalization argument. (*See* Resp. Exh. VV at 128–32.) That portion of Ground 24, therefore, is defaulted.

A claim must be presented at each step of the judicial process in State court in order to avoid procedural default. *Jolly*, 28 F.3d at 53. The failure to present a claim on appeal from the denial of a post-conviction motion results in a procedural default of that claim. *Id.* To be fairly presented, the claim in State court must

contain the same factual grounds and legal theories as asserted in the federal habeas petition. *Picard v. Connor*, 404 U.S. 270 (1971); *Abdullah v. Groose*, 75 F.3d 408, 411 (8th Cir. 1996). Mere similarity in claims is insufficient. *Abdullah*, 75 F.3d at 412 (citing *Duncan v. Henry*, 513 U.S. 364 (1995) (per curiam)). Broadening an ineffective assistance of counsel claim in a federal habeas proceeding to include factual bases not raised before the State court is impermissible. *See Ward v. Norris*, 577 F.3d 925, 935 (8th Cir. 2009).

As a basis for habeas relief in Ground 24, Deck claims that counsel was ineffective for failing to object to that portion of the prosecutor's closing argument where he engaged in improper personalization, that is, asking the jurors to place themselves in the victims' shoes. On post-conviction appeal, Deck argued that counsel was ineffective for failing to object to that portion of the prosecutor's closing argument where he asked the jurors to consider Deck's prior escapes and his help to other prisoners in planning escapes. While both claims argue a failure to object, the sole factual basis of the claim raised on post-conviction appeal is substantially different than the additional factual basis raised here.

Deck failed to assert the factual basis of improper personalization on post-conviction appeal. That factual aspect of the claim is therefore procedurally barred from review by this Court unless Deck can show cause for his default and actual prejudice resulting from the alleged unconstitutional conduct, or demonstrate that

failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 731-32, 750. Deck neither asserts nor shows cause for his failure to raise this factual basis on post-conviction appeal with respect to his claim of ineffective assistance of trial counsel. Nor has Deck presented any evidence of actual innocence as it relates to imposition of the death penalty. *Sawyer*, 505 U.S. at 336, 347-50. Therefore, my refusal to entertain this procedurally defaulted aspect of the claim raised in Ground 24 will not result in a fundamental miscarriage of justice.

Accordingly, the claim raised in Ground 24(b) is procedurally barred from federal habeas review and will be denied.

3. *Grounds 23(b), 26, 28, and 32(b) – Assistance of Appellate Counsel*

In Grounds 23(b), 26, 28, and 32(b), Deck contends that he received ineffective assistance of counsel on direct appeal of his final death sentence when counsel failed to raise on appeal claims of prosecutorial misconduct, a claim of trial court error during jury deliberations, and a claim of unconstitutional delay. Deck did not raise these claims of ineffective appellate counsel at any proceeding in State court. (*See* Resp. Exhs. QQ, VV.)

A claim must be presented at each step of the judicial process in State court in order to avoid procedural default. *Jolly*, 28 F.3d at 53. Under Missouri law, Missouri Supreme Court Rule 29.15 provides the exclusive means by which a

petitioner may assert claims of ineffective assistance of direct appeal counsel. Accordingly, Deck's failure to raise these claims of ineffective assistance of appellate counsel in his Rule 29.15 motion results in this Court being procedurally barred from reviewing the claims in this federal habeas petition absent a showing of cause and prejudice, or that a fundamental miscarriage of justice would result if the Court were not to review the claims.

Deck concedes that he did not raise these claims in State court but asserts as cause that post-conviction counsel was ineffective in their failure to raise the claims in his Rule 29.15 post-conviction motion. Citing *Martinez*¸ Deck argues that the ineffectiveness of post-conviction counsel excuses his procedural default. This argument is misplaced.

"Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. *Martinez* does not extend to defaulted claims of ineffective assistance of appellate counsel, however. *Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014). Deck asserts no other ground as cause for his procedural default of the claims raised in Grounds 23(b), 26, 28, and 32(b) of this petition and has thus failed to show cause sufficient to overcome his procedural default. His failure to show cause makes a determination of prejudice unnecessary. *Cagle*, 474 F.3d at 1099. Nor has Deck presented any evidence of actual

innocence as it relates to the death penalty. *Sawyer*, 505 U.S. at 336, 347-50. Therefore, my refusal to entertain these procedurally defaulted claims will not result in a fundamental miscarriage of justice.

Accordingly, the claims raised in Grounds 23(b), 26, 28, and 32(b) are procedurally barred from federal habeas review and will be denied.

4. *Ground 27 – Trial Error During Jury Deliberations*

In Ground 27, Deck claims that the trial court erred during the third penalty-phase trial when it gave an improper response to a jury question during jury deliberations. Specifically, Deck claims that when the jury asked a question regarding aggravating circumstances in relation to the murder of James Long, the trial court erred by responding to the question and instructing that its response also applied in relation to the murder of Zelda Long. Deck did not raise this claim of trial error on direct appeal of the third penalty-phase trial.

Missouri procedure requires that a claim for relief be presented at each step of the judicial process. *Jolly*, 28 F.3d at 53. Under Missouri law, claims of trial court error must be raised on direct appeal. *Middleton v. State*, 103 S.W.3d 726, 740 (Mo. banc 2003); *Ham v. State*, 7 S.W.3d 433, 440 (Mo. Ct. App. 1999). Because Deck failed to raise the instant claim of trial court error on direct appeal, the claim is procedurally defaulted and cannot be reviewed by this Court unless he shows cause for his default and prejudice resulting therefrom, or that a

fundamental miscarriage of justice would occur if the Court were not to address the merits of the claim. *Coleman*, 501 U.S. at 750.

Deck appears to argue that his direct appeal counsel's failure to raise this claim on appeal constitutes cause sufficient to excuse his procedural default.[17] While ineffective assistance of direct appeal counsel may constitute cause for procedural default, *Reese v. Delo*, 94 F.3d 1177, 1182 (8th Cir. 1996) (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)), Deck must have first presented this Sixth Amendment argument to the State court as an independent claim in order for this federal habeas court to review the claim as cause for default. *Edwards v. Carpenter*, 529 U.S. 446, 450-53 (2000); *Taylor v. Bowersox*, 329 F.3d 963, 971 (8th Cir. 2003) (citing *Murray*, 477 U.S. at 489); *Charron v. Gammon*, 69 F.3d 851, 858 (8th Cir.1995). Deck failed to do so here. (*See* Resp. Exh. QQ.) To the extent Deck argues that the procedural default of his ineffectiveness claim is itself excused by ineffective assistance of post-conviction counsel for failing to raise this claim of ineffective assistance of appellate counsel, inadequate assistance of counsel at initial-review collateral proceedings cannot establish cause for procedural default of a claim of ineffective assistance of counsel on appeal.

[17] Deck actually contends that post-conviction counsel was ineffective for failing to raise a claim of ineffective assistance of appellate counsel for appellate counsel's failure to raise the instant claim of trial error on direct appeal. I will construe this layered argument as Deck's attempt to assert ineffective assistance of appellate counsel as cause for his default of this claim of trial court error.

Dansby, 766 F.3d at 833. I am therefore precluded from addressing alleged counsel error as cause to excuse Deck's procedural default of the claim now raised in Ground 27. *Williams v. Kemna*, 311 F.3d 895, 897 (8th Cir. 2002). Deck asserts no other cause to excuse his default.

Deck has thus failed to establish cause to excuse his procedural default, thus obviating the need for me to determine whether prejudice has been shown. *Cagle*, 474 F.3d at 1099. In addition, because Deck has failed to show actual innocence under *Sawyer*, my refusal to entertain his procedurally defaulted claim will not result in a fundamental miscarriage of justice.

The claim raised in Ground 27 is procedurally barred from federal habeas review and will be denied.

VII. Claims Addressed and Denied on the Merits

A review of the record shows Deck to have properly raised the following claims in State court and that the Missouri Supreme Court, upon review of the merits of the claims, denied relief. I therefore turn to the merits of these claims, exercising limited and deferential review of the underlying State court decisions as required by the AEDPA.

GUILT PHASE

A. Ground 2 – Change of Venue

In his second ground for relief, Deck contends that he was denied due process, his right to be tried by a fair and impartial jury, his right to reliable sentencing, and his right to be free from cruel and unusual punishment when the trial court denied a change of venue. Deck specifically contends that the jury pool from Jefferson County was so tainted by the extensive pretrial publicity given to the Long murders that he could not receive a fair trial without a change of venue. Deck raised this claim on direct appeal to the Missouri Supreme Court. Upon review of the claim, the Missouri Supreme Court denied relief.

At the time Deck's conviction became final, the law was clearly established that "exposure to . . . news accounts of the crime with which [a defendant] is charged [does not] alone presumptively depriv[e] the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 799 (1975). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). "The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." *Irvin*, 366

U.S. at 722. A trial court's findings of juror impartiality may "be overturned only for 'manifest error.'" *Patton*, 467 U.S. at 1031 (quoting *Irvin*, 366 U.S. at 723).

On direct appeal, the Missouri Supreme Court invoked this established standard, *Deck I*, 994 S.W.2d at 532-33, and determined that the facts of the case showed that Deck was not deprived of a fair and impartial jury because of pretrial publicity. The court first noted that while evidence before the trial court showed there had been nine newspaper articles and several television news broadcasts addressing the crimes, all of this coverage occurred within a few weeks of the July 1996 murders. *See Deck I*, 994 S.W.2d at 533. Jury selection began about nineteen months later, on February 18, 1998. The court also noted that although an opinion poll conducted in November and December 2006 by a St. Louis University political science professor showed that sixty-nine percent of the 518 surveyed Jefferson County residents were aware of the case and twenty-seven percent held an opinion regarding Deck's guilt, the professor nevertheless conceded that the passage of time between exposure to publicity and trial would result in fewer people remembering what they had heard. *Id.* The Missouri Supreme Court determined that because the media accounts at issue here occurred long before trial, there was no "barrage of inflammatory publicity immediately prior to trial" amounting to a "huge wave of public passion" such that a presumption of prejudice would attach. *Id.* at 533-34. This determination is consistent with clearly

established federal law as determined by the United States Supreme Court. *See Patton*, 467 U.S. at 1032-33 (quoting *Murphy*, 421 U.S. at 798; *Irvin*, 366 U.S. at 728).

Further, the Missouri Supreme Court noted that the professor's polling data did not account for whether those who had opinions would be unable to follow the law and make a determination based on the evidence adduced at trial, which is the hallmark for determining the prejudicial effect of pretrial publicity on a jury. The venire panel on Deck's case consisted of 120 persons. (*See* Resp. Exh. D at 218). The supreme court noted that fifty of those prospective jurors indicated that they had heard about or read about the case. Thirteen of these 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. Twelve of these thirteen jurors were struck for cause or otherwise excused. With respect to the thirteenth juror, the supreme court noted that Deck declined to strike her because she had 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. *Deck I*, 994 S.W.2d at 533. The mere existence of a preconceived notion as to the guilt or innocence of an accused is insufficient alone to rebut the presumption of a prospective juror's impartiality where the juror can "lay aside his impression or opinion and render a verdict based on the evidence presented in

court." *Murphy*, 421 U.S. at 800 (quoting *Irvin*, 366 U.S. at 723). Instead, the defendant must "demonstrate 'the actual existence of such an opinion in the mind of the juror[.]'" *Id.* (quoting *Irvin*, 366 U.S. at 723). Deck does not attempt to demonstrate actual existence of such an opinion here. In short, the evidence shows that no juror who sat on Deck's jury had such fixed opinions that they could not render a fair and impartial verdict in the case.

The Missouri Supreme Court set out the constitutional standard for determining whether a defendant could receive a fair trial from a jury exposed to pretrial publicity. Against this standard, the supreme court considered the extent of the publicity, its timing, and the voir dire process itself and found no indication that Deck was denied a fair and impartial jury because of publicity. This decision was well based on law and fact and was not "contrary to, or involved an unreasonable application of," clearly established federal law. 28 U.S.C. § 2254(d)(1). Nor has Deck shown that the court's determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

The claim raised in Ground 2 of the petition will be denied.

B. Ground 3 – State's Peremptory Strike of D.G.

In his third ground for relief, Deck claims that the trial court erred by permitting the State to exercise one of its peremptory challenges in a

discriminatory manner by striking Juror D.G. because of her gender. Deck contends that this error deprived him of his right to due process and denied the members of the venire panel their right to equal protection. Deck raised this claim on direct appeal, and, upon review of the merits of the claim, the Missouri Supreme Court denied relief.

At the time Deck's conviction became final, the law was clearly established that the Equal Protection Clause of the United States Constitution forbids the prosecution from using its peremptory challenges to strike potential jurors "solely on account of their race." *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Under *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141-42 (1994), this rule also applies to peremptory strikes based solely on the potential juror's gender. As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. *Id.* at 144-45 (citing *Batson*, 476 U.S. at 97). When such an explanation is required, it must be based on a juror characteristic other than gender, and it may not be pretextual. *Id.* at 145 (citing *Hernandez v. New York*, 500 U.S. 352 (1991)). Under Missouri law, the defendant bears the burden of proving pretext once a race- and/or gender-neutral explanation is offered. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992).

"[T]he trial court's decision on the ultimate question of discriminatory intent

represents a finding of fact of the sort accorded great deference on appeal[.]" *Hernandez*, 500 U.S. at 364 (citing *Batson*, 476 U.S. at 98 n.21); *see also Gibson v. Bowersox*, 78 F.3d 372, 374 (8th Cir. 1996) (citing *Jones v. Jones*, 938 F.2d 838, 841 (8th Cir. 1991)); *Elem v. Purkett*, 64 F.3d 1195, 1199 (8th Cir. 1995). This is so because "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *Hernandez*, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Findings of fact made by State appellate courts have the same presumptive correctness as findings of fact made by State trial courts. *Weaver*, 241 F.3d at 1031. Factual findings of a State court are presumed to be correct unless the petitioner shows otherwise by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Barnett v. Roper*, 541 F.3d 804, 812 (8th Cir. 2008).

Here, the State exercised a peremptory strike against Juror D.G., and Deck argued to the trial court that the strike was based on D.G.'s gender. In response, the prosecutors averred that they struck D.G. because they considered her to be a "very weak" juror based on her demeanor and manner of speaking during voir dire and, further, because D.G.'s relatives had been or were currently being prosecuted for a criminal offense. *Deck I*, 994 S.W.2d at 537. Deck raised no argument to the trial court challenging the prosecutor's explanation regarding D.G.'s "weakness." (*See* Resp. Exh. E at 539-42.) With respect to D.G.'s relatives, Deck alluded to

"other jurors" similarly situated to D.G. in this regard, but provided no detailed argument. (*Id.* at 542.) The trial court denied Deck's challenge to the State's peremptory strike of D.G. (*Id.)*

On direct appeal, the Missouri Supreme Court applied the *Batson-J.E.B.* standard and determined that Deck failed to show that the State's reasons to strike D.G. were merely pretext and that the strike was motivated by D.G.'s gender. *Deck I*, 994 S.W.2d at 536-38. Specifically, the court found that "[a]n explanation based on a prospective juror's general demeanor, which in this case gave rise to the perception that [D.G.] was 'weak,' is facially non-discriminatory." *Id.* at 537. This reason is indeed a valid non-discriminatory reason to exercise a peremptory strike, and Deck has provided no clear and convincing evidence to rebut the State court's factual finding of no pretext in this regard. *See United States v. Maxwell*, 473 F.3d 868, 872 (8th Cir. 2007) (juror's demeanor and body language are legitimate non-discriminatory reasons to strike potential juror); *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001) (juror's words and conduct led prosecutor to believe she was weak; petitioner failed to rebut presumptive correctness of state court decision that this reason was non-discriminatory).

The Missouri Supreme Court also found that the fact of an arrest, conviction, or incarceration of a prospective juror's relative is likewise a non-discriminatory reason to exercise to a strike. *Deck I*, 994 S.W.2d at 537. In his claim, however,

Deck contends that a male juror also had a relative who had been prosecuted, thus demonstrating that the State's strike of D.G. was based on her gender. Assuming for the sake of argument that this circumstance may give rise to some inference of discrimination, this inferred discrimination is nevertheless insufficient given the State's other nondiscriminatory reason for the use of the peremptory strike, that is, the perception that the juror was weak based on her demeanor. *See Bell-Bey v. Roper*, 499 F.3d 752, 758 (8th Cir. 2007) (citing *Weaver*, 241 F.3d at 1032) (denying an application for a writ of habeas corpus based on a *Batson* challenge when the state attorney had articulated both discriminatory and nondiscriminatory reasons for the use of the peremptory strike)).[18]

The Missouri Supreme Court's factual finding that the State's articulated reason for striking D.G. was gender-neutral and not pretext was not an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. *See Purkett v. Elem*, 514 U.S. 765, 769 (1995); *Gibson*, 78 F.3d at 374; *Jones*, 938 F.2d at 843 (state appellate court's findings of fact presumed to be correct). As such, Deck has failed to overcome the presumption of correctness accorded to the State court's conclusion that the prosecutors did not act

[18] Deck argues in the alternative that trial counsel was ineffective for failing to provide details to the trial court regarding this substantially similar male juror. (*See* Amd. Petn., ECF #30 at 33-34, n.9.) Because the State provided another nondiscriminatory reason to strike Juror D.G., any failure by counsel to further pursue this argument did not prejudice Deck.

with discriminatory intent in their strike of D.G. *See Boyd v. Groose*, 4 F.3d 669, 672 (8th Cir. 1993).

Based on the above, the Missouri Supreme Court's decision denying relief on this claim is well based on law and fact. I am unaware of any "clearly established Federal law, as determined by the Supreme Court of the United States" of which the court's decision runs afoul, nor has Deck demonstrated such. Therefore, it cannot be said that the State court's adjudication of the instant claim "resulted in a decision that was contrary to, or involved an unreasonable application of," clearly established federal law. 28 U.S.C. § 2254(d)(1). Nor has Deck shown that the court's determination "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Accordingly, the claim raised in Ground 3 of the petition will be denied.

C. Ground 4 – Denial of Challenge for Cause of Juror S.A.

Deck sought to strike Juror S.A. for cause, arguing that this juror gave some indication during voir dire that he might automatically impose the death penalty. The trial court denied this request, after which Deck exercised a peremptory strike to remove him. *See Deck I*, 994 S.W.2d at 538. In Ground 4 of his petition, Deck claims that the trial court's refusal to strike S.A. for cause denied him his rights to due process, to a fair and impartial jury, to reliable sentencing, and to be free from

cruel and unusual punishment. Deck raised this claim on direct appeal. The Missouri Supreme Court found that a challenge to a juror's qualifications is not a ground to reverse a conviction or judgment "'unless such juror served upon the jury at the defendant's trial and participated in the verdict rendered against the defendant.'" *Id.* (quoting Mo. Rev. Stat. § 494.480.4). This decision was not contrary to or an unreasonable application of clearly established federal law.

A claim that a jury was not impartial must focus on the actual jurors. *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988). Although Deck had to use a peremptory strike to remove S.A., the United States Supreme Court has rejected "the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Id.* at 88. "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* S.A. did not sit on Deck's jury. Deck's Sixth Amendment claim that he was denied a fair and impartial jury therefore fails.

In addition, the rights governing the exercise of peremptory challenges in State court is determined by State law. *See Ross*, 487 U.S. at 89.[19] "[P]eremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair

[19] *See also Rivera v. Illinois*, 556 U.S. 148, 152 (2009).

trial." *Georgia v. McCollum*, 505 U.S. 42, 57 (1992); *see also Ross*, 487 U.S. at 88. Deck does not claim here that he was denied anything that the State law allowed him to do. His due process and other constitutional claims therefore fail. *Ross*, 487 U.S. at 90-91.

The claim raised in Ground 4 will be denied.

D. Ground 10 – Assistance of Direct Appeal Counsel

Before trial, Deck moved to disqualify the prosecuting attorney's office because of an alleged conflict of interest. Deck argued that the conflict existed because a current assistant prosecutor in the office previously represented him on a burglary case in 1993. The trial court heard the motion and denied it. (Resp. Exh. C at 1-19.) This conflict-of-interest claim was not raised on direct appeal.

In his Rule 29.15 post-conviction motion, Deck claimed that direct appeal counsel rendered ineffective assistance by failing to raise the conflict-of-interest issue. The motion court denied the claim. On post-conviction appeal, the Missouri Supreme Court determined Deck's underlying conflict-of-interest claim to have no merit. Citing Missouri law, the supreme court held that

> Mr. Deck's [conflict-of-interest] 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 involvement in this case.

Deck II, 68 S.W.3d at 431. The supreme court affirmed the motion court's denial

of Deck's related claim of ineffective assistance of appellate counsel. *Id.* at 431-32.

At the time Deck's conviction became final, the law was clearly established that the Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel, including effective assistance on direct appeal. *Strickland*, 466 U.S. at 686; *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). The standard set forth in *Strickland* must be applied to determine whether Deck indeed received ineffective assistance of appellate counsel with regard to this issue of error. *Reese*, 94 F.3d at 1185. Deck must therefore show that counsel's representation fell below an "objective standard of reasonableness" and that he was prejudiced as a result. *Strickland*, 466 U.S. at 687-88, 694. To demonstrate prejudice on account of counsel's failure to raise this claim on appeal, Deck must show a "reasonable probability that an appeal of [the] issue would have been successful and that the result of the appeal would thereby have been different." *Pryor v. Norris*, 103 F.3d 710, 714 (8th Cir.1997). He must show more than that the alleged error had some conceivable effect on the outcome of the proceeding. *Id.* at 713. "'Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 693).

Counsel's failure to raise a non-meritorious claim on appeal cannot be found

deficient under *Strickland*, nor can it result in any prejudice. *Burton v. Dormire*, 295 F.3d 839, 846 (8th Cir. 2002); *Zinzer v. State of Iowa*, 60 F. 3d 1296, 1299 (8th Cir. 1995). Because the Missouri Supreme Court determined Deck's underlying conflict-of-interest claim to have no merit, its determination to affirm the denial of his related claim of ineffective assistance of appellate counsel was neither contrary to nor an unreasonable application of clearly established federal law. Nor does the record show that the court's determination resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The claim raised in Ground 10 will be denied.

PENALTY PHASE

A. Ground 11 – Prior Death Sentences Held Unconstitutional

As discussed above, the United States Supreme Court found that Deck was denied his constitutional right to due process during his second penalty-phase trial because he was visibly shackled during the trial. Deck contends that because the previous death sentences were held to be unconstitutional, the trial court was required under Missouri law to impose life sentences instead of proceeding to a third penalty-phase trial. He argues that the court's denial of his motion to impose such sentences denied him his procedural due process rights by depriving him of a liberty interest created under State law. Deck raised this due process claim on

direct appeal of the third penalty-phase trial.

The Missouri Supreme Court denied the claim based on its finding that Deck was not entitled under Missouri law to the sentencing relief he requested. The court did not analyze the due process aspect of the claim. This lack of analysis, however, "does not mean that [Deck] is necessarily entitled to habeas relief[.]" *Huss*, 252 F.3d at 956. Instead, I must apply established Supreme Court precedent to the facts of this case to determine whether Deck is entitled to relief on this due process claim that was fairly presented to the State court. *Id.*

Generally, federal habeas relief does not lie for a petitioner challenging the State court's application of State law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). *See also Sweet*, 125 F.3d at 1151 ("It is not the office of a federal habeas court to determine that a state court made a mistake of state law."). When the court's application is arbitrary and causes the deprivation of a State-created liberty interest, however, the petitioner's constitutional right to due process is implicated. *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980).

To create a liberty interest enforceable under the Due Process Clause, a State statute or regulation must place substantive limitations on official discretion. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). "[T]he most common manner in which a State creates a liberty interest is by establishing

'substantive predicates' to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)). The statute must "contain 'explicitly mandatory language,' *i.e.*, specific directives to the decisionmaker that if the [statute's] substantive predicates are present, a particular outcome must follow[.]" *Id.* at 463 (citing *Hewitt*, 459 U.S. at 471-72.)

> At issue here is Mo. Rev. Stat. § 565.040.2, which states:
>
> In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

The parties here do not dispute that this statute creates a liberty interest given that it includes a specific directive to the trial court to impose a life sentence once a specified substantive predicate is met, that is, when a death sentence imposed is held to be unconstitutional.[20] Respondents contend, however, that Deck had no liberty interest in the exercise of this statute – and thus no due process implication

[20] Deck makes no claim that the statute itself failed to provide the procedural safeguards necessary to provide him notice and an opportunity to be heard. *Contra Ford v. Wainwright*, 477 U.S. 399, 417 (1986).

– because, under Missouri law, his circumstances failed to meet the substantive predicate. Whether Deck met the substantive predicate of § 565.040.2 is a matter of State law.

In its decision, the Missouri Supreme Court examined the language of the statute and discussed in depth its previous decision in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), and determined that the substantive predicate of § 565.040.2 included only those instances in which the imposition of the death sentence itself is unconstitutional, and not instances where a separate, unrelated trial error is alleged. *Deck III*, 303 S.W.3d at 533-35. Citing *Whitfield*, the court noted that it had "previously indicated that trial error premised on a constitutional violation not directly affecting the imposition of the death penalty statutory scheme does not result in the application of section 565.040." *Id.* at 533. The court then examined the circumstance from which the United States Supreme Court found reversible error in Deck's case – that is, his visible shackling during trial – and found it to be trial error and unrelated to the imposition of the death sentence itself. Because the death sentence *itself* was not found to be unconstitutional, the Missouri Supreme Court determined that § 565.040.2 was not implicated in Deck's case. *Deck III*, 303 S.W.3d at 535.

As a federal habeas court, I have no authority to second guess the Missouri court's substantive determination that Deck failed to meet the requirements of its

own State law. *See Ford v. Wainwright*, 477 U.S. 399, 430-31 (1986) (O'Connor, J., dissenting in part); *Arnold v. Dormire*, 675 F.3d 1082, 1086 (8th Cir. 2012) (citing *Bounds v. Delo*, 151 F.3d 1116, 1118 (8th Cir. 1998)). *See also Buchalter v. People of State of New York*, 319 U.S. 427, 431 (1943). Nor has Deck shown that the Missouri Supreme Court arbitrarily applied State law to his case. Indeed, the contrary is true.

The Missouri Supreme Court determined, as a matter of State law, that Deck's circumstances did not meet the substantive predicate necessary to invoke the mandatory imposition of a life sentence under § 565.040.2. Although § 565.040.2 creates a liberty interest under the standard set forth in *Thompson*, this interest does not attach in the circumstances of this case. In the absence of this claimed protected liberty interest, Deck's due process claim must fail. *See Paul v. Davis*, 424 U.S. 693, 712 (1976) (respondent cannot assert denial of any right vouchsafed to him by the State and thereby protected under Fourteenth Amendment; respondent therefore not deprived of any liberty or property interests protected by Due Process Clause); *Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999) ("the possession of a protected life, liberty, or property interest is . . . a condition precedent to any due process claim.") (internal quotation marks omitted).

Based on the foregoing, I find that the decision of the Missouri Supreme Court in denying Deck relief on this due process claim is not substantially different

from what the decision would have been if that court had addressed the federal aspect of the claim in accordance with established precedent of the United States Supreme Court. The claim raised in Ground 11 of the instant petition will therefore be denied.

B. Ground 12 – Striking of Qualified Jurors

In his twelfth ground for relief, Deck contends that he was denied due process, his right to a fair and impartial jury, and freedom from cruel and unusual punishment when the trial court improperly struck two qualified jurors for cause based on their reluctance to serve as foreperson. Deck raised this claim on direct appeal. Upon review of the merits of the claim, the Missouri Supreme Court denied relief.

At the time Deck's conviction became final, the law was clearly established that prospective jurors may be removed for cause if their views on capital punishment would prevent or substantially impair their ability to fully and fairly consider all possible punishments. *Wainwright*, 469 U.S. at 420. The bias against the death penalty need not be evident with unmistakable clarity because such clarity is rarely evident; instead, the matter is one that is "peculiarly" within the trial judge's province. *Kinder v. Bowersox*, 272 F.3d 532, 543 (8th Cir. 2001); *see also Uttecht v. Brown*, 551 U.S. 1, 22 (2007). Because the trial court's judgment is based in part on the demeanor of the juror, its judgment is entitled to deference by

a reviewing court. *Uttecht*, 551 U.S. at 9; *Wainwright*, 469 U.S. at 428.

In its review of Deck's claim, the Missouri Supreme Court summarized that portion of the voir dire examination that showed Jurors M.C. and B.L. to indicate that they could consider both possible sentences in the case – that is, life imprisonment and the death penalty – but that they could not sign a verdict form imposing death. *Deck III*, 303 S.W.3d at 536-37. Identifying the clearly established federal law set out above, *id.* at 535-36, the supreme court accorded deference to the trial court and determined the facts to support that court's decision to strike these jurors for cause:

> In this case, it is not just the simple refusal to sign the verdict that may warrant removal. Where, as here, if a veniremember claims on the one hand that he or she could fairly consider both punishments but, at the same time, unequivocally states that he or she would not sign a verdict of death, the trial court is in the best position to consider whether the record contains sufficient evidence of equivocation creating a doubt as to whether that veniremember would be able to fairly consider both punishments. Here, the veniremembers' responses revealed an inability to follow the court's instructions if that person were chosen as foreman of the jury and the trial court could have concluded from the record as a whole that there was a substantial possibility that the veniremember may not be able to fairly consider both punishments despite their assurances to the contrary.

Id. at 538.

The Missouri Supreme Court's determination to affirm the trial court's decision to strike Jurors M.C. and B.L. is based on reasonable factual findings and application of clearly established federal law. Deck is therefore not entitled to

habeas relief on this claim of trial court error, and the claim raised in Ground 12 of the instant petition will be denied.

C. Ground 13 – Sentence Imposed for Unpled Offense

In order for the death penalty to be imposed under Missouri law for first degree murder, the jury must find beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. Without a finding of aggravated circumstance(s), the only authorized punishment for first degree murder is life imprisonment. In Ground 13, Deck contends that because a finding of an aggravated circumstance is required in order to increase the maximum penalty from life imprisonment to death, such circumstance(s) must be pled in the charging document. Deck argues that the Information under which he was charged and convicted here failed to include any aggravating circumstances and thus that he was unconstitutionally sentenced to death for a crime that was never pled. Deck raised this claim on direct appeal. Upon review of the merits of the claim, the Missouri Supreme Court denied relief.

At the time Deck's conviction became final, the law was clearly established that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). In *Ring v. Arizona*, the Supreme Court extended *Apprendi* to the fact-

finding necessary for imposition of the death penalty. *Ring*, 536 U.S. 584, 609 (2002). Deck does not contend that the jury failed to find beyond a reasonable doubt the aggravating circumstances required in order to make him "death-eligible" in this case. Nor does he claim that he was not given reasonable notice of the aggravating factors the State sought to prove. Instead, Deck contends only that the Information failed to plead such aggravating factors, thus rendering his sentence unconstitutional. To the extent he argues that *Apprendi* and *Ring* require that aggravating factors be pled in a charging document, this argument misinterprets the law.

In *Apprendi*, the Supreme Court made it clear that the Fifth Amendment to the United States Constitution provides the source for the requirement that facts increasing a maximum penalty must be pled in the indictment. Indeed, the *Apprendi* Court specifically noted that it was *not* addressing the question of whether the Fourteenth Amendment requires the States to include sentence enhancements in the charging document and alluded to there not being such a requirement. *Apprendi*, 530 U.S. at 477 n.3 (Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment or indictment of a Grand Jury[.]'"). Although the *Ring* Court likewise did not address this question given that it was not raised, it nevertheless noted the *Apprendi* Court's recognition that the Fourteenth Amendment did not apply to such claims. *Ring*,

536 U.S. at 597 n.4. Accordingly, both *Apprendi* and *Ring* express doubt that the Fifth Amendment's guarantee of a right to be indicted by a Grand Jury is applicable to State prosecutions, as that protection has not been understood to be incorporated by the Fourteenth Amendment. To find otherwise would run contrary to the Supreme Court's repeated assertion that the Grand Jury Clause of the Fifth Amendment does not apply to the States.

Deck also argues that Missouri's statutory scheme creates two separate crimes of first-degree murder – that is, "unenhanced" first-degree murder, carrying a maximum sentence of life without probation or parole; and "aggravated" first-degree murder, requiring an additional element of at least one statutory aggravator and which carries the maximum sentence of death. Deck contends that the failure to include any statutory aggravators in the Information necessarily resulted in him being charged with only "unenhanced" first-degree murder, and thus that his death sentence for aggravated first-degree murder – an uncharged crime – violated his constitutional rights.

In rejecting this claim, the Missouri Supreme Court relied on long-standing State court precedent and reaffirmed its previous holdings that the relevant Missouri statute defines a single offense of first-degree murder with the maximum sentence of death. Therefore, because imposition of the death penalty does not have the effect of increasing the maximum penalty for first degree murder, the

statutory aggravating factors are not required to be pled in the charging document. *Deck III*, 303 S.W.3d at 549-50. I may not reevaluate the Missouri Supreme Court's interpretation of its own State's law.

Simply stated, Deck seeks constitutional protection for a right not extended by the United States Constitution nor established by the United States Supreme Court. Because the Supreme Court has given "no clear answer to the question presented, . . . it cannot be said that the state court unreasonably applied clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (internal citations, quotation marks, and alterations omitted). "Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." *Id.* It was not an unreasonable application of clearly established federal law for the State court here not to apply a specific legal rule that has not been squarely established by the Supreme Court. Deck's attempt to apply such a rule through the claim raised in Ground 13 must fail.

Ground 13 of the petition will be denied.

D. Ground 14 – Prosecutor's Closing Argument

In his fourteenth ground for relief, Deck claims that he was denied due process, his right to a fair and impartial jury, and his right to fair and reliable sentencing when the prosecutor made improper statements during his closing argument. Deck raised this claim on direct appeal. Although he specifically

challenged four areas of argument made by the prosecutor, the challenge to only one argument was preserved for appeal – that the prosecutor improperly personalized the argument – which the Missouri Supreme Court denied on its merits.[21] I look to the merits of that claim here.

In determining whether the prosecutor's closing argument violated Deck's constitutional rights, the pertinent inquiry is "whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The test applied to determine whether error makes a trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the error not occurred. *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Hamilton v. Nix*, 809 F.2d 463, 470 (8th Cir. 1987). I may grant Deck habeas relief only if "the prosecutor's closing argument was so inflammatory and so outrageous that any reasonable trial judge would have *sua sponte* declared a mistrial." *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999). With "the strict due process standard of constitutional review, the deferential review mandated by the AEDPA, and [this Court's] less reliable vantage point for gauging the impact of closing

[21] The Missouri Supreme Court reviewed the other three challenges for plain error and found none. As discussed at Part VI.A.1, above, these three challenges to the prosecutor's closing argument are procedurally barred from federal habeas review and will not be addressed here.

argument on the overall fairness of a trial," my review of whether the prosecutor's closing argument violated Deck's right to due process is "exceptionally limited." *Id.; see also Sublett v. Dormire*, 217 F.3d 598, 600 (8th Cir. 2000).

In this claim, Deck contends that the prosecutor's following statements during closing argument constituted improper personalization:

> [STATE]: The last thing I'm gonna tell you and say to you is this: I – I've done this job long enough, and this isn't about me – but I've done this long enough that on occasion, five years after a case like this has gone –
>
> [DEFENSE]: Objection; vouching, personalization.
>
> [COURT]: Sustained.
>
> [STATE]: Often times, I'll get a phone call later on from a family member, and they'll say –
>
> [DEFENSE]: Objection; relevance, same objection.
>
> [COURT]: Overruled.
>
> [STATE]: And they'll say to me, to my granddaughter, I've told them about my loved one that was murdered. They want – they want to know what happened. Can you explain it to them. There are 19 grandchildren. 19 great-grandchildren, and I don't know how many more there'll be. And some day these people are going to be told about James and Zelma Long. And they're gonna be told about what wonderful parents they were, how they liked to fish. How their Grandmother got her masters and taught. They're gonna be told about these wonderful people. And you know the question they're gonna ask, is they're gonna say well, where are they now? They're gonna have to be told about this. And then they're gonna ask another question, and that question I get to some – unfortunately sometimes explain is was justice done? When you go up there, you'll tell us if

> justice is done. Now I'm gonna sit down and wait for your answer, so I can tell them.

Deck III, 303 S.W.3d at 540. Referring to the clearly established law set out above, the Missouri Supreme Court found the challenged statements not to rise to the level of improper personalization and thus that there was no merit to Deck's argument. *Id.*

Improper personalization occurs when the closing argument asks the jury to place themselves in the place of a party or victim, or suggests personal danger to the jurors or their families if the defendant were to be acquitted. *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); *West v. State*, 244 S.W.3d 198, 201 (Mo. Ct. App. 2008). As noted by the Missouri Supreme Court here, the part of the argument challenged by Deck "did not imply any danger to the jurors or ask the jurors to place themselves in the victims' shoes." *Deck III*, 303 S.W.3d at 540. Accordingly, as found by the supreme court, no improper personalization occurred.

Even if the statements were improper, they were not so outrageous to render Deck's trial fundamentally unfair. They did not mischaracterize the evidence or implicate any other of Deck's specific rights. Further, when coupled with the court's instruction to the jury that closing arguments are not evidence and the "jury's 'common sense ability to put aside a particular type of overzealous advocacy,'" it cannot be said that these statements so infected the trial with

unfairness that a reasonable probability exists that the verdict might have been different had the error not occurred. *Lisenba*, 314 U.S. at 236; *Sublett*, 217 F.3d at 601 (quoting *James*, 187 F.3d at 870). Accordingly, under *Darden* and *Lisenba*, the Missouri Supreme Court's findings were not contrary to clearly established federal law. Accordingly, this claim raised in Ground 14 will be denied.

E. Ground 16 – Burden of Proof on Mitigating Evidence

In his sixteenth ground for relief, Deck contends that Instructions 8 and 13 given to the jury impermissibly shifted to him the burden of proof regarding mitigating evidence, thereby denying him due process and his rights to a fair jury trial and reliable sentencing. Deck raised this claim on direct appeal. Upon review of the merits of the claim, the Missouri Supreme Court denied relief.

In *Kansas v. Marsh*, 548 U.S. 163 (2006), the United States Supreme Court stated:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

Id. at 170-71. In its decision denying Deck's current claim, the Missouri Supreme Court noted that it had previously determined that the instructions at issue did not run afoul of *Marsh* and that Deck offered no meritorious reason for it to hold

otherwise:

> The instructions given were patterned after MAI–CR 3d 313.44A and explained to the jurors if they found the facts and circumstances in aggravation of punishment taken as a whole warrant a death sentence, they must then determine if there were facts or circumstances in mitigation of punishment that were sufficient to outweigh those in aggravation of punishment. The instruction then explains to the jurors that they did not have to agree on mitigating facts, but that if each juror determined that the mitigating evidence outweighs the aggravating evidence, the jury must return a sentence of life without parole.

Deck III, 303 S.W.3d at 548. The jury was also instructed that "the burden is on the State to prove statutory aggravating circumstances beyond a reasonable doubt" and that if the jury "had determined that one or more aggravating circumstances existed, it was next to consider whether the facts and circumstances in aggravation of punishment taken as a whole were sufficient to warrant imposing a sentence of death." *Id.* at 549. Instructions must be viewed as a whole rather than in artificial isolation. *Boyde v. California*, 494 U.S. 370, 378 (1990); *Middleton v. Roper*, 498 F.3d 812, 818 (8th Cir. 2007).

In light of the other instructions to the jury establishing the State's burden to prove the existence of aggravating circumstances beyond a reasonable doubt, and nothing indicating that the State's burden of proof was less, the state supreme court's determination that the trial court did not err in giving Instructions 8 and 13 regarding mitigating evidence was not contrary to nor an unreasonable application

of Supreme Court precedent. Nor has Deck demonstrated that the state supreme court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The claim raised in Ground 16 of the petition will be denied.

F. Ground 17 – Proportionality Review

A criminal defendant has a liberty interest in being sentenced under the proper standard under State law and, in Missouri, to have the Missouri Supreme Court conduct a proportionality review of any death sentence as provided under Mo. Rev. Stat. § 565.035. *Cf. Rust v. Hopkins*, 984 F.2d 1486, 1492-93 (8th Cir. 1993) (citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980)). While there is no federal constitutional right to a proportionality review, *Pulley v. Harris*, 465 U.S. 37 (1984), "once in place it must be conducted consistently with the Due Process Clause." *Kilgore v. Bowersox*, 124 F.3d 985, 995 (8th Cir. 1997). What constitutes a proper proportionality review under the Missouri statute, however, is a matter of State law; whether the State court properly interpreted the State statute is not a matter I can determine in this federal habeas action. *Estelle*, 502 U.S. at 67-68; *Sweet*, 125 F.3d at 1159.

Here, the Missouri Supreme Court conducted a proportionality review of Deck's death sentence under Mo. Rev. Stat. § 565.035.3(3), which requires that court to determine "[w]hether the sentence of death is excessive or

disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." *See Deck III*, 303 S.W.3d at 550-53. In doing so, the supreme court considered previous cases in which a death sentence was imposed, *id.* at 552, rejecting Deck's argument that it must also consider factually similar cases that did not result in a death sentence. *Id.* at 551. The supreme court's rationale in this regard was based on established Missouri law as it existed at the time of Deck's sentence and appeal. *Id.* at 551-52.

In cases decided after *Deck III*, the Missouri Supreme Court held that the law with regard to proportionality review required consideration of death cases and cases that resulted in life imprisonment. *See State v. Davis*, 318 S.W.3d 618, 645 (Mo. banc 2010); *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. banc 2010). In *State v. Nunley*, 341 S.W.3d 611 (Mo. banc 2011), the supreme court specifically held that this new construction of the State statute was not to be applied retroactively. *Id.* at 624. In circumstances such as Deck's, therefore, proportionality reviews that considered only cases that resulted in a death sentence were left undisturbed.

Deck argues here that the Missouri Supreme Court's failure to conduct a proportionality review that included consideration of similar cases resulting in a life sentence violated his right to due process and, further, that the failure of the supreme court to retroactively apply the new proportionality rule announced in *Davis* and *Dorsey* permits his death sentence to stand in contravention of the law,

which likewise deprives him of due process. Both claims fail.

First, challenges to the manner in which proportionality review was conducted or to the State court's interpretation of § 565.035 are beyond the scope of habeas review. *Kilgore*, 124 F.3d at 996; *Sweet*, 125 F.3d at 1159; *LaRette*, 44 F.3d 681, 688 (8th Cir. 1995); *Foster v. Delo*, 39 F.3d 873, 882 (8th Cir. 1994); *Murray v. Delo*, 34 F.3d 1367, 1377 (8th Cir. 1994). Where the Missouri Supreme Court addressed and decided the proportionality issue in its opinion, the Constitution does not require me "to look behind [the State court's proportionality] conclusion to consider the manner in which the court conducted its review or whether the court misinterpreted the Missouri statute." *Sweet*, 125 F.3d at 1158 (citing *Walton v. Arizona*, 497 U.S. 639, 656 (1990)); *see also Tokar v. Bowersox*, 198 F.3d 1039, 1051 (8th Cir.1999); *Ramsey v. Bowersox*, 149 F.3d 749, 754 (8th Cir.1998); *Zeitvogel v. Delo*, 84 F.3d 276, 283 (8th Cir.1996). In this case, the Missouri Supreme Court performed its proportionality review, citing cases to which it compared Deck's and found that his death sentence was not disproportionate. Therefore, I may not further review Deck's proportionality claim. *Middleton*, 498 F.3d at 821-22; *Foster*, 39 F.3d at 882; *Basile v. Bowersox*, 125 F. Supp. 2d 930, 976 (E.D. Mo. 1999); *Tokar v. Bowersox*, 1 F. Supp. 2d 986, 1012 (E.D. Mo. 1998).

To the extent Deck argues that the failure of the Missouri Supreme Court to

retroactively apply a new rule of law regarding proportionality review deprives him of his right to due process, the Eighth Circuit squarely rejected this argument in *Clay v. Bowersox*, 628 F.3d 996 (8th Cir. 2011):

> The Supreme Court in *Wainwright v. Stone*, 414 U.S. 21 (1973) (per curiam), held that a state supreme court is not constitutionally compelled to make retroactive its new construction of a state statute, *id.* at 23-24, explaining that "'[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.'" *Id.* at 24 (quoting *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932)). . . . Clay therefore has not made a substantial showing that the decision of the Supreme Court of Missouri to apply its new construction of Mo. Rev. Stat. § 565.035.3 prospectively only is an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

Id. at 998 (internal parallel citations omitted).

Accordingly, the claim raised in Ground 17 of the petition will be denied.

G. Ground 18 – Assistance of Trial Counsel / Jury Selection

Deck contends that he received ineffective assistance of trial counsel when counsel failed to inquire of prospective jurors whether they were willing to meaningfully consider mitigation evidence of childhood experience proffered by the defense. Deck raised this claim in his motion for post-conviction relief and on appeal of the denial of the motion. Applying the familiar *Strickland* analysis, the Missouri Supreme Court found that counsel's performance was not deficient and

thus that Deck did not receive ineffective assistance of counsel. For the following reasons, this decision was neither contrary to nor an unreasonable application of established Supreme Court precedent. Nor was it based on an unreasonable determination of the facts in light of the evidence presented.

Deck complains that trial counsel failed to adequately examine the potential for juror bias by failing to ask the venire whether they could look at his childhood experience and give it meaningful consideration as a reason to vote against the death penalty. In reviewing this claim, the Missouri Supreme Court found that a question asking potential jurors whether they could consider this evidence "as a reason to vote against the death penalty" effectively asks the venire to commit to the weight they would give certain mitigating evidence before actually hearing it. *Deck IV*, 381 S.W.3d at 344-45. After thoroughly setting out Supreme Court precedent establishing what evidence a juror must consider when determining whether to impose the death penalty,[22] the court determined that asking potential jurors how certain evidence would affect their decision would be improper. *Id.* This determination was reasonable. *See, e.g.*, *United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir. 1998)[23] (improper to ask jurors to speculate or precommit on

[22] *See Deck IV*, 381 S.W.3d at 344 (citing *Morgan v. Illinois*, 504 U.S. 719 (1992); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

[23] *Overruled in part on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).

how they might vote based on any particular facts) (citing *Morgan v. Illinois*, 504 U.S. 719 (1992)).

The Missouri Supreme Court further found that, to the extent Deck was concerned about potential juror bias against the introduction of childhood evidence generally, the issue was adequately explored by the prosecutor whose question did not ask the jurors to commit to the weight they would accord such evidence:

> And I guess the question I want to ask you is that you'll hear – I anticipate you'll hear some evidence concerning [Movant]'s childhood, his upbringing.
>
> Is there anybody here, that if you start hearing evidence about troubled childhoods, things like that, it's going to [a]ffect your ability to be fair in this case, one way or the other?

Deck IV, 381 S.W.3d at 345 (alteration in *Deck IV*).

Given that the matter of potential juror bias on the basis of childhood evidence was adequately explored during voir dire through the questions posed by the prosecutor, and that the question proffered by Deck would have improperly asked the venire members to commit to the weight given such evidence, the State court found that the failure of trial counsel to pose this improper question did not render their performance deficient. *Deck IV*, 381 S.W.3d at 345. This is not an unreasonable application of nor contrary to established Supreme Court precedent. Further, absent evidence that a biased juror was actually seated, a claim that counsel was ineffective during voir dire necessarily fails. *See Sanders v. Norris*,

529 F.3d 787 (8th Cir. 2008); *Singleton v. Lockhart*, 871 F.2d 1395, 1400 (8th Cir. 1989) (citing *Strickland*, 466 U.S. at 694).

Deck argues that the Missouri Supreme Court unreasonably determined the facts as they applied to his claim because the question he proffered that trial counsel should have posed to the venire panel did not require the jurors to agree not to vote against the death penalty because of childhood experiences, but only that they consider evidence of such experiences. This argument is belied by the record. In both his post-conviction motion and on appeal of its denial, Deck argued that his trial counsel should have asked the venire if they could give meaningful consideration to Deck's childhood experience "as a reason to vote against the death penalty." (*See* Resp. Exh. QQ at 92; Exh. VV at 39.) The Missouri Supreme Court's determination that this question would have required jurors to commit to how they would consider certain evidence is not an unreasonable interpretation of the question as it was proffered by post-conviction counsel. Deck's contention otherwise is without.

The claim raised in Ground 18 will be denied.

H. Ground 19 – Assistance of Trial Counsel / Mitigation Witnesses

In this ground for relief, Deck claims that trial counsel was ineffective for failing to investigate and present testimony at trial from numerous witnesses, and specifically, Latisha Deck, Rita Deck, Elvina Deck, Michael Johnson, Stacy-

Tesreau-Bryant, Wilma Laird, Carol Miserocchi, Arturo Miserocchi, Tonia Cummings, and David L. Hood.[24] Deck raised this claim in his post-conviction motion and on appeal of the denial of the motion. The Missouri Supreme Court addressed the merits of the claim and denied relief.

As summarized above, Deck underwent a third penalty-phase trial in September 2008 upon remand from the United States Supreme Court. At this trial, counsel presented live testimony from a child development expert and from a psychiatrist, as well as the videotaped depositions of Mike Deck and Mary Banks, and the transcribed depositions of Major Puckett and Beverly Dulinski. *See Deck IV*, 381 S.W.3d at 346-49. The experts testified to their opinions that Deck "suffered an 'extreme case of a horrendous childhood' because he moved 22 times in 21 years, along with the abuse, neglect, and lack of guidance"; and "that [Deck's] childhood was similar to one of the 'most extreme cases of child abuse ever described.'" *Id.* at 348.

At the post-conviction hearing, trial counsel testified to their preparation, investigation, and strategies leading up to and during the third penalty-phase trial. Specifically, counsel testified that they talked to a lot of people during their investigation, which was much like finding "needles in haystacks" (Resp. Exh. UU

[24] As discussed above at Part VI.C.1, this claim is procedurally defaulted to the extent it contends that Ed Kemp should have been called to testify.

at 136-37, 245), and that they determined not to call witnesses who would provide only cumulative evidence or who now appeared to be hostile to the defense. Counsel also testified that some witnesses were no longer available to testify or could not be located. In addition, counsel expressed concern that some family members appeared to be more concerned about making themselves look good rather than testifying to Deck's bad childhood. (*See generally id.* at 113-46, 178-94, 241-53.) Counsel therefore made the decision that evidence of Deck's abusive and neglect-filled childhood would come in through the testimony of expert witnesses. (*Id.* at 247-48.)

Against this backdrop, I now turn to the specific witnesses Deck claims counsel should have called to testify at his final penalty-phase trial.

Latisha Deck, Elvina Deck, Wilma Laird, and Rita Deck

The Missouri Supreme Court examined counsel's reasons for not presenting live testimony from these witnesses, including that they would have provided only cumulative testimony, were uncooperative, could not be located, were of questionable competence, or would have undermined counsel's strategy to emphasize that Deck was a victim of horrible parenting. The court then determined that counsel's resulting decision "to tell the story of [Deck's] childhood through experts rather than presenting a piecemeal picture of his childhood" through this live witness testimony was an exercise of reasonable trial strategy

from which Deck was not prejudiced. *Deck IV*, 381 S.W.3d at 349-52.

A presumption exists that counsel's conduct "might be considered sound trial strategy." *Strickland*, 466 U.S. at 688. "[A] reasoned decision not to call a witness is a virtually unchallengeable decision of trial strategy." *Rodela-Aguilar*, 596 F.3d at 464 (internal citation and quotation marks omitted). As stated by the Missouri Supreme Court, counsel's decision not to call these witnesses was well-reasoned and a matter of sound trial strategy, thereby defeating Deck's claim that counsel rendered ineffective assistance in this regard. *See Winfield*, 460 F.3d at 1034 (failure to present cumulative evidence does not result in prejudice sufficient to give rise to a claim of ineffective assistance of counsel; *Walls*, 151 F.3d at 834 (not ineffective assistance in failing to call family members to testify when such testimony would have revealed their total lack of support). This decision is based on reasonable factual findings and application of clearly established federal law. Deck is therefore not entitled to habeas relief with respect to these uncalled witnesses.

Tonia Cummings

The Missouri Supreme Court found counsel's decision not to call Tonia Cummings as a witness to likewise be a matter of reasonable trial strategy. In addition to finding that Ms. Cummings' testimony would have been cumulative to some extent, the court found it reasonable that counsel did not want to put Deck's

codefendant on the stand "because counsel did not want to allow the prosecution to cross-examine her about the murders. Also, counsel was concerned that Tonia may be viewed as an additional victim because she was in prison for the crimes that she committed with [Deck]." *Deck IV*, 381 S.W.3d at 353.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "The decision not to call a witness is a 'virtually unchallengeable' decision of trial strategy[.]" *United States v. Staples*, 410 F.3d 484, 488 (8th Cir. 2005) (citations omitted); *see also Bowman v. Gammon*, 85 F.3d 1339, 1345 (8th Cir. 1996) (noting that under *Strickland*, "decisions related to trial strategy are virtually unchallengeable"). Counsel's strategy to not call Tonia Cummings was reasonable given the concern that her testimony might refocus the jurors' attention on the nature of the crimes themselves rather than portraying Deck in a way such that the jurors might spare his life. Deck has failed to overcome the presumption that, under the circumstances, counsel's challenged action could be considered sound trial strategy.

The Missouri Supreme Court's denial of this claim with respect to counsel's failure to call Tonia Cummings was not the result of an unreasonable

determination of the facts or contrary to clearly established federal law. Deck is not entitled to habeas relief with respect to this uncalled witness.

Michael Johnson, the Miserocchis, and D.L. Hood

Depositions taken in 2011 of the Miserocchis were admitted into evidence at the post-conviction motion hearing (Resp. Exh. TT at 38), and the post-conviction motion court summarized testimony therefrom:

> Mr. Miserocchi testified that lawyers did contact him three times on behalf of [Deck]. Mr. Miserocchi testified he did not want to come to court and has a certain level of sympathy for [Deck's] victims.
>
> Mrs. Miserocchi testified that she did not work outside the home and was responsible for supervising the foster children who stayed with her. She testified that [Deck] did not want to be in foster care and wanted to be back with his family. Mrs. Miserocchi did not remember any family member coming to visit [Deck]. [Deck] did speak about wanting to go home to his father. [Deck] never got close to the Miserocchi's.
>
> Mrs. Miserocchi also indicated an unwillingness to have testified at trial. She testified that Mr. Deck was reported to have acted sexually inappropriate and that [Deck] was not liked by the other children because he was "mouthy" and had a "smart mouth."

(Resp. Exh. RR at 288-89.) Trial counsel testified at the post-conviction hearing that they determined not to call the Miserocchis to testify at the third penalty-phase trial because the testimony they provided at earlier post-conviction hearings was tangential and the information could be better conveyed through the experts' testimony. (Resp. Exh. UU at 129.)

Michael Johnson testified at the post-conviction hearing that he was the son of Deck's stepmother, Marietta Deck, and lived with Deck and his siblings for one year when Deck was about eleven or twelve years old. Johnson testified to the neglect he and the Deck children experienced while living with Marietta and Deck's father, the physical abuse inflicted by Marietta, and verbal abuse from Johnson's grandfather during this time. Johnson also testified that the Deck children kept to themselves. Johnson testified that he would have been available to provide this testimony at the penalty-phase trial if he had been called. (Resp. Exh. RR at 98-107.) Trial counsel testified at the post-conviction hearing that they had no memory of any attempt to contact Mr. Johnson and likewise had no memory of whether they did or did not want to call him to testify at the penalty-phase trial. (*Id.* at 136-38.)

Finally, D.L. Hood – who was Kathy Deck's former boyfriend – provided deposition testimony that Kathy was crazy and had tried to stab Hood one night. Hood also testified that Kathy was promiscuous and that she had told him that she had taken her children to the welfare office and left them on the steps. *Deck IV*, 381 S.W.3d at 349. Trial counsel testified at the post-conviction motion hearing that they decided not to call D.L. Hood because his testimony was tangential and because he was not in Deck's life for that long a period of time. (Resp. Exh. RR at 296.)

In ruling on Deck's claims regarding these proffered witnesses, the post-conviction motion court found generally that the proposed testimony proffered by counsel was presented to the jury through the testimony of the experts and that the additional testimony was not compelling. With respect to Michael Johnson and the Miserocchis specifically, the court found that their proposed testimony was inconsequential. (Resp. Exh. RR at 302-03.)

The Missouri Supreme Court addressed the substance of the proposed testimony from these witnesses and found that the "testimony was so lacking in substance that it would not have had an impact on the jury in their decision." *Deck IV*, 381 S.W.3d at 349. "Movant failed to show that, had the additional mitigating witnesses been called to testify, their testimony would have outweighed the aggravating evidence so that there was a reasonable probability the jury would have voted for life." *Id.* Given that the proposed testimony "would not have been compelling," the supreme court found that the post-conviction motion court did not err in denying Deck's claim regarding counsel's failure to call these witnesses. *Id.*

This finding that Deck was not prejudiced by counsel's failure to call these witnesses is not contrary to nor an unreasonable application of clearly established federal law. Nor is it based upon an unreasonable determination of facts presented in the State court proceedings. The proffered testimony of the Miserocchis, Johnson, and Hood was cumulative to the expert testimony and deposition

testimony presented to the jury. This evidence "would barely have altered the sentencing profile presented[.]" *Strickland*, 466 U.S. at 699-700. Further, the proffered testimony would have been elicited from persons who had relationships with Deck for relatively short periods of time. In addition, some of the testimony that may have been adduced might have been harmful to Deck's case, especially that from the Miserocchis indicating that they felt sorry for Deck's victims and that Deck displayed inappropriate behavior toward their children.

Because Deck has failed to make the required showing that he was prejudiced by counsel's failure to call these witnesses at his third penalty-phase trial, his claim of ineffective assistance of counsel fails with regard to these witnesses. *Strickland*, 466 U.S. at 700.

Stacey Tesreau-Bryant

At the post-conviction hearing, Stacey Tesreau-Bryant testified that she previously had a relationship with Deck during which time he became close with her son. Bryant testified that Deck shared with her that he had been molested by his mother's boyfriends while he was growing up and had been raped in prison. Deck also shared with Bryant that he had no respect for his mother. Bryant testified that she would have provided this testimony at Deck's third penalty-phase trial if had she been subpoenaed and called to testify. (Resp. Exh. UU at 199-209.)

Trial counsel testified at the post-conviction hearing that their investigator

attempted to locate Bryant prior to the third penalty-phase trial but was met with hostility from Bryant's husband who did not want Bryant to become involved. No other attempts were made to locate Bryant. Counsel determined that, given the hostility exhibited by Bryant's husband and the tangential nature of Bryant's expected testimony, the information would be best presented to the jury through the testimony of the expert witnesses. (Resp. Exh. UU at 130-35, 249-50.)

In light of this evidence adduced at the post-conviction hearing, the Missouri Supreme Court determined that Deck had failed to show that, through reasonable investigation, counsel would have been able to locate Bryant and have her testify at the third penalty-phase trial. The supreme court noted that Bryant lived with her husband at the time, who "was always home," and that counsel would have had to contact her through her husband. Given that Bryant's husband was "totally against" her involvement in the case, it was not likely that counsel would have been successful in continued attempts to establish contact with her. *Deck IV*, 381 S.W.3d at 352. In addition, the supreme court found that Bryant's proffered testimony would have been cumulative to testimony that had been adduced at trial; and, further, that her testimony regarding Deck's rape in prison would have called attention to Deck's adult criminal life, which could have been more detrimental than beneficial to Deck's case. *Id.* A habeas petitioner does not show prejudice by counsel's decision to not present evidence potentially harmful to his case,

especially evidence highlighting the defendant's criminal history. *See Strickland*, 466 U.S. at 673, 700.

Accordingly, the Missouri Supreme Court's denial of this claim with respect to counsel's failure to call Stacey Tesreau-Bryant was not the result of an unreasonable determination of the facts or contrary to clearly established federal law. Deck is not entitled to habeas relief with respect to this uncalled witness.

I. Ground 21 – Assistance of Trial Counsel / Failure to Call Neuropsychologist

A convicted defendant's right to effective assistance of counsel extends to mitigating evidence in the context of capital cases. Convicted capital defendants have a constitutionally protected right to provide the jury with "mitigating evidence that [their] trial counsel either failed to discover or failed to offer." *Williams*, 529 U.S. at 393. Where a habeas petitioner claims that his trial counsel conducted an inadequate investigation into potential evidence, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

Here, Deck claims that despite trial counsel's awareness that he had had a number of head injuries, had used illegal drugs, and possibly experienced trauma at birth, they did not request a neuropsychological evaluation that could have developed evidence of brain trauma, which could have then been presented as

mitigating evidence at his final penalty-phase trial. In denying Deck's claim that this constituted ineffective assistance of counsel, the Missouri Supreme Court found that Deck could not show that he was prejudiced by counsel's failure to seek a neuropsychological evaluation because Deck had failed to establish that such an evaluation would have shown that he suffered a brain injury so significant that the jury would have voted for life instead of death. For the following reasons, this conclusion was not the result of an unreasonable determination of the facts; nor was it contrary to or an unreasonable application of clearly established federal law. The claim will therefore be denied.

The Missouri Supreme Court determined that Deck failed to establish that he was prejudiced by counsel's conduct. To establish prejudice for counsel's failure to pursue or present evidence of a neuropsychological evaluation, Deck must establish a "reasonable probability that a competent attorney, aware of the available mitigating evidence would have introduced it at sentencing, and that had the jury been confronted with this mitigating evidence, there is a reasonable probability that it would have returned with a different sentence." *Sinisterra v. United States*, 600 F.3d 900, 906 (8th Cir. 2010) (quoting *Wong v. Belmontes*, 558 U.S. 15, 19-20 (2009)). The burden of showing prejudice here is twofold. *See Ringo v. Roper*, 472 F.3d 1001, 1006 (8th Cir. 2007). First, Deck would have to show that it was reasonably probable that if counsel had retained a

neuropsychologist, the neuropsychologist would have diagnosed him as having a brain injury. If Deck overcomes this initial burden, he would have to establish that there is a reasonable probability that the brain injury evidence would have altered the outcome of the penalty phase of the trial. Then – because I review this claim in the habeas context – Deck would have to show that the State court's conclusion that he was not prejudiced involved an unreasonable application of clearly established federal law as determined by the Supreme Court. *Ringo*, 472 F.3d at 1006; 28 U.S.C. § 2254(d).

At Deck's post-conviction motion hearing, neuropsychologist Michael Gelbort testified that he conducted a neuropsychological evaluation of Deck in August 2010. Dr. Gelbort testified that Deck informed him during this testing of historical events that could be important to his neuropsychological functioning – such as hitting his head on rocks while swimming, being held under water while trying to help a friend who was drowning, and having been born by caesarean section – but that these descriptions were vague and Deck presented nothing that "was clear-cut." (Resp. Exh. TT at 56-58.) He also testified that evidence of drug use significant for brain dysfunction was, "for the most part, absent." (*Id.* at 63.)

Dr. Gelbort testified that he administered to Deck a battery of intelligence and cognitive-based tests, none of which showed Deck to suffer significant or even moderate impairments. Instead, Deck consistently scored within the normal range,

albeit in the low average to average range. (*See* Resp. Exh. TT at 105.) To the extent Deck's lower scores were related, Dr. Gelbort testified that they tended to show weakness in focus, attention, and concentration, and in his ability to accurately account for information. (*Id.* at 106, 115.) Dr. Gelbort testified, however, that on one particular test – the category test – Deck scored in the borderline defective range, which was "right on the border between someone who is with 95 percent assurance coming from a population that doesn't have normal brain function." (*Id.* at 106.) This test measured Deck's ability to see connections between things and to take information learned from one circumstance and apply it to similar circumstances. (*Id.* at 107-08.)

Dr. Gelbort testified that Deck's history and test results would support a finding that Deck had cognitive dysfunction, but that – if he had the same capacity at the time of the murders as at the time of testing – he likely would have had the capacity to understand right from wrong. (Resp. Exh. TT at 141.) Dr. Gelbort further testified that, while Deck was less able than a normal person to make an adept, insightful, and reasonable decision, he could "of course make a decision" to commit or not to commit murder. (*Id.* at 143.)

Trial counsel testified at the post-conviction hearing that their review of Dr. Gelbort's report did not lead them to conclude that they should have pursued neuropsychological evaluation for Deck's third penalty-phase trial. Counsel

specifically testified that information from Dr. Gelbort would have benefited the prosecution in the case, given that testing showed Deck to function for the most part in the average range. To the extent the testing showed a cognitive deficit demonstrating some impaired judgment, counsel testified that the facts brought out in testing that led to that conclusion would have been problematic for Deck at trial. (Resp. Exh. UU at 86-92.)

Assuming without deciding that Deck could establish that testing would have shown him to have a cognitive deficit caused by a brain injury, he nevertheless cannot show a reasonable probability that this evidence would have altered the outcome of his penalty-phase trial. Deck's performance on the majority of Dr. Gelbort's tests showed him to function both intellectually and cognitively in the low average to average range. To the extent one subset test and the connection between Deck's lower scores showed him to have difficulty with focus and correlating information, leading to a conclusion that he had impaired judgment, Dr. Gelbort nevertheless opined that Deck had the capacity to understand right from wrong at the time of the murders and could "of course" decide whether or not to commit murder. Indeed, a review of Dr. Gelbort's hearing testimony in its entirety supports trial counsel's trepidation that the facts brought out through this testing would be detrimental to Deck at the penalty-phase trial instead of benefitting him.

The Missouri Supreme Court found that counsel's thorough investigation

into Deck's childhood revealed no evidence of brain damage or impaired psychological functioning that would have led counsel to seek evidence from a neuropsychologist in the first place. The court went on to find, however, that even if evidence from a neuropsychologist had been obtained and presented at Deck's penalty-phase trial, Deck failed to show a reasonable probability that the jury would have voted for life instead of death. *Deck IV*, 381 S.W.3d at 354. For the reasons set out above, this conclusion was neither contrary to nor involved an unreasonable application of clearly established federal law as determined by the Supreme Court.

Accordingly, the claim raised in Ground 21 will be denied.

J. Ground 23(a) – Assistance of Trial Counsel / Failure to Object to Cross-Examination

As discussed above, Dr. Surratt testified as a mitigation witness at Deck's third penalty-phase trial and rendered an opinion – based upon interviews and her review of additional evidence – that Deck's childhood "was similar to one of the 'most extreme cases of child abuse ever described.'" *Deck IV*, 381 S.W.3d at 348. During cross-examination of Dr. Surratt, the prosecutor acknowledged that Dr. Surratt's testimony was intended to explain Deck's behavior. He then engaged in the following examination:

> PROSECUTOR: And wouldn't it be easy or helpful to explain his behavior, if you had asked him why did you put a gun against these

people's head and kill them?

DR. SURRATT: And it could have, yes.

PROSECUTOR: It could have, but it also could have been pretty detrimental to Mr. Deck, if he had said, the reason I killed them is *because I'm a no-good s.o.b. and wanted them dead*, because I didn't want to go to prison. That wouldn't be a very good answer for Mr. Deck, would it?

DR. SURRATT: It would have went along with my findings of how he responds to things; is it good or bad, not for me to say, but it certainly would have been fitting.

PROSECUTOR: He wanting these people dead just because he wanted their money fits along with what you believe?

COUNSEL TUCCI: Objection; asked and answered.

THE COURT: Sustained; move on, please.

Id. at 354-55 (emphasis in *Deck IV*). Deck claims that trial counsel was ineffective when they failed to object to the prosecutor's reference to Deck as being a "no good s.o.b." and wanting the victims dead. The Missouri Supreme Court denied Deck's claim, finding that he had failed to overcome the presumption that a failure to object is a matter of trial strategy and, further, that Deck nevertheless was not prejudiced by the prosecutor's statement. For the following reasons, the supreme court's decision was neither contrary to nor an unreasonable application of clearly established federal law. Nor was it based on an unreasonable determination of facts. The claim will be denied.

Because I review Deck's claim of ineffective assistance of counsel in the habeas context, I may not apply the *Strickland* analysis as if I were addressing the claim in the first instance. In order to succeed on this habeas claim under § 2254(d)(1), therefore, it is not enough for Deck to convince me that, in my independent judgment, the State court applied *Strickland* incorrectly. Rather, he must show that that court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Hoon v. Iowa*, 313 F.3d 1058, 1063 (8th Cir. 2002); *see also Bell v. Cone*, 535 U.S. 685, 698-99 (2002). For the following reasons, Deck is unable to do so here.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. Because of the inherent difficulties in assessing an attorney's performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). To establish prejudice on account of counsel's performance during the penalty phase of this capital case, Deck must show that in the absence of counsel's error, the jury would not have sentenced him to death. *Cole v. Roper*, 579 F. Supp. 2d 1246, 1263 (E.D. Mo. 2008), *aff'd*, 623 F.3d 1183 (8th Cir. 2010).

In its decision, the Missouri Supreme Court acknowledged that the prosecutor's challenged remark was improper and that trial counsel could not articulate at the post-conviction hearing their strategy for not objecting to the statement. The supreme court noted that one of Deck's attorneys, attorney Reynolds, suggested at the hearing that an objection may not have been made so as not to highlight the issue for the jury, and the court found this to be reasonable trial strategy. *Deck IV*, 381 S.W.3d at 357. Although Deck argues that the court could not have reasonably found this to be a strategy given that counsel did not articulate any specific strategy at the post-conviction hearing, "[t]rial counsel's lack of a strategic reason for failing to object is irrelevant" to my inquiry here, given that Deck suffered no prejudice from this failure. *Cole*, 579 F. Supp. 2d at 1264.

The Missouri Supreme Court noted that the challenged statement was brief and that further questioning in this vein was "shut down" by counsel's sustained objection, which avoided the compounding effect of egregious errors. As noted earlier in this opinion, the jury had before it live testimony of fifteen witnesses, deposition testimony from three additional witnesses, expert testimony, and seventy exhibits. The trial record spanned over 450 pages. In view of this, even if counsel's failure to object to the prosecutor's improper remark was unreasonable, Deck has failed to demonstrate that this brief and isolated remark had a substantial and injurious effect on the trial as a whole, or greatly influenced the jury to the

extent that it returned a sentence of death because of it. *See Nave v. Delo*, 62 F.3d 1024, 1027 (8th Cir. 1995); *Schneider v. Delo*, 890 F. Supp. 791, 831 (E.D. Mo. 1995), *aff'd*, 85 F.3d 335 (8th Cir. 1996).

Accordingly, the Missouri Supreme Court did not misapply *Strickland* when it found that Deck could not establish a claim of ineffective assistance of counsel given his failure to show that he suffered prejudice as a result of counsel's failure to object to the prosecutor's improper remark. Because I can grant relief on this claim only if the Missouri court applied *Strickland* unreasonably, and it did not, the claim raised in Ground 23(a) will be denied. *See Nance v. Norris*, 392 F.3d 284, 294 (8th Cir. 2004).

K. Ground 24(a) – Assistance of Trial Counsel / Failure to Object to Closing Argument

For similar reasons set out above with respect to Ground 23(a), this claim of ineffective assistance of counsel fails.

Deck was convicted in 1985 of aiding an escape from prison. His sentence and judgment for this conviction was admitted at the third penalty-phase trial; no other evidence relating to this crime was admitted. During closing argument, the prosecutor told the jury that it could consider "all [Deck's] prior escapes" and urged the jury not to impose a life sentence, arguing that Deck knew how to escape and, further, had helped others escape – "people that were in for the rest of their

lives." *Deck IV*, 381 S.W.3d at 357. Deck's counsel objected on the bases that this prior conviction was not a noticed aggravator and that the argument was irrelevant. Both objections were overruled. Deck now claims that his counsel was ineffective because he should have argued that the prosecutor's argument misstated the evidence, implied to the jury that the prosecutor was aware of additional facts regarding multiple escapes, and improperly injected fear into the jury's considerations.

In reviewing this claim on post-conviction appeal, the Missouri Supreme Court determined that Deck could not show that he was prejudiced by the prosecutor's misstatements. The court examined the prosecutor's challenged statements "in the context of the entire record" and determined that the prosecutor's simple misstatement of the plural form of "escape" did not affect the jury's sentencing decision. To the extent the prosecutor addressed the sentence length of the persons whom Deck aided in their escape, the supreme court referred to the findings of the post-conviction motion court – which found that the import of this part of the prosecutor's argument was that Deck knew how to escape, thereby making sentence length of those whom he helped escape inconsequential and insignificant (Resp. Exh. RR at 306) – and, again viewing the statement in the context of the entire record, determined the motion court not to have erred in its conclusion. The supreme court therefore determined that Deck failed to show that,

had counsel indeed pursued additional objections to the prosecutor's misstatements, the result of Deck's sentencing proceeding would have been different. *Deck IV*, 381 S.W.3d at 358.

The Missouri Supreme Court reviewed the prosecutor's challenged statements in the context of the entire trial – which, as I have repeatedly noted, contained extensive evidence – and found that there was no reasonable probability that the jury would have returned a different verdict if counsel had made additional objections to the statements. In reaching this conclusion that Deck did not show prejudice under *Strickland*, the court did not misapply *Strickland* nor apply it unreasonably. Accordingly, regardless of any doubt that may exist with respect to whether counsel lodged the appropriate objections to the prosecutor's statements made during closing argument, this habeas claim of ineffective assistance of counsel must be denied. *Nance*, 392 F.3d at 294.

L. Ground 25 – Assistance of Trial Counsel / Jury Questionnaires

Jurors G.H. and R.E. sat on the jury at the third penalty-phase trial that voted to sentence Deck to death. In her juror questionnaire, G.H. reported that she was married to a Missouri State park ranger, and currently worked as an inventory control specialist at a retail store. (Traverse, Exh. 6, ECF #67-6.) In R.E.'s questionnaire, he answered "yes" to the question "Are you related to or close friends with any law enforcement officer?" (*Id.*, Exh. 7, ECF #67-7.) Deck claims

that his trial counsel was ineffective for not asking these jurors to elaborate on these answers during voir dire examination, "with an eye to a challenge for cause or peremptory strike." (Amd. Petn., ECF #30 at 95.) Deck's claim fails.

Juror G.H. – Juror Number 65

Deck first argues that trial counsel should have questioned G.H. about her employment as an inventory control specialist. He argues that this position likely involves concerns with theft and that, because Deck had prior convictions for theft, G.H.'s response to the question regarding her employment deserved further inquiry. Other than claiming that he could have considered this information when determining strikes, Deck does not present any argument or show how he was prejudiced by counsel's failure to question G.H. in this manner. Regardless, I have reviewed the transcript of the entire voir dire examination of all the venire members and find that counsel did not act unreasonably by not specifically questioning G.H. about her employment.

After general voir dire examination, the venire panel was divided into four groups for further examination. G.H. was in the third group. During examination of the first group, Deck's counsel began asking the venire members specific questions regarding their employment. (Resp. Exh. KK at 298-300.) The court admonished counsel and instructed him not to continue: "I don't see how going into the occupation or employment is going to assist in any way, shape, or form in

answering the questions that you and the state and the Court are going to have to answer when it comes time to striking any additional people." (*Id.* at 302.) With this admonishment, it cannot be said that counsel acted unreasonably when he did not ask specific questions of G.H. regarding her employment when the third venire group underwent voir dire examination. *Cf. Moore v. Haviland*, 531 F.3d 393, 403 (6th Cir. 2008) (unreasonable to require litigant to refuse court's orders in order to preserve claim).

To the extent it may be argued that counsel should have asked these employment questions during the general voir dire examination, my review of that examination shows G.H. not to have exhibited any evidence of bias or prejudice with respect to the issue of theft. Indeed, she testified during general examination that her brother was currently serving a prison sentence for a crime that involved stealing, but that she could put aside that experience and decide Deck's case solely on the facts presented in court. (Resp. Exh. KK at 192-93.) Deck has presented no evidence or argument, and none appears in the record, that G.H. acted with actual or implied bias during her service on the jury. Because Deck cannot show that G.H.'s presence on the jury prejudiced him, he cannot prevail on his ineffective assistance claim. *Sanders*, 529 F.3d at 794.

Deck also argues that counsel "asked no questions" of G.H. regarding her questionnaire answer that her husband was a law enforcement officer, that is, a

park ranger; and, further, did not follow up on her voir dire answer that he "worked for the state parks." (Amd. Petn., ECF #30 at 95.) My review of the voir dire examination shows Deck's claim to be without merit:

> MR. TUCCI: . . . Has anybody ever been married to a police officer? Juror Number 65, you are – are you currently married to a police officer?
>
> VENIREPERSON NUMBER 65: Yes, he first started with the police department in Curreyville, and the Sheriff's Department, and then he went to the State.
>
> MR. TUCCI: Now he's a park ranger?
>
> VENIREPERSON NUMBER 65: Yes. He's been in law enforcement for 20 years.
>
> MR. TUCCI: For over 20?
>
> VENIREPERSON NUMBER 65: Over 20.

(Resp. Exh. KK at 215.) Deck's claim that counsel failed to ask G.H. about her husband's employment as a law enforcement officer is belied by the record. I need not discuss this claim further.

Juror R.E. – Juror Number 60[25]

During the general voir dire examination, the panel was asked if they or a close family member or friend was involved in law enforcement. (Resp. Exh. KK

[25] Although Deck states that R.E. was Juror Number 9 on the venire panel (Amd. Petn., ECF #30 at 95), my review of the record shows that R.E. was actually Number 60. He was Number 9 on the petit jury that sat during the penalty-phase trial. (Resp. Exh. KK at 459-60.)

at 157-58.) Although R.E. responded "yes" to the law enforcement question on the juror questionnaire, he did not respond to the question during voir dire. Each venire member who did answer "yes" during voir dire was then asked whether this circumstance would affect their ability to be fair in the case and whether they would be able to decide the case based solely on the evidence adduced at trial. (*Id.* at 158-69.) Deck claims that his counsel should have developed the issue of R.E.'s relationship with law enforcement during voir dire, "with an eye to a challenge for cause or a peremptory strike." (Amd. Petn., ECF #30 at 95.)

My review of the voir dire examination shows R.E. to have responded directly to only one question, that being one asking about military service. R.E. responded that he was in the Navy for eight years and that nothing about his experience would make him unable to deliberate on the facts as heard only in court. (Resp. Exh. KK at 222-23.)

At the end of the prosecutor's examination, the entire panel was asked if anyone felt the need to respond to a question that was asked earlier. R.E. did not respond. (Resp. Exh. KK at 200-01.) At the conclusion of defense counsel's examination, the panel was asked whether there were any issues – either already addressed or not – that would "enter into [their] thinking" if they were to consider the case. R.E. did not respond. (*Id.* at 239-40.)

As with G.H., my review of the entire voir dire examination shows that R.E.

did not exhibit any evidence of bias or prejudice, or raise any concern regarding his ability to consider the case on only the facts presented in court. Deck has presented no evidence or argument, and none appears in the record, that R.E. acted with actual or implied bias during his service on the jury. Because Deck cannot show that R.E.'s presence on the jury prejudiced him, he cannot prevail on his ineffective assistance claim. *Sanders*, 529 F.3d at 794.

The claim raised in Ground 25 will be denied.

VIII. Claims Granted – Unconstitutional Delay

The murders of James and Zelda Long occurred on July 8, 1996, and Deck was arrested that same date. Deck was tried for the murders in February 1998 and was sentenced to death. The sentence was reversed, and a second penalty-phase trial was held in 2003, which resulted in another death sentence. The United States Supreme Court reversed that sentence in 2005. Deck's third and final penalty-phase trial was held in September 2008, and Deck was again sentenced to death for the murders.

In Ground 31 of his petition, Deck claims that the inordinate delay between his conviction in February 1998 and his final sentencing trial in September 2008 caused his mitigation evidence to be unavailable on account of its loss or destruction and because of "witness fatigue," thereby depriving him of his constitutional right to adequately present mitigating evidence to the jury at his third

penalty-phase trial. Deck argues that because this delay was not attributable to him, his sentencing proceeding was fundamentally unfair and thus violated his rights to due process and to be free from the infliction of cruel and unusual punishment. In Ground 32(a), Deck claims that trial counsel was ineffective for failing to bring this due process/Eighth Amendment claim in State court. For the following reasons, I will grant habeas relief on these claims.

A. Background

The Long murders occurred in July 1996, and Deck's trial for the murders was held in February 1998, after which he was sentenced to death in accordance with the jury's verdicts. The sentence was reversed in February 2002 after the Missouri Supreme Court found that Deck received ineffective assistance of counsel during the penalty phase of the trial. Deck's second penalty-phase trial was held fourteen months later – in April 2003 – and he was again sentenced to death. In May 2005, the United States Supreme Court reversed this death sentence, finding that Deck's visible shackling during the second penalty-phase trial violated his constitutional right to due process. On August 30, 2005, the matter was remanded back to the circuit court for a new penalty-phase trial. (Resp. Exh. GG at 67-68.) Three years later, in September 2008, Deck's third penalty-phase trial began. Over ten years had passed since Deck's conviction, and over twelve years had passed since the Long murders.

After the case was remanded to the circuit court in 2005, defense counsel filed various motions, including motions to change venue, to produce Brady material, for discovery, and for imposition of a life sentence under Missouri law. The motions were filed in November 2005, and they were set to be heard on the circuit court's February 2006 docket. At that docket, the court set the trial for September 12, 2006. (Resp. Exh. GG at 118.) The Jefferson County Prosecuting Attorney's Office represented the State.

On March 15, 2006, the State sought a three-day continuance of the trial because of the unavailability of one of its witnesses. This extension was granted. (Resp. Exh. GG at 124.) On March 24, 2006, for reasons not stated, the State requested another trial continuance to December 2006, to which Deck objected. The court continued the trial to March 27, 2007. (*Id.* at 126.)

In August 2006, Deck's attorneys were permitted to withdraw because of a conflict of interest. New counsel, Stephen Reynolds and John Tucci, entered and they remained Deck's trial counsel through the remainder of the penalty-phase proceedings. On January 9, 2007, counsel requested that the March 2007 trial be continued, arguing, *inter alia*, that they were in the process of interviewing and securing mitigation witnesses from the previous penalty-phase trials; were attempting to obtain additional mitigation evidence and locate additional witnesses; and that recently-secured expert Dr. Surratt had been unable to review the case.

Counsel averred that Dr. Surratt would be available for trial in July or August 2007. (Resp. Exh. GG at 157-60.) The court continued the trial to October 30, 2007. (*Id.* at 170.)

Trial counsel filed additional pretrial motions in September 2007, some of which emphasized the constitutional significance of mitigation evidence and its effect on the jury's determination of life versus death. (*See, e.g.*, Resp. Exh. HH at 220-30, *et seq.*). Among these motions were requests to admit prior videotaped and/or deposition testimony of some mitigation witnesses for the reason that they were unavailable to testify because of illness and/or were located out of state. In the latter instance, counsel averred that they had made efforts to contact a witness at her last known location in Utah but were unsuccessful. (*Id.* at 251.)

In October 2007, Deck's counsel notified the trial court that they had recently become aware that the niece of James and Zelda Long was an employee in the Victims Services Unit of the Jefferson County Prosecuting Attorney's Office and was involved in a meeting between the prosecuting attorney and the Long family regarding a proposed disposition proffered by Deck and his counsel. Counsel also informed the court that after this meeting, the niece was reported to have told other persons in the courthouse about the outcome of the meeting, and specifically, that the proffer was rejected. (Resp. Exh. HH at 330-33.) On October 19, 2007, the court disqualified the Jefferson County Prosecutor's Office for

conflict of interest. (Resp. Exh. II at 460.) After the Missouri Attorney General's Office entered for the State in December, the court reset the trial to September 15, 2008 (*see* Resp. Exh. GG at 51; Exh. II at 463), which is when Deck's third penalty-phase trial began.

The only live testimony Deck's counsel presented at trial was from a child development expert and a psychiatrist. Counsel also presented videotaped depositions of Deck's brother and aunt, and they read into the record depositions of another aunt and of a foster parent. The State presented live testimony from thirteen witnesses: four relatives of the Longs, eight investigating law enforcement officers, and the medical examiner. After deliberating for three hours, the jury returned its verdict for death. The Missouri Supreme Court affirmed the sentence on direct appeal, and the United States Supreme Court denied certiorari.

In May 2010, Deck filed his pro se motion to vacate, set aside, or correct his sentence under Missouri Supreme Court Rule 29.15, raising three claims for relief: 1) that trial counsel was ineffective for failing to adduce all mitigating evidence; 2) that trial counsel was ineffective for providing wrong advice regarding his decision to testify; and 3) that his sentence violates his Eighth Amendment right to be free from cruel and unusual punishment. (Resp. Exh. QQ at 6.) Appointed counsel thereafter filed an amended post-conviction motion, raising seven claims for relief, six of which challenged the assistance of trial counsel. Three of those claims

addressed counsel's presentation of mitigation evidence, with two claims specifically alleging that trial counsel failed to call additional mitigation witnesses and failed to present additional mitigation record evidence. Post-conviction counsel argued that trial counsel should have but failed to call several mitigation witnesses at the third penalty-phase trial, averring that these witnesses were all available and would have testified if subpoenaed. Trial counsel's testimony at the post-conviction hearing, however, revealed a different story.

At the first penalty-phase trial in 1998, Deck presented the live testimony of four witnesses: Rita Deck, Beverly Dulinski, Major Puckett, and Michael Deck. The Missouri Supreme Court found this mitigation evidence to be "substantial."[26] At the second penalty-phase trial in 2003, Deck presented the live testimony of Rita Deck, Beverly Dulinski, Elvina Deck, Major Puckett, and Dr. Surratt. Deck also presented the video deposition of Michael Deck at the second trial. Prior to the third penalty-phase trial in 2008, trial counsel attempted to contact some of these witnesses and others to have them testify. Attorney Tucci testified at the post-conviction hearing that he thought it was "absolutely" important to have some of Deck's family members testify at trial – to be able to "look at the jury, and say, please spare his life. He is of value to me." (Resp. Exh. UU at 142-43.) He

[26] Indeed, the court held that with this substantial mitigating evidence, there was a reasonable probability that the result of the proceeding would have been different if the jury had been given proper penalty-phase instructions. *Deck II*, 68 S.W.3d at 431.

further testified, however, that because of changed circumstances given the passage of time, these persons could not be located or were no longer willing or able to participate. "[A] lot of time has passed between 2000 and 2006, 2007, whatever year it was or 2008. . . . [T]here were so few and so scarce of live family members who would come and say anything on Carman's behalf, that we would try to grasp anybody that we could." (*See id.* at 118-23.)

Tucci testified that in determining their strategy as to what witnesses and evidence to present at trial, he and co-counsel had to consider what was going on with these potential witnesses "immediately prior to trial," because "some people had changed." (Resp. Exh. UU at 181-82.) For instance, Tucci testified that while Rita Deck was cooperative and provided favorable testimony at the two earlier penalty-phase trials (*id.* at 118), she was "now doing a 180" with respect to the third trial. (*Id.* at 181-82.) Rita's husband, Pete, was too sick to testify and Rita sought to have him released from his subpoena. (*Id.* at 114-16.) Counsel wanted to talk to Elvina Deck to determine where she stood "at that particular time" – especially "given the passage of time, and seeing how Rita Deck had changed her opinion" – but she could not be located by their investigator. (Resp. Exh. UU at 121-23.) While looking for Elvina, however, the investigator learned that another potential witness, namely Norman Deck, had died. (*Id.*)

Tucci testified that if they could have found any person who could have

helped to spare Deck's life, they would have presented them at trial. "This guy's life is at stake, and anything that we had that would have helped, you know, held water, and that, you know, would have served as just one basis, one basis to spare Carman Deck's life, that person would have been presented." (Resp. Exh. UU at 193.) But he recognized during Deck's earlier post-conviction proceedings back in 2000 and 2003 that "if this case ever went back to trial, these people are going to become as uncooperative at trial as they were like wood [sic] dogs." (*Id.* at 154.) As it turned out, Deck indeed had to go back to trial, and these people became uncooperative.

B. Discussion

At the time Deck's sentencing judgment became final, the law was clearly established that, in a capital case, a criminal defendant has a constitutionally protected right to provide the jury with mitigating evidence. *Williams*, 529 U.S. at 393. The Eighth Amendment prohibits the infliction of cruel and unusual punishment, which, in a capital case, means that while the death penalty may be the appropriate punishment in a specific case, it can only be imposed after adequate consideration of factors that might warrant mercy. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *California v. Brown*, 479 U.S. 538, 554 (1987). The presentation of mitigating evidence allows for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of

humankind . . . [which is] a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304. *See also Skipper v. South Carolina*, 476 U.S. 1 (1986). Accordingly, the sentencer must "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (emphasis in *Lockett*).

Deck claims here that the inordinate delay between his conviction in February 1998 and his final sentencing trial in September 2008 caused his mitigation evidence to be unavailable on account of its loss or destruction and because of "witness fatigue," thereby depriving him of his constitutional right to adequately present mitigating evidence to the jury at his third penalty-phase trial. Deck argues that because this delay was not attributable to him, his sentencing proceeding was fundamentally unfair and thus violated his rights to due process and to be free from the infliction of cruel and unusual punishment.

In *Betterman v. Montana*, the United States Supreme Court held that a criminal defendant's right to a speedy trial under the Sixth Amendment does not apply once he has been found guilty at trial or has pleaded guilty to criminal charges. The Sixth Amendment's speedy trial guarantee protects the accused from

arrest or indictment through trial, but not after a defendant has been convicted. 136 S. Ct. 1609, 1612 (2016). The Court recognized, however, that for inordinate delay in sentencing, a defendant may have recourse other than the Speedy Trial Clause of the Sixth Amendment, "including, in appropriate circumstances, tailored relief under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Id.* "After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair." *Id.* at 1617. "[D]ue process serves as a backstop against exorbitant delay" between conviction and sentence. *Id.*

The defendant in *Betterman* did not raise a due process challenge to the fourteen-month gap between his conviction and sentence, so the Supreme Court limited its specific holding to his Sixth Amendment challenge and expressed "no opinion on how he might fare under that more pliable [due process] standard." 136 S. Ct. at 1617-18 (citing *United States v. $8,850*, 461 U.S. 555, 562-565 (1983)). The Court noted, however, that considerations relevant to such a due process challenge "may include the length of and reasons for delay, the defendant's diligence in requesting expeditious sentencing, and prejudice." *Id.* at 1618 n.12. *See also $8,850*, 461 U.S. at 564-65 (factors to consider when assessing whether due process requirement of fairness has been satisfied in a particular case); *Barker v. Wingo*, 407 U.S. 514, 530 (1972). When viewed in the context of speedy trial

delay or delay in forfeiture proceedings, these factors are required to be considered together with all other relevant circumstances. *Barker*, 407 U.S. at 533. All factors are related. No one factor is outcome-determinative. *Id.* In considering Deck's claim that the delay between his conviction and final penalty-phase trial rendered his final sentencing proceeding fundamentally unfair, I will likewise review these factors together and take into consideration the other circumstances of the case.

Length of Delay

"[T]he overarching factor is the length of the delay," which the Supreme Court considers to be "a triggering mechanism" for the remainder of the due process analysis. *$8,850*, 461 U.S. at 565 (citing *Barker*). "Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case." *Id.* I find here that the ten-and-a-half-year delay between Deck's conviction and his final penalty-phase trial triggers the remainder of the due process analysis, especially given the negative implications such a delay could have on a capital defendant's constitutionally protected right to adequately provide the sentencing jury with mitigating evidence for its consideration in determining the appropriate sentence.

Reason for Delay

Regarding the reason for the delay, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. A deliberate attempt to interfere with the defense would weigh heavily against the government, and more neutral reasons such as negligence or an overcrowded docket should weigh less heavily. Even neutral reasons must be considered, however, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* However, if the delay is attributable exclusively to the defendant, he may be found to have waived his right to a speedy resolution. *See id.* at 529. I find the reasons underlying the lengthy delay here to weigh against the government.

Deck's original sentence imposed in 1998 was reversed in 2002 when the Missouri Supreme Court determined that trial counsel's errors during the penalty phase of the trial were so egregious that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Deck II*, 68 S.W.3d at 431.[27] Upon remand, the circuit court set the second penalty-phase trial for April 29, 2003, and, after Deck and the State proceeded through pretrial motion practice, the case began as scheduled. I cannot weigh against Deck this initial span of time between his conviction and second

[27] The Missouri Supreme Court made this determination on the "particular facts of [the] case," which included the fact that "substantial mitigating evidence was offered." 63 S.W.3d at 431.

penalty-phase trial, because – beyond the time taken for appellate and post-conviction review – it was the ineffective assistance of his counsel at the first trial that accounted for this delay. When attorney error amounts to constitutionally ineffective assistance of counsel, that error is imputed to the State. *Coleman*, 501 U.S. at 754. For when a State obtains a conviction against a defendant who was denied the effective assistance of counsel, "it is the State that unconstitutionally deprives the defendant of his liberty." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

Prior to the start of Deck's second penalty-phase trial, his trial counsel requested that the jury not be permitted to view Deck in shackles or restraints. The court denied this request, and trial proceeded. (Resp. Exh. S at 183-94.) After the jury returned its death verdict and the death sentence was imposed, Deck directly appealed. The Missouri Supreme Court affirmed the sentence in May 2004, but the United States Supreme Court granted certiorari. On May 23, 2005, the Court reversed Deck's death sentence, finding his visible shackling in leg irons, handcuffs, and a belly chain to have violated a basic element of constitutional due process in the circumstances of the case. *Deck v. Missouri*, 544 U.S. 622 (2005). The matter was remanded to the circuit court in August 2005 for a new penalty-phase trial. Trial began three years later, in September 2008.

Beyond the time expended to proceed through the appellate process, the

delay between the second and third penalty-phase trials must be weighed against the government. First, as with the constitutionally ineffective counsel during the first penalty-phase trial, the deprivation of Deck's constitutional right to due process in the second penalty-phase trial is imputed to the State. *See Evitts*, 469 U.S. at 396 (quoting *Cuyler*, 446 U.S. at 343). In addition, the first trial setting after remand was for September 2006. After obtaining a three-day continuance, the State requested an additional three-month continuance for unknown reasons. The court continued the trial for an additional six months, however, to March 2007. After new counsel entered for Deck, they asked for an additional continuance so that they could obtain mitigating evidence. Although counsel averred that they would be ready to proceed to trial in July, the trial court continued the trial to October. Immediately prior to trial, the court disqualified the prosecuting attorney's office after learning that it employed a member of the victims' family. The trial was thereafter continued for another ten months. While some delay is to be expected with motion practice and docket management, the responsibility for a significant amount of time that passed here lies with the State, especially with its requested continuance for unknown reasons and its undisclosed conflict of interest that resulted in another ten-month delay. Further, the court repeatedly continued the trial for several months at a time, with such continuances greatly exceeding the time requested by the respective party. While these delays

may have been for a neutral reason, such as a crowded docket, they nevertheless cannot be weighed against Deck.

Diligence in Requesting Expeditious Sentencing

This factor does not weigh heavily in favor of either Deck or the State. I do not find, however, that Deck's conduct shows that he failed to pursue an expeditious proceeding. First, I note that Deck objected to the State's request for a three-month continuance from the September 2006 trial setting. From this, it cannot be said that he passively acquiesced in delayed proceedings. *Cf. Barker*, 407 U.S. at 529. In addition, I note that Deck sought one limited continuance so that his counsel could secure mitigation witnesses and prepare documents to be reviewed by their expert. Not only is this a reasonable reason to request a delay, but counsel indicated in their request that they would be ready to go to trial only four months after the then-scheduled trial date. This request for a limited four-month continuance does not show a lack of diligence.

Prejudice

"[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious." *Barker*, 407 U.S. at 532.

Here, prejudice resulting from the delay weighs heavily in favor of Deck. As described above, his inability to present substantial mitigation evidence at his

third penalty-phase trial was directly attributable to the passage of many years' time. Witnesses who previously cooperated and provided favorable testimony were no longer available, either because of their unknown location, changed and hostile attitudes, illness, or even death. These witnesses provided mitigation testimony at earlier trials that the Missouri Supreme Court itself found "substantial" – indeed to the extent that it found that without constitutional error, a reasonable probability existed that the jury would not have voted for death.

Conclusion

The death penalties imposed after Deck's first and second penalty-phase trials were reversed because of constitutional error that occurred during those trials. When Deck's third and final penalty-phase trial began, over ten years had passed since his conviction. Most of this delay is attributed to the action of the State, especially since the violation of Deck's constitutional rights in the first and second penalty-phase trials were not Deck's fault; and Deck did nothing to forfeit his right to a speedy disposition. With the demonstrated unavailability of mitigation evidence (previously found to be substantial) having been caused by this significant passage of time, the prejudice suffered by Deck is obvious.

Accordingly, after carefully balancing these factors and all other relevant circumstances of this case, I find that the inordinate passage of time between Deck's conviction and his final penalty-phase trial deprived Deck of his

constitutional right to present mitigation evidence, thereby rendering his final trial fundamentally unfair. Deck's inability to present mitigation evidence prevented the jury from adequately considering compassionate or mitigating factors that might have warranted mercy. And, as the Missouri Supreme Court found in *Deck II*, the mitigating evidence presented at the first trial was substantial. *Deck II*, 68 S.W.3d at 430-31. Because the last jury was not able to consider this substantial mitigating evidence, imposition of the death penalty violates Deck's right to be free from cruel and unusual punishment.

C. Ground 32(a) – Trial Counsel Failed to Raise this Meritorious Claim

Despite the meritorious basis of this due process/Eighth Amendment claim, Deck's trial counsel did not raise the claim in any State court proceeding. In Ground 32(a), Deck claims that counsel was ineffective for their failure to do so. I agree. However, this ineffective assistance of counsel claim likewise was not raised in State court, thereby making it subject to procedural default. Deck can only overcome this procedural bar by demonstrating "cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. For the reasons that follow, I find that Deck has shown sufficient cause and prejudice to excuse his procedural default, and I will therefore proceed to determine the claim.

Cause for Default

A habeas petitioner can establish cause for failing to raise a claim of ineffective assistance of trial counsel by demonstrating that his initial-review post-conviction counsel was constitutionally ineffective. To do this, the petitioner must show that post-conviction counsel was ineffective under the standards of *Strickland* and further demonstrate that his underlying claim of ineffective assistance of trial counsel is a "substantial" one, that is, that the claim has some merit. *Martinez*, 566 U.S. at 14. Deck relies on *Martinez* to argue that post-conviction counsel's failure to raise his substantial claim of ineffective trial counsel constitutes cause for his procedural default of the underlying claim. I agree.

Deck's underlying claim of ineffective assistance of trial counsel has some merit and is therefore "substantial" under *Martinez*. The record shows that trial counsel was acutely aware of the constitutional significance of presenting mitigation evidence at Deck's penalty-phase trial and likewise knew that they were unable to present some of that evidence solely because of the passage of time. Evidence adduced at earlier trials – determined by the Missouri Supreme Court to be substantial and, in the absence of constitutional error, likely would have caused the jury to vote for life instead of death – was no longer available. Counsel made the trial court aware that they were unable to secure some of this evidence, and

they were put in the position of having to make strategic decisions not to present other evidence because of attitudes that had changed over time. Despite their awareness that Deck could not present desired mitigation evidence to the jury as he is constitutionally entitled to do, that this inability was on account of inordinate delay not attributable to Deck, and that his final penalty-phase trial was rendered fundamentally unfair as a result, counsel did not raise this constitutional claim.

Given the "severity" and "finality" of the sanction of death, *Monge v. California*, 524 U.S. 721, 732 (1998), the "acute need" for reliable decisionmaking when the death penalty is at issue, *id.*, and counsel's demonstrated awareness that the jury was being precluded from adequately considering aspects of Deck's character and record that might warrant mercy, counsel's error in failing to raise these constitutional issues deprived Deck of "counsel" as guaranteed by the Sixth Amendment. Because of counsel's error, Deck proceeded through a death penalty trial that was fundamentally unfair from the outset and, indeed, from even before it began. Given trial counsel's deficient performance in this regard, coupled with the prejudicial result, Deck's claim that he received constitutionally ineffective assistance of trial counsel was substantial and should have been raised in State court by post-conviction counsel.

And post-conviction counsel was ineffective for failing to raise it. As discussed earlier, post-conviction counsel raised numerous claims of ineffective

assistance of trial counsel, all of which provided insufficient bases to grant relief. While post-conviction counsel challenged trial counsel's failure to present certain mitigation evidence, they did not explore the "why" behind this failure. Instead, in a perfunctory manner, they represented to the motion court that all witnesses that should have been called by trial counsel were ready, willing, and able to testify at the final penalty trial. The court found, however, that with respect to a number of these witnesses, the representation that they would have cooperated "was not, in fact, true." (Resp. Exh. RR at 302.) Instead, the court found that many witnesses were hostile and uncooperative, could not be found, or avoided contact. (*Id.* at 295-98.)

It is not difficult to see from a review of the record that the passage of time rendered much of this evidence unavailable. The constitutional implications of the delayed penalty trial in this case are apparent. Had post-conviction counsel adequately investigated why trial counsel did not call a number of mitigation witnesses, they would have discovered this circumstance, thereby providing the basis for a meritorious claim that counsel was ineffective for failing to raise a claim of constitutional error at trial – which itself was a claim that was likely to succeed. Given the evidence that was known, a reasonable attorney would have investigated further. *Wiggins*, 539 U.S. at 527. Failure to do so in the circumstances of this case, leading to the failure to raise a meritorious claim,

rendered post-conviction counsel's conduct deficient. *Strickland*, 466 U.S. at 690-91.

Because there is a reasonable probability that the result of Deck's final penalty proceeding would have been different had trial counsel been constitutionally adequate, there is necessarily a reasonable probability that the State court would have so found had post-conviction counsel properly presented that underlying claim. *See Arkansas v. Sullivan*, 532 U.S. 769 (2001) (state supreme court, like all lower courts, must abide by United States Supreme Court's interpretation of constitutional rights). Because there is a reasonable probability that Deck would have succeeded on his claim of ineffective assistance of trial counsel had it been raised to the State court in his post-conviction motion, I conclude that Deck was prejudiced by post-conviction counsel's failure to raise the claim.

For all of the foregoing reasons, post-conviction counsel rendered ineffective assistance in failing to raise Deck's underlying claim of ineffective assistance of trial counsel in State court. Deck has therefore established "cause" for his default of the underlying claim. I now turn to whether he was prejudiced by trial counsel's failure to raise the claim of constitutional error.

Prejudice as a Result of Counsel Error

To show prejudice, Deck must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id.*

Substantial mitigation evidence was offered at Deck's first penalty-phase trial. This and additional mitigation evidence was offered at Deck's second penalty-phase trial. Both of these trials, however, were constitutionally deficient. At the third penalty-phase trial, Deck was precluded from presenting certain mitigation evidence – including from witnesses called at the first two trials – because the inordinate delay in proceeding to the third trial caused this evidence to become unavailable. The jury was therefore precluded from considering mitigating factors bearing on Deck's character and record, which itself is a constitutionally indispensable part of the process of sentencing a person to death.

Considering that, through no fault of his own, Deck could not present mitigation evidence that was previously found to be substantial, and that the jury could not consider this evidence given its unavailability, I find there to be a reasonable probability that Deck would not have been sentenced to death if his counsel had raised this constitutional challenge. Indeed, I find there to be a reasonable probability that Deck would not have even undergone the third penalty-

phase trial had counsel properly raised this issue, because these constitutional deficiencies could not at that time, and cannot now, be cured. Accordingly, had counsel raised this constitutional claim at or before trial, there is a reasonable likelihood that the outcome of the sentencing proceeding would have been different. Deck has therefore shown that he was prejudiced by counsel's error.

Deck has thus shown cause for his default and prejudice as a result of the constitutional violation. I therefore may address the merits of his underlying claim of ineffective assistance of trial counsel.

Merits

Trial counsel's performance was deficient when, given the circumstances of the case, they failed to raise a due process/Eighth Amendment claim challenging the fundamental fairness of conducting his penalty trial over ten years after his conviction. Deck was prejudiced by this deficient performance given the reasonable probability that the result of his sentencing proceeding would have been different had counsel raised the claim. Because Deck has shown both deficient performance and prejudice, I conclude that he received constitutionally ineffective assistance of counsel during his third penalty-phase trial, rendering the result of that trial unreliable. *Strickland*, 466 U.S. at 687.

Deck is therefore entitled to habeas relief on the claim raised in Ground 32(a) of his petition.

D. Ground 31 – Unconstitutional Delay

In Ground 31 of his petition, Deck contends that the passage of time between the offense and his final penalty-phase trial – more than twelve years – and between his conviction and final penalty trial – more than ten years – denied him due process given the loss or weakening of mitigation evidence over this period of time, and that being put to death after having been denied due process constitutes cruel and unusual punishment. This claim was not raised in State court, thereby making it subject to procedural default.

As cause to excuse his default, Deck contends that trial counsel was ineffective by failing to raise the claim in State court. Such a claim of ineffective assistance of counsel can constitute cause for default if it was pursued in State court as an independent Sixth Amendment claim. *Edwards*, 529 U.S. at 451-52; *Williams*, 311 F.3d at 897. As demonstrated above, however, Deck did not raise in State court his claim that trial counsel was ineffective for failing to raise this due process/Eighth Amendment claim. Deck argues that the procedural default of his ineffectiveness claim is itself excused by the ineffective assistance of post-conviction counsel for failing to raise the claim. *See Edwards*, 529 U.S. at 453 (defaulted ineffective-assistance-of-counsel claim asserted as cause for default of another claim can "*itself* be excused if [petitioner] can satisfy the cause-and-prejudice standard with respect to *that* claim.") (emphasis in *Edwards*). For the

reasons stated earlier, I agree.

As I have already determined, post-conviction counsel rendered ineffective assistance by failing to raise Deck's underlying claim that trial counsel was ineffective for failing to argue at trial that the inordinate delay between conviction and the final penalty proceeding denied him due process and his right to be free from cruel and unusual punishment. Deck has therefore shown cause for his procedural default of the underlying ineffective assistance claim. Further, I have already found that trial counsel was indeed ineffective in their failure to raise the due process/Eighth Amendment claim and that Deck was prejudiced thereby. Therefore, Deck has shown cause for his failure to raise the underlying due process/Eighth Amendment claim in State court. Moreover, for the reasons discussed at length above, Deck was prejudiced by the underlying due process/ Eighth Amendment violation. Having shown cause and prejudice for his failure to raise this constitutional claim in State court, a determination may be made on the claim's merits.

I have exhaustively discussed the merits of Deck's constitutional claim above and will not repeat my findings here. Suffice it to say, my conclusion remains the same, that is, that the inordinate passage of time between Deck's conviction and his final penalty-phase trial deprived Deck of his constitutional right to present mitigation evidence, thereby rendering his final trial fundamentally

unfair. Indeed, Deck proceeded through a death penalty trial that was fundamentally unfair from even before it began. Deck's inability to present mitigation evidence prevented the jury from adequately considering compassionate or mitigating factors that might have warranted mercy. In the absence of such consideration, imposition of the death penalty violates Deck's right to be free from cruel and unusual punishment.

Accordingly, Deck is entitled to habeas relief on the claim raised in Ground 31 of his petition.

IX. Conclusion

Capital proceedings must be "policed at all stages by an especially vigilant concern for procedural fairness and the accuracy of factfinding." *Strickland*, 466 U.S. at 704 (Brennan, J., concurring in part and dissenting in part).

While the passage of time does not and cannot lessen the loss and grief suffered by the victims' family, it nevertheless affected the fairness of the process in this case and the factfinder's ability to render a just penalty. Deck was deprived of a constitutionally fair penalty trial, the result of which cannot stand. Because the constitutional deficiencies cannot be cured and Deck cannot now undergo a penalty-phase trial that comports with due process, I will order that Deck's death sentences be vacated and that he be sentenced to life in prison without the possibility of parole.

X. Certificate of Appealability

Under 28 U.S.C. § 2253, an appeal may not be taken to the court of appeals from a final order denying habeas relief in a 28 U.S.C. § 2254 proceeding unless a circuit justice or judge issues a Certificate of Appealability. 28 U.S.C. § 2253(c)(1)(A). To grant such a certificate, the justice or judge must find a substantial showing of the denial of a federal constitutional right. 28 U.S.C. § 2253(c)(2). *See Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997). I find that reasonable jurists could not differ on any of the claims I denied, so I will deny a Certificate of Appealability on those claims.

Accordingly,

IT IS HEREBY ORDERED that the amended petition of Carman L. Deck for writ of habeas corpus [30] is granted as to the sentence of death only, based on Claims 31 and 32(a) as discussed above, and denied in all other respects. Petitioner's death penalty is vacated. Because the constitutional deficiencies cannot be cured and Deck cannot now be subjected to a penalty-phase trial that comports with due process, he must be sentenced to life in prison without the possibility of parole.

An appropriate judgment granting the writ of habeas corpus is issued this same date.

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 13th day of April, 2017.

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
ArrestDuration 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
ArrestDuration 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.

End of Document

136 S.W.3d 481
Supreme Court of Missouri,
En Banc.

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

No. SC 85443.
|
May 25, 2004.
|
Rehearing Denied July 1, 2004.

Synopsis

Background: Defendant filed motion for postconviction relief from murder conviction and death sentence, alleging ineffective assistance of counsel. The Circuit Court, Jefferson County, Gary P. Kramer, J., denied motion. The Supreme Court reversed, holding that failure to offer proper mitigation instructions during penalty phase was ineffective assistance of counsel, 68 S.W.3d 418. After new sentencing hearing, the jury again recommended two death sentences, and judgment was entered consistent with that recommendation. Defendant appealed.

Holdings: The Supreme Court, Ronnie L. White, C.J., held that:

[1] officer's double-hearsay testimony concerning citizen's report relaying another out-of-court declarant's statement warning of robbery and possible murder was admissible to supply relevant background information;

[2] trial court was justified in requiring defendant to be restrained in courtroom throughout trial;

[3] any error in trial court's decision to restrain defendant was harmless;

[4] trial court's unobjected-to pattern penalty-phase jury instructions did not suggest to jury that State's burden of proving aggravating circumstances was lower than beyond reasonable doubt;

[5] trial court's unobjected-to failure to administer short-form jury recess instruction did not amount to plain error;

[6] victim-impact evidence of chart depicting murder victim's family tree was admissible;

[7] victim-impact evidence of narrative statement of murder victim's son was admissible;

[8] victim-impact testimony of murder victim's daughter referencing victim's 11-year-old granddaughter's fear of coming to court was admissible;

[9] portion of State's closing jury argument in which it asked jurors to think about murder victims prior to their death was appropriate reference to record and response to defense argument;

[10] venire members were subject to exclusion from jury for cause based on their equivocation about their ability to recommend death sentence;

[11] jury's recommendation that defendant be sentenced to death was supported upon unanimous finding of six aggravating factors; and

[12] omission of statutory aggravating factors from indictment did not deprive trial court of jurisdiction to impose death penalty.

Affirmed.

West Headnotes (26)

[1] **Criminal Law**Evidence as to information acted on
Criminal Law Double hearsay

110Criminal Law
110XVIIEvidence
110XVII(N)Hearsay
110k419Hearsay in General
110k419(3)Evidence as to information acted on
110Criminal Law
110XVIIEvidence
110XVII(N)Hearsay
110k419Hearsay in General
110k419(13)Double hearsay

Police officer's double-hearsay testimony concerning citizen's report relaying another out-of-court declarant's statement warning of robbery and possible murder was admissible to supply relevant background information, to explain why police began search for defendant and a house-to-house search that ultimately led to discovery of murder scene.

3 Cases that cite this headnote

[2] Criminal Law Hearsay in General

110Criminal Law
110XVIIEvidence
110XVII(N)Hearsay
110k419Hearsay in General
110k419(1)In general

A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.

[3] Criminal Law Evidence as to information acted on

110Criminal Law
110XVIIEvidence
110XVII(N)Hearsay
110k419Hearsay in General
110k419(3)Evidence as to information acted on

Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity.

3 Cases that cite this headnote

[4] Criminal Law Particular cases

110Criminal Law
110XXTrial
110XX(B)Course and Conduct of Trial in General
110k637Custody and Restraint of Accused
110k637.5Particular cases
(Formerly 110k637)

Trial court was justified in requiring defendant, accused of murder, to be restrained in courtroom throughout trial, with leg irons, handcuffs, and belly chain, where defendant's trial counsel made no record of jury's awareness of restraints, and evidence demonstrated a flight risk, defendant, a repeat offender, having allegedly killed his two victims to avoid apprehension.

1 Cases that cite this headnote

[5] 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)

Challenging the trial court's discretion to impose security by restraining a defendant during jury trial is an individual and fact-specific inquiry.

1 Cases that cite this headnote

[6] Criminal Law Custody or restraint of accused; prison clothes

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1166.5Conduct of Trial in General
110k1166.8Custody or restraint of accused; prison clothes

Any error in trial court's decision to restrain defendant in courtroom throughout murder trial, with leg irons, handcuffs, and belly chain, was harmless, since showing of restraints, by itself, did not demonstrate prejudice, and when questioned during voir dire,

jurors stated that defendant's appearance in shackles would not affect their decision.

2 Cases that cite this headnote

[7] **Sentencing and Punishment** Instructions
Sentencing and Punishment Presentation and reservation in lower court of grounds of review

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(3)Instructions
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(3)Presentation and reservation in lower court of grounds of review

Trial court's unobjected-to pattern penalty-phase jury instructions following defendant's conviction for murder, in which State sought death penalty, did not suggest to jury that State's burden of proving aggravating circumstances was lower than beyond reasonable doubt, nor amount to plain error. MAI Criminal 3d Nos. 313.41A et seq., 313.44A et seq.

1 Cases that cite this headnote

[8] **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(3)Presentation and reservation in lower court of grounds of review

Trial court's unobjected-to failure to administer short-form jury recess instruction during penalty phase of murder trial, requiring jurors to abstain from discussing case with anyone until case was submitted for deliberations, did not amount to plain error, where

jury had heard instruction multiple times throughout course of trial, and there was no evidence indicating violation of instruction by any juror by discussing the case or by forming an opinion prior to completion of case. MAI Criminal 3d No. 300.04, subd. 2.

1 Cases that cite this headnote

[9] 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

To establish that an unobjected-to instructional error rose to the level of plain error, the appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict.

1 Cases that cite this headnote

[10] Sentencing and Punishment Victim impact

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)2Evidence
350Hk1755Admissibility
350Hk1763Victim impact

Victim-impact evidence of chart depicting murder victim's family tree, with 46 named family members, was admissible during penalty phase of trial, even though chart contained names of several family members who had not yet been born at time of murder, and spouses who were no longer part of victim's family, where such information was provided to jury, which was free to decide what impact, if any, victim's death had on those absent family members.

1 Cases that cite this headnote

[11] Sentencing and Punishment Discretion of court

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)2Evidence
350Hk1752Discretion of court

The trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital murder case.

[12] Sentencing and Punishment Victim impact

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)2Evidence
350Hk1755Admissibility
350Hk1763Victim impact

Victim impact evidence is admissible during the penalty phase of a capital murder case under the federal and state Constitutions, and the state is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.

1 Cases that cite this headnote

[13] 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

Victim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair. U.S.C.A. Const.Amend. 6.

[14] Sentencing and Punishment Victim impact

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)2Evidence
350Hk1755Admissibility
350Hk1763Victim impact

Victim-impact evidence of narrative statement of murder victim's son during punishment phase of trial was admissible to help prevent him from breaking down emotionally or from making impermissible statements.

[15] Witnesses Statement by witness or testimony without questions

410Witnesses
410IIIExamination
410III(A)Taking Testimony in General
410k235Statement by witness or testimony without questions

The form of witness examination in a criminal trial, whether in a narrative or interrogatory manner, is a matter committed to discretion of the trial court.

[16] Sentencing and Punishment Victim impact

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

350HVIII(G)2Evidence
350Hk1755Admissibility
350Hk1763Victim impact

Victim-impact testimony of murder victim's daughter during penalty phase of trial, referencing her daughter's fear of coming to court, was admissible absent showing that statement would somehow allow jurors to speculate that her fear was related to defendant's presence in courtroom.

[17] **Criminal Law**Appeals to Sympathy or Prejudice
Criminal Law Inferences from and effect of evidence

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2145Appeals to Sympathy or Prejudice
110k2146In general
(Formerly 110k723(1))
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2164Rebuttal Argument; Responsive Statements and Remarks
110k2175Inferences from and effect of evidence
(Formerly 110k726)

Portion of State's closing jury argument in which it asked jurors to think about murder victims during the moments prior to their deaths, "on their stomachs begging for their lives for ten minutes," was appropriate reference to record and response to defense argument, and thus, trial court was under no obligation to sustain defendant's objection to argument.

[18] **Criminal Law**Arguments and statements by counsel
Criminal Law Scope of and Effect of 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
110k2071Scope of and Effect of Summing Up
110k2072In general
(Formerly 110k708.1)

The trial court has broad discretion in controlling the scope of closing argument and the trial 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

[19] Criminal Law Appeals to fears of jury

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2145Appeals to Sympathy or Prejudice
110k2155Appeals to fears of jury
(Formerly 110k723(4))

"Improper personalization" in closing argument occurs when the argument suggests a personal danger to the jurors or their families.

[20] Criminal Law Appeals to fears of jury

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2145Appeals to Sympathy or Prejudice
110k2155Appeals to fears of jury
(Formerly 110k723(4))

Arguing for jurors to supplant themselves in the position of a party or a victim is improper personalization that can only arouse fear in the jury.

[21] **Jury**Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

Venire members were subject to exclusion from jury for cause based on their equivocation about their ability to recommend death sentence during voir dire in capital murder case; two prospective jurors indicated that they had a problem with considering the death penalty and that they believed punishment should be limited to life imprisonment without parole.

[22] **Jury**Personal Opinions and Conscientious Scruples

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k104.1In general

Venirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the trial court's instructions and their oaths.

[23] **Jury**Grounds

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k124Challenges for Cause
230k126Grounds

A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the

trial court's instructions in a first degree murder case.

[24] **Jury** Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury.

[25] **Sentencing and Punishment** Determinations based on multiple factors
Sentencing and Punishment Proportionality

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1661Determinations based on multiple factors
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1788Review of Death Sentence
350Hk1788(6)Proportionality

Jury's recommendation that defendant be sentenced to death for double homicide, rather than a product of passion, prejudice, or any other arbitrary factor, was supported upon unanimous finding of six aggravating factors, and sentence was neither excessive nor disproportionate to penalties imposed in similar cases, considering the crime, strength of evidence, and the defendant. V.A.M.S. §§ 565.032, subd. 2(2, 4, 7, 10, 11), 565.035, subd. 3.

1 Cases that cite this headnote

[26] Sentencing and Punishment Indictments and charging instruments

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)1In General
350Hk1740.5Indictments and charging instruments
(Formerly 210k113)

Omission of statutory aggravating factors from indictment charging defendant with first-degree murder did not deprive trial court of jurisdiction to impose death penalty; single offense of murder was recognized by sentencing statute as qualifying offense for death sentence.

Attorneys and Law Firms

***484** Rosemary E. Percival, Office of the Public Defender, Kansas City, MO, for appellant.

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

RONNIE L. WHITE, Chief Justice.

I.

A jury convicted Appellant, Carman Deck, of two counts of first-degree murder and recommended a sentence of death for each count.[1] Judgment was entered consistent with the recommendation. Appellant moved for postconviction relief after his convictions and sentences were affirmed on direct appeal.[2] This Court remanded for a new penalty phase, finding that trial counsel's failure to offer proper mitigation instructions during that phase of the trial constituted

ineffective assistance of counsel.[3] On retrial, the jury recommended two death sentences, and judgment was entered consistent with that recommendation. Appellant now asserts nine points of error with his resentencing. This Court has jurisdiction pursuant to Mo. Const. art. V, sec. 3. Affirmed.

II.

In his first point, Appellant contends that the trial court abused its discretion by allowing the admission of a double hearsay statement made to Deputy Sheriff Donna Thomas. Tonia Cummings made the original statement to Charles Hill, who in turn relayed it to Deputy Thomas. The statement was a warning that a robbery and possible murder were going to occur in rural DeSoto, Missouri, involving an elderly gentleman.

***485** **[1] [2] [3]** "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value."[4] Charles Hill's statement was offered to explain why the police began a search for the Appellant and a house-to-house search that ultimately led to discovery of the crime scene. Statements made by out-of-court declarants that explain subsequent police conduct are admissible to supply relevant background information and continuity.[5] The trial court did not abuse its discretion when allowing the admission of this out-of-court statement.

III.

[4] Next Appellant asserts that the trial court abused its discretion by overruling his motion to appear at trial free of restraints. Appellant believes having to appear before the jury wearing leg irons and handcuffed to a belly chain violated his rights to due process, equal protection, confrontation of the evidence, a fair and reliable sentencing and freedom from cruel and unusual punishment.

[5] The trial court has discretion to impose security measures necessary to maintain order and security in the courtroom, including the use of restraints.[6] "A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful

consideration."[7] "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion."[8] Recognizing this discretion, however, this Court does not minimize in any way its concern for maintaining a jury that is not prejudiced by extra-judicial influences and passions. Challenging the trial court's discretion to impose security by use of restraints is an individual and fact-specific inquiry.

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. There is also evidence that there was a risk that Appellant 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. While this does not represent a comprehensive list of factors this Court would analyze in making determinations on this issue, there is sufficient evidence in the record to support the trial court's exercise of its discretion to deny Appellant's motion.

[6] Even assuming, arguendo, that the trial court did abuse its discretion in this instance, Appellant has not demonstrated that the outcome of his trial was prejudiced. Appellant offers nothing more than speculation in support of his argument. Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prejudice.[9] ***486** Moreover, the venire panel was questioned in voir dire, and all members responded that Appellant's appearance in shackles would not affect their decision.

IV.

[7] In Appellant's third point, he argues that the trial court plainly erred when submitting penalty phase instructions numbers 7, 8, 12, and 13. He contends that these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that mitigating circumstances were insufficient to outweigh the evidence of aggravating circumstances. Appellant believes the wording of the instructions could have allowed the jury to infer that the burden of proof was lower than beyond a reasonable doubt. Having not raised this issue at trial, review is under the plain error standard.[10]

These instructions are derived from section 565.030.4 and were appropriately patterned after MAI–CR 3d 313.41, and 313.44.[11] This Court recently addressed this claim and found no error with these patterned instructions.[12] The MAI instructions are constitutional, and there was no plain error in law with their delivery to the jury.[13] Having examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value.[14]

V.

[8] Appellant's fourth point raises the issue of whether the trial court erred by failing to read to the jury MAI–CR 3d 300.04.2—the short version of the jury recess instruction.[15] Appellant claims that the jury's verdict was affected because the court failed to provide the short version of the instruction when: (1) the court divided the jury panel into small groups for death qualification, (2) the small groups returned to the larger group, (3) the proceedings ended on the first and second days of trial, and (4) the parties rested their cases. Defense counsel failed to timely object to this alleged error, so this Court reviews for plain error.[16]

[9] To establish that the instructional error rose to the level of plain error, appellant must demonstrate that the trial court so misdirected or failed to instruct the jury that it is evident the instructional error affected the jury's verdict.[17] The jury recess instruction directs the jury not to discuss the case with anyone, including the other jury members, or express or form an opinion of the case until it is submitted for the jury's decision.[18]

The Notes on Use for MAI–CR 3d 300.04 state that the long version, 300.04.1, entitled, "At the First Recess and Adjournment," shall be read at the conclusion of voir dire and if recess occurs during voir ***487** dire than it shall also be read at that time. The short version of this MAI, 300.04.2, is entitled, "At Subsequent Recesses or Adjournments," and the Notes of Use state that it may be given in any other form so long as it complies with section 546.230.

The record reveals that, while Appellant's claimed omissions did occur, the panel was given the full instruction prior to the noon recess during voir dire, again prior to individual voir dire in the afternoon and again when voir dire was completed. During the death qualification phase, the jurors were not in recess while the smaller groups were interviewed to trigger the need to read the instruction. The instruction was again delivered prior to a recess for dinner, and after dinner the jury was assembled and instructed to return home and pack to prepare for hotel sequestration. On the second day of trial, the instruction was given at every recess, but not at the day's adjournment. On the third day of trial, the instruction was given at every recess except for the one occurring after both parties had rested and before the instruction conference began.

The jury heard the instruction multiple times throughout the course of Appellant's trial, and Appellant offers no evidence that any juror violated the instruction by engaging in discussion about the case or by forming an opinion prior to the completion of the case. The trial court did not so misdirect or fail to instruct the jury that it is evident the instructional error affected the

jury's verdict. Appellant's claim fails to establish plain error for the limited omissions in repeating the recess instruction.

VI.

[10] Appellant next argues the trial court abused its discretion with the admission of victim-impact evidence. Specifically, he asserts that an extensive family tree from the victim's family, a narrative statement by the victim's son, and an alleged hearsay statement that the victim's granddaughter was worried and afraid to come to court were excessive and prejudicial.

[11] [12] [13] "[T]he trial court is vested with broad discretion in determining the admissibility of evidence offered at the penalty stage of a capital case."[19] Victim impact evidence is admissible under the United States and Missouri Constitutions, and the State is permitted to show that a victim is not a faceless stranger and that his or her death represents a unique loss to society and to the family.[20] "[V]ictim impact evidence violates the constitution only if it is so unduly prejudicial that it renders the trial fundamentally unfair."[21]

The chart depicting the victim's family tree, with 46 named family members, was found by the trial court to be less prejudicial than having each of these individuals testify. The chart did contain the names of several family members who had not yet been born at the time of the murders and spouses that were no longer part of the family. This information was provided to the jury; however, the jury was free to decide what impact, if any, the victims' deaths had on those absent family members.

[14] [15] The narrative statement, read by the victims' son, was intended to help prevent him from breaking down emotionally ***488** or from making impermissible statements. It was the same statement that was read at Appellant's first trial, and being narrative as opposed to interrogative does not constitute a per se abuse of discretion.[22] As Appellant points out, this statement did include the remark, "How senseless this was to take the nucleus of our family away." However, this remark is not inconsistent with other remarks contained within the narrative, and Appellant provides nothing more than speculation in his attempt to claim that this narrative, or the individual statement, was in any way prejudicial.

[16] Finally, with regard to the victims' daughter's testimony referencing the eleven-year-old granddaughter's fear of coming to court, this would only be a natural response for any child having to attend a courtroom proceeding. Appellant again fails to substantiate his clam that this statement would somehow allow jurors to speculate that her fear was related solely to

Appellant's presence in the courtroom.

In short, all of Appellant's assertions regarding the victim impact evidence are unsubstantiated and based totally in speculation. Defendant's bare assertions of prejudice are not sufficient to establish fundamental unfairness nor do they demonstrate how the outcome of the case was substantively altered.

VII.

[17] In his sixth point, Appellant argues that the trial court abused its discretion by allowing the State, over objection, to personalize its closing argument. Appellant claims that the prosecutor urged the jurors to "relive" the final ten minutes of the victims' lives when they begged for mercy while the Appellant contemplated if he would murder them. Appellant believes that allowing this alleged improper argument deprived him of rights to due process, a fair trial and impartial jury, and freedom from cruel and unusual punishment.

[18] [19] [20] "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."[23] "Improper personalization in closing argument occurs when the argument suggests a personal danger to the jurors or their families."[24] Arguing for jurors to supplant themselves in the position of a party or a victim is also improper personalization that can only arouse fear in the jury.[25]

In Appellant's closing argument, defense counsel stated that this was not a planned murder and that Appellant was scared and nervous. Counsel also states, "... and he made a lousy, lousy decision. He never should've shot. He never should be been [sic] in there in the first place. He never should've, but it's a split second and on the tape it says he went there to rob."

In response to this argument that the murder was not planned, the prosecutor in ***489** his closing argument states, "Think about the evidence. Think about [Appellant] with the gun in his hand, James and Zelma Long lying on the bed. Ten minutes doesn't seem that long. See how long that is just when you're sitting in the jury room. Think about them on their stomachs begging for their lives for ten minutes."

The evidence of the ten minutes elapsing between the time the victims were ordered to lay on the bed in the positions described and the time of their being shot was properly in the record, and it was not improper to reference these facts in closing argument. The specific reference to

these facts in the prosecutor's statements above addressed the credibility of Appellant's claim that the murders were committed without more than a split second's worth of thought. The trial court did not abuse its discretion when overruling Appellant's objection, and there is no evidence, beyond speculation, that the decision to allow the prosecutor's argument to proceed resulted in prejudice to the defendant.

VIII.

[21] [22] [23] Appellant next asserts that the trial court abused its discretion when overruling his objection to striking venirepersons Richard Overmann and Michael Schaeffer for cause. However, "[v]enirepersons may be excluded from the jury when their views would prevent or substantially impair the performance of their duties as jurors in accordance with the court's instructions and their oaths".[26] "A challenge for cause will be sustained if it appears that the venireperson cannot consider the entire range of punishment, apply the proper burden of proof, or otherwise follow the court's instructions in a first degree murder case."[27]

[24] The transcripts show that both prospective jurors indicated that they had a problem with considering the death penalty and that they believed punishment should be limited to life imprisonment without parole. There was serious equivocation expressed by Mr. Overmann and Mr. Schaeffer about their ability to follow the instructions of the court and their ability to consider and recommend the full range of punishment for Appellant. "A juror's equivocation about his ability to follow the law in a capital case together with an equivocal statement that he could not sign a verdict of death can provide a basis for the trial court to exclude the venireperson from the jury."[28] The trial court did not abuse its discretion when sustaining the prosecutor's motion to strike.

IX.

[25] Appellant raises, as his eighth point, this Court's independent proportionality review and advocates for reducing his sentence to life imprisonment without parole. Under section 565.035.3, this Court is required to determine whether:

(1) The sentence of death was imposed under the influence of passion, prejudice, or any

other arbitrary factor;

(2) The evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;

(3) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Having thoroughly reviewed the record, this Court concludes that there is no evidence ***490** to suggest that the punishment imposed was a product of passion, prejudice, or any other arbitrary factor.

The trial court's findings are next reviewed to determine if the evidence supports, beyond a reasonable doubt, the existence of an aggravating circumstance and any other circumstance found. In Appellant's first trial, the jury unanimously found six statutory aggravating circumstances as a basis for considering the two death sentences.[29] The same evidence was heard in Appellant's retrial of the penalty phase, and it amply supports the statutory aggravators found by the jury when delivering its recommendation for the death sentence.

Finally, this Court has upheld sentences of death in similar cases where the defendant murdered multiple victims, acted for pecuniary gain, or where the defendant sought to eliminate possible witnesses to avoid a lawful arrest.[30] The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant.

X.

[26] Appellant finally argues that the trial court lacked jurisdiction and authority to sentence Appellant because the state failed to charge him with "aggravated first-degree murder." Appellant contends that failure to plead facts, as listed in section 565.030.4, creates a charge of murder whereby the maximum penalty was life in prison.

This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first-degree murder does not deprive the sentencing court of jurisdiction to impose the death penalty.[31] Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense.[32] Having

examined this claim thoroughly and finding no error of law, an extended opinion on these issues would have no precedential value.[33]

XI.

The judgment is affirmed.

All concur.

All Citations

136 S.W.3d 481

Footnotes

1 Appellant was also convicted of two counts of armed criminal action, one count of first-degree robbery, and one count of first-degree burglary for which he received, respectively, concurrent life sentences, consecutive thirty-year sentences, and a fifteen-year sentence.

2 *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999).

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

4 *Smulls v. State*, 71 S.W.3d 138, 148 (Mo. banc 2002).

5 *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991).

6 *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. banc 1999).

7 *In re Care and Treatment of Spencer*, 123 S.W.3d 166, 168 (Mo. banc 2003).

8 *Id.*

9 *State v. Hall*. 982 S.W.2d 675, 685 (Mo. banc 1998); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997); *State v. Clements*, 849 S.W.2d 640, 647 (Mo.App.1993).

10 Rule 30.20.

11 All statutory citations refer to RSMo 2000 unless otherwise noted.

12 *State v. Taylor*, 134 S.W.3d 21, 30 (Mo. banc 2004).

13 *Lyons v. State*, 39 S.W.3d 32, 43 (Mo. banc 2001).

14 Rule 30.25.

15 Appellant also brought a claim of instructional error with regard to MAI–CR 3d 302.02, but expressly abandoned that claim per letter to this Court dated March 2, 2004.

16 Rules 28.03 and 30.20. See also *State v. Wurtzberger*, 40 S.W.3d 893, 897–98 (Mo. banc 2001).

17 *State v. Baker*, 103 S.W.3d 711, 723 (Mo. banc 2003).

18 MAI–CR 3d 300.04.2.

19 *State v. Johns*, 34 S.W.3d 93, 112 (Mo. banc 2000).

20 *Deck*, 994 S.W.2d at 538–39; *Payne v. Tennessee*, 501 U.S. 808, 822–25, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

21 *Id.*

22 *State v. Clark*, 693 S.W.2d 137, 142 (Mo.App.1985). The form of witness examination at trial, whether in a narrative or interrogatory manner, is also a matter committed to discretion of the trial court. *Id.* On direct appeal from Appellant's first convictions and sentences, this Court rejected Appellant's argument that the narrative statement produced emotional outbursts so prejudicing his trial that a mistrial was warranted. *Deck*, 994 S.W.2d at 538–39.

23 *Deck*, 994 S.W.2d at 543.

24 *State v. Bristol*, 98 S.W.3d 107, 115 (Mo.App.2003).

25 *State v. Williams*, 97 S.W.3d 462, 474 (Mo. banc 2003).

26 *State v. Smith*, 32 S.W.3d 532, 544 (Mo. banc 2000).

27 *Id.*

28 *Id.*

29 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). *Deck*, 994 S.W.2d at 545.

30 *State v. Ringo*, 30 S.W.3d 811(Mo. banc 2000); *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999).

31 *State v. Cole*, 71 S.W.3d 163, 171 (Mo. banc 2002).

32 *Id.* See also *State v. Tisius*, 92 S.W.3d 751, 766 (Mo. banc 2002).

33 Rule 30.25.

End of Document

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.

224 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.

97 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.

314 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.

287 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.

270 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.

Attorneys and Law Firms

Rosemary E. Percival, Kansas City, MO, for petitioner.

Cheryl C. Nield, for respondent.

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, James R. Layton, State Solicitor, Cheryl Caponegro Nield, Evan J. Buchheim, Counsel of Record, Assistant Attorneys General, Jefferson City, MO, for Respondent.

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.

Parallel Citations

125 S.Ct. 2007, 161 L.Ed.2d 953, 73 USLW 4370, 05 Cal. Daily Op. Serv. 4355, 2005 Daily Journal D.A.R. 5913, 18 Fla. L. Weekly Fed. S 295

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’ ”).

End of Document

303 S.W.3d 527
Supreme Court of Missouri,
En Banc.

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

No. SC 89830. | Jan. 26, 2010. | Rehearing Denied March 2, 2010.

Synopsis

Background: Defendant moved for postconviction relief after his convictions for first-degree murder and other offenses and his sentences of death were affirmed, 994 S.W.2d 527. The motion was denied, and defendant appealed. The Missouri Supreme Court affirmed in part, reversed in part, and remanded for a new penalty-phase trial, 68 S.W.3d 418. On remand, defendant received two death sentences. Appeal followed. The Missouri Supreme Court affirmed, 136 S.W.3d 481. The United States Supreme Court granted certiorari and reversed and remanded, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953. On remand in the Circuit Court, Jefferson County, Gary P. Kramer, J., defendant again received two death sentences. He appealed.

Holdings: The Missouri Supreme Court, Zel M. Fischer, J., held that:

[1] trial court was not statutorily required to impose sentences of life imprisonment without the possibility of parole;

[2] trial court acted within its discretion in sustaining the state's motion to strike for cause two prospective jurors who stated that they could not sign a death verdict;

[3] prosecutor's closing-argument comments on certain accomplishments of victims and how descendants of victims would someday want to know whether justice was done did not constitute improper personalization;

[4] prosecutor's closing-argument request for the jury to think about laying on a bed for ten minutes at gunpoint and being rendered helpless did not constitute improper personalization;

[5] defendant was not prejudiced by the prosecutor's erroneous closing-argument suggestion that

defendant had escaped from incarceration more than one time;

[6] defendant was not prejudiced by the prosecutor's erroneous closing-argument suggestion that inmates who defendant helped to escape were serving life sentences;

[7] manifest injustice did not result from trial court's failure to give a Missouri approved jury instruction on procedures in death-penalty cases; and

[8] the death penalty was not excessive or disproportionate.

Affirmed.

Breckenridge, J., concurred in part and concurred in result and filed opinion.

Stith, J., concurred in result and filed opinion in which Wolff, J., concurred.

Teitelman, J., concurred in result only.

West Headnotes (43)

[1] **Sentencing and Punishment** Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Trial court on remand was not statutorily required to impose sentences of life imprisonment without the possibility of parole after the United States Supreme Court concluded that defendant, who had received two death sentences, did not receive a fair penalty-phase trial because he appeared in shackles in the presence of the jury; the reversible error recognized by the United States Supreme Court, i.e., the shackling, was trial error unrelated to the statutory scheme that set out the death-penalty procedures. V.A.M.S. § 565.040(2).

4 Cases that cite this headnote

[2] **Criminal Law**Review De Novo

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

Construction of a statute is a question of law reviewed de novo.

Cases that cite this headnote

[3] **Criminal Law**Selection and impaneling

110Criminal Law
110XXIVReview
110XXIV(N)Discretion of Lower Court
110k1152Conduct of Trial in General
110k1152.2Jury
110k1152.2(2)Selection and impaneling

A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.

Cases that cite this headnote

[4] **Jury**Competency for Trial of Issues in General

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k83Competency for Trial of Issues in General
230k83(1)In general

Qualifications for a prospective juror are not determined from a single response to a voir dire question but rather from the entire examination.

2 Cases that cite this headnote

[5] **Jury** Discretion of court

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k85Discretion of court

A trial court has broad discretion to determine the qualifications of prospective jurors.

1 Cases that cite this headnote

[6] **Jury** Bias and Prejudice

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k97Bias and Prejudice
230k97(1)In general

When determining the qualifications of prospective jurors, a trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors, including the ability to follow instructions on the burden of proof.

1 Cases that cite this headnote

[7] **Criminal Law** Jury selection

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

A great deal of deference is owed on appeal to a trial court's determination that a prospective juror is substantially impaired.

Cases that cite this headnote

[8] **Criminal Law** Jury selection

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

Deferential standard of review of a trial court's determination that a prospective juror is substantially impaired applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias.

Cases that cite this headnote

[9] **Criminal Law** Jury selection

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

A trial court's finding that a prospective juror is substantially impaired may be upheld even in the absence of clear statements from the juror that he or she is impaired.

Cases that cite this headnote

[10] **Jury** Trial and determination

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k124Challenges for Cause
230k133Trial and determination

When there is ambiguity in a prospective juror's statements, a trial court, aided as it undoubtedly is by its assessment of the juror's demeanor, is entitled to resolve it in favor of the state when determining whether the juror is substantially impaired.

Cases that cite this headnote

[11] **Jury** Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

For the purpose of determining whether a prospective juror in a capital case is substantially impaired, even a prospective juror's assurance that he or she can follow the law and consider the death penalty may not overcome the reasonable inferences from other responses that he or she may be unable or unwilling to follow the law.

1 Cases that cite this headnote

[12] **Jury** Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

Trial court acted within its discretion at a penalty-phase trial in a capital case in sustaining the state's motion to strike for cause two prospective jurors who stated that they could not sign a death verdict, even though the jurors stated that they could fairly consider both possible punishments, i.e., death or life imprisonment without the possibility of parole; the jurors' responses revealed an inability to follow instructions if the juror were chosen as foreman of the jury, and trial court could have concluded from the record as a whole that there was a substantial possibility that the juror might not have been able to fairly consider both punishments despite assurances to the contrary.

1 Cases that cite this headnote

[13] **Jury** Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections

230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

A prospective juror's reluctance or refusal to sign a death verdict may be considered by the trial court but need not be conclusive in deciding whether the juror should be struck for cause in a capital case; the reluctance or refusal may be considered among other facts and circumstances, including the trial court's observation of the juror.

2 Cases that cite this headnote

[14] **Criminal Law**🔑Necessity and scope of proof
Criminal Law🔑Discretion of court in controlling argument

110Criminal Law
110XXTrial
110XX(C)Reception of Evidence
110k661Necessity and scope of proof
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2061Control of Argument by Court
110k2063Discretion of court in controlling argument

A trial court is vested with broad discretion to exclude or admit evidence and to control closing arguments.

5 Cases that cite this headnote

[15] **Criminal Law**🔑Evidence in general
Criminal Law🔑Statements as to Facts, Comments, and Arguments

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error
110k1169Admission of Evidence
110k1169.1In General
110k1169.1(1)Evidence in general
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

To be entitled to relief on appeal, a defendant challenging an evidentiary ruling or a closing argument must show that an error was so prejudicial that he or she was deprived of a fair trial.

1 Cases that cite this headnote

[16] **Sentencing and Punishment** Notice of sentencing factors
Sentencing and Punishment Notice of evidence and witnesses

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)1In General
350Hk1744Notice of sentencing factors
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)1In General
350Hk1745Notice of evidence and witnesses

Neither the statute requiring disclosure of aggravating or mitigating circumstances that either party intends to prove at the penalty phase of a trial for first-degree murder nor the rule requiring disclosure, on request, of certain types of evidence or information requires notice of the specific argument that is going to be made based on disclosures. V.A.M.S. § 565.005(1); V.A.M.R. 25.03.

Cases that cite this headnote

[17] **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

Prosecutor's closing-argument comments on certain accomplishments of victims and how descendants of victims would someday want to know whether justice was done did not constitute improper personalization at a penalty-phase trial in a capital case; the prosecutor did not imply any danger to the jurors or ask the jurors to place themselves in the victims'

shoes.

3 Cases that cite this headnote

[18] **Criminal Law** Appeals to fears of jury

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2145Appeals to Sympathy or Prejudice
110k2155Appeals to fears of jury

Improper personalization in closing argument is established when the state suggests that a defendant poses a personal danger to the jurors or their families.

8 Cases that cite this headnote

[19] **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

Prosecutor's closing-argument comments on certain accomplishments of victims and how descendants of victims would someday want to know whether justice was done did not constitute an improper appeal to sympathy at a penalty-phase trial in a capital case.

Cases that cite this headnote

[20] **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

Prosecutor's closing-argument request for the jury to think about laying on a bed for ten minutes at gunpoint and being rendered helpless did not constitute improper personalization at a penalty-phase trial in a capital case; the jury was not asked in any manner to place itself in the victims' shoes.

Cases that cite this headnote

[21] **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

Plain-error relief is rarely appropriate for claims involving closing arguments because the decision to object is often a matter of trial strategy.

2 Cases that cite this headnote

[22] **Criminal Law**Arguments and conduct in general
Criminal Law Burden of showing error

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
110Criminal Law
110XXIVReview
110XXIV(M)Presumptions
110k1141In General
110k1141(2)Burden of showing error

Under plain-error review, a conviction will be reversed for improper closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice; the burden to prove decisive effect is on the defendant.

5 Cases that cite this headnote

[23] **Criminal Law**For prosecution
Criminal Law Statements Regarding Applicable Law
Criminal Law Matters not within issues
Criminal Law Matters Not Sustained by Evidence

110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2071Scope of and Effect of Summing Up
110k2073For prosecution
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2084Statements Regarding Applicable Law
110k2085In general
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2087Matters not within issues
110Criminal Law
110XXXICounsel
110XXXI(F)Arguments and Statements by Counsel
110k2088Matters Not Sustained by Evidence
110k2089In general

The state has wide latitude in closing arguments, but closing arguments must not go beyond the evidence presented; courts should exclude statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.

3 Cases that cite this headnote

[24] **Criminal Law**Arguments and conduct of counsel

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)2Matters or Evidence Considered
110k1134.16Arguments and conduct of counsel

Entire record is considered when interpreting a closing argument, not an isolated segment.

2 Cases that cite this headnote

[25] **Sentencing and Punishment** Arguments and conduct of counsel
Sentencing and Punishment Harmless and reversible error

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(9)Harmless and reversible error

Defendant was not prejudiced at a penalty-phase trial in a capital case by the prosecutor's erroneous closing-argument suggestion that defendant had escaped from incarceration more than one time, given the entire record in which the suggestion was made.

Cases that cite this headnote

[26] **Sentencing and Punishment** Arguments and conduct of counsel
Sentencing and Punishment Harmless and reversible error

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)3Hearing
350Hk1780Conduct of Hearing
350Hk1780(2)Arguments and conduct of counsel
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(9)Harmless and reversible error

Defendant was not prejudiced at a penalty-phase trial in a capital case by the prosecutor's erroneous closing-argument suggestion that inmates who defendant helped to escape were serving life sentences; the jury was aware that defendant previously had participated in an escape, and no basis existed for a conclusion that the suggestion had a decisive effect on

the outcome of the trial.

1 Cases that cite this headnote

[27] **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

Prosecutor's closing-argument request for jurors to protect prison guards and inmates who would be present with defendant if he received a life sentence constituted a permissible future-dangerousness argument at a penalty-phase trial in a capital case.

Cases that cite this headnote

[28] **Sentencing and Punishment** Dangerousness

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1720Dangerousness

One purpose of capital punishment is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future.

1 Cases that cite this headnote

[29] **Sentencing and Punishment** Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Law-of-the-case doctrine precluded examination of defendant's claim, on appeal after a second penalty-phase retrial on remand in a capital case, that police officers did not have reasonable suspicion to stop him, even though an officer testified at the first trial that the headlights on defendant's vehicle were off when defendant drove past him, and the officer testified at the second retrial that defendant turned off his lights as he drove past and before he pulled into a parking lot; defendant unsuccessfully raised the issue in his first direct appeal, and the slight factual difference in the officer's testimonies did not establish manifest injustice or constitute facts substantially different from the first adjudication. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[30] **Criminal Law** Evidence wrongfully obtained

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.8Evidence
110k1158.12Evidence wrongfully obtained

When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether substantial evidence supports the trial court's decision.

Cases that cite this headnote

[31] **Criminal Law** Reception of evidence

110Criminal Law
110XXIVReview
110XXIV(M)Presumptions
110k1144Facts or Proceedings Not Shown by Record
110k1144.12Reception of evidence

When reviewing a trial court's ruling on a motion to suppress, an appellate court views the facts and any reasonable inferences in a light most favorable to the trial court and disregards any contrary inferences.

Cases that cite this headnote

[32] **Criminal Law**Subsequent Appeals
Criminal Law Mandate and proceedings in lower court

110Criminal Law
110XXIVReview
110XXIV(T)Subsequent Appeals
110k1180In general
110Criminal Law
110XXIVReview
110XXIV(U)Determination and Disposition of Cause
110k1192Mandate and proceedings in lower court

A previous holding is the law of the case, precluding relitigation of issues on remand and subsequent appeal.

Cases that cite this headnote

[33] **Courts**Previous Decisions in Same Case as Law of the Case

106Courts
106IIEstablishment, Organization, and Procedure
106II(G)Rules of Decision
106k99Previous Decisions in Same Case as Law of the Case
106k99(1)In general

Decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not.

Cases that cite this headnote

[34] **Criminal Law**Summoning and impaneling jury

110Criminal Law
110XXIVReview
110XXIV(E)Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1In General
110k1035Proceedings at Trial in General
110k1035(6)Summoning and impaneling jury

Manifest injustice did not result from trial court's failure, before commencement of the

death-qualification phase of voir dire at a penalty-phase trial in a capital case, to give a Missouri approved jury instruction on procedures in death-penalty cases; the information that would have been conveyed to the veniremembers by the instruction was otherwise provided except for the issue of mental retardation, and mental retardation was not an issue in defendant's case. MAI Criminal 3d No. 300.03A.

Cases that cite this headnote

[35] **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

Whenever there is a Missouri approved jury instruction applicable under the law in a criminal case, the approved instruction is to be given to the exclusion of any other instruction.

1 Cases that cite this headnote

[36] **Criminal Law** Duty of judge in general

110Criminal Law
110XXTrial
110XX(G)Instructions: Necessity, Requisites, and Sufficiency
110k769Duty of judge in general

Error results when a trial court fails to give a mandatory instruction.

1 Cases that cite this headnote

[37] **Criminal Law** Instructions in general

110Criminal Law
110XXIVReview
110XXIV(Q)Harmless and Reversible Error

110k1172Instructions
110k1172.1In General
110k1172.1(1)Instructions in general

Supreme Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant.

Cases that cite this headnote

[38] **Sentencing and Punishment**Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Law-of-the-case doctrine precluded defendant's claim, on appeal after a second penalty-phase retrial in a capital case, that certain jury instructions impermissibly shifted the burden of proof to him with respect to mitigating evidence, where defendant challenged the instructions in an earlier appeal, and the Supreme Court rejected his claim.

Cases that cite this headnote

[39] **Sentencing and Punishment**Determination and disposition

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1789Review of Proceedings to Impose Death Sentence
350Hk1789(10)Determination and disposition

Law-of-the-case doctrine precluded defendant's claim, on appeal after a second penalty-phase retrial in a capital case, that trial court erred in sentencing him to death because the state failed to plead statutory aggravating circumstances in the information; defendant raised an identical claim in an earlier appeal, which the Supreme Court rejected.

1 Cases that cite this headnote

[40] **Sentencing and Punishment** Proportionality

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1788Review of Death Sentence
350Hk1788(6)Proportionality

Supreme Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. (Per Fischer, J., with chief justice and one judge concurring, one judge concurring in part and concurring in result, and three judges concurring in result.) V.A.M.S. § 565.035.

3 Cases that cite this headnote

[41] **Sentencing and Punishment** Proportionality

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(G)Proceedings
350HVIII(G)4Determination and Disposition
350Hk1788Review of Death Sentence
350Hk1788(6)Proportionality

When conducting a proportionality review of a death sentence, the Supreme Court simply reviews the sentence and, while giving due deference to the factual determinations reached below, decides whether the sentence is disproportionate as a matter of law. (Per Fischer, J., with chief justice and one judge concurring, one judge concurring in part and concurring in result, and three judges concurring in result.) V.A.M.S. § 565.035.

4 Cases that cite this headnote

[42] **Sentencing and Punishment** More than one killing in same transaction or scheme

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(D)Factors Related to Offense
350Hk1683More than one killing in same transaction or scheme

Death penalty for two murders was not excessive or disproportionate. V.A.M.S. § 565.035.

1 Cases that cite this headnote

[43] **Sentencing and Punishment** Childhood or familial background

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1716Childhood or familial background

A bad or difficult childhood does not provide sufficient grounds to set aside a death penalty. (Per Fischer, J., with chief justice and one judge concurring, one judge concurring in part and concurring in result, and three judges concurring in result.)

Cases that cite this headnote

Attorneys and Law Firms

***532** Rosemary E. Percival, Office of the Public Defender, Kansas City, for appellant.

Chris Koster, Atty. General, Evan J. Buchheim, Kevin Zoellner, Office of Missouri Atty. General, Jefferson City, for respondent.

ZEL M. FISCHER, Judge.

I. Introduction and Procedural History

In February 1998, a jury found Carman Deck guilty 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 for the 1996 robbery and shooting deaths of James and Zelma Long. He was sentenced to two death sentences. This Court affirmed those convictions and sentences *in State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999) ("*Deck I* ").[1] Deck filed a motion for ***533** post-conviction relief

pursuant to Rule 29.15, which was overruled by the circuit court. On appeal, this Court reversed the death sentences but affirmed the findings of guilt for his convictions. *Deck v. State,* 68 S.W.3d 418 (Mo. banc 2002) ("*Deck II* "). At the penalty-phase retrial, he was, again, sentenced to two death sentences. This Court affirmed the death sentences in *State v. Deck,* 136 S.W.3d 481 (Mo. banc 2004) ("*Deck III* "), but the United States Supreme Court granted certiorari and found he was denied a fair trial because he appeared in shackles in the presence of the jury. *See Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). This Court ordered a second penalty-phase retrial, and Deck again received two death sentences. He appeals these two death sentences on numerous grounds. This Court has exclusive jurisdiction pursuant to Mo. Const. art. V, § 3. The judgment is affirmed.

II. Point One: Automatic Life Sentence under Section 565.040.2

[1] Deck argues the trial court violated his rights to due process, equal protection, and freedom from cruel and unusual punishment under the United States and Missouri Constitutions in sentencing him to two death sentences. He contends section 565.040.2, RSMo 2000, mandates he should have been sentenced to life imprisonment without eligibility for parole because the death sentences imposed were held to be unconstitutional in *Deck,* 544 U.S. at 622, 125 S.Ct. 2007.

Standard of Review

[2] Deck's claim involves the construction and application of section 565.040.2. The construction of a statute is a question of law reviewed *de novo. State v. Perry,* 275 S.W.3d 237, 241 (Mo. banc 2009).

Analysis

This Court has previously indicated that trial error premised on a constitutional violation not directly affecting the imposition of the death penalty statutory scheme does not result in the application of section 565.040.2. *See State v. Whitfield,* 107 S.W.3d 253 (Mo. banc 2003).

Section 565.040.2 provides that when a death sentence is held to be unconstitutional, the trial court that previously imposed the sentence shall resentence the defendant to life imprisonment without the possibility of parole:

> In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor, with the exception that when a specific aggravating circumstance found in a case is held to be inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of section 565.035.

In *Whitfield*, the jury found the defendant guilty of first-degree murder, "but could not agree on punishment during the penalty phase, voting 11 to 1 in favor of life imprisonment." 107 S.W.3d at 256. Because the jury was unable to reach a verdict, the trial judge "undertook the four-step process required by section 565.030.4," which, at the time, was the process to determine punishment. *Id.* The trial judge found the presence of statutory and non-statutory aggravating circumstances, determined these circumstances warranted death, considered whether there were mitigating circumstances and ***534** found they did not outweigh the circumstances in aggravation, and decided under all the circumstances to impose a death sentence. *Id.*

After all of Whitfield's appeals and claims of ineffective assistance were exhausted, the United States Supreme Court decided *Ring v. Arizona*, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and held that capital defendants had a right under the Sixth Amendment to a jury determination of any fact that increases their maximum punishment, which included the finding of any statutory aggravating circumstances. *Whitfield*, 107 S.W.3d at 256. Because the judge, not the jury, made the factual findings and sentenced Whitfield to death, this Court held that the sentence of death was unconstitutionally imposed. *Id.*

This Court then applied section 565.040.2 and sentenced Whitfield to life imprisonment without parole. *Id.* This Court held that section 565.040.2 applied because the entry of the death sentence itself was accomplished through the application of an unconstitutional procedure under chapter 565 because the trial court made findings that the Sixth Amendment required a jury to make. *Id.* at 270. In reaching this holding, this Court noted that the alleged error—allowing the judge to determine the facts making Whitfield eligible for the death penalty—was not "some unrelated trial error, but the very entry of a judgment of death based on the judge's findings" in violation of *Ring*, which made the death sentence itself unconstitutional. *Id.* at 270 n. 20.

In applying section 565.040.2, this Court stressed that the situation in *Whitfield,* in which the entry of the death sentence itself was unconstitutional or imposed under an unconstitutional statutory scheme, was distinguishable from a case such as the case at bar in which a new trial is ordered because of unrelated trial court error that violates a defendant's constitutional rights:

> This [case] is to be distinguished from situations like *State v. Mayes*, 63 S.W.3d 615, 635 (Mo. banc 2001), and other cases cited by the separate opinion, in which a new trial was ordered because of unrelated trial error of constitutional dimension. Here, as discussed, it is the very entry of the death sentence that is held to be unconstitutional, since made without the very jury findings required for imposition of the death penalty under Missouri law, and hence the only remedy is to order imposition of the proper penalty—a life sentence.

Id. at 272 n. 23.

This construction of section 565.040.2 was amplified by the dissent in *Whitfield:*

> Section 565.040, however, does not apply to situations of mere procedural error, even if such error is rooted in constitutional principles. First, the plain words of the statute limit its application to events in which "the death penalty [in its totality] ... is held to be unconstitutional" or in which "any death sentence imposed [as to a particular offender] ... is held to be unconstitutional". Second, there is no policy reason to mandate a particular more extreme remedy when a lesser, more moderate remedy, is sufficient to guard the procedural rights of the offender.

Id. at 274 (Price, J. dissenting) (alteration in original).

This observation is consistent with the legislative intent behind the passage of section 565.040.2. The dissent even went on to point out the several cases in which this Court had concluded that although a death sentence had been imposed, a remand for a retrial of the penalty phase proceeding was the appropriate remedy for a trial error premised on a constitutional violation. *Id.*

***535** The limitation put on the application of section 565.040.2, as articulated in both the majority and dissenting opinions in *Whitfield*, is in perfect harmony with the legislative intent and history behind its enactment.

In this case, Deck is not entitled to the relief allowed by section 565.040.2 because the reversible error recognized by the United States Supreme Court—Deck's shackling in front of the jury—was trial error unrelated to the statutory scheme that set out the death penalty procedures.

III. Point Two: Veniremembers Removal for Cause

Deck asserts the trial court violated his right to a trial by a fair and impartial jury and abused its discretion in sustaining the State's motions, over his objections, to strike certain potential jurors

for cause based on their reluctance to serve as the jury's foreperson. He contends these potential jurors were otherwise qualified to serve as jurors and their only "fault" was a reluctance to serve as foreperson and sign the verdict form of death.

Standard of Review

[3] "The trial court's 'ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.' " *State v. Taylor,* 134 S.W.3d 21, 29 (Mo. banc 2004) (quoting *State v. Smith,* 32 S.W.3d 532, 544 (Mo. banc 2000)).

[4] [5] [6] The qualifications for a prospective juror are not determined from a single response, but rather from the entire examination. *State v. Johnson,* 22 S.W.3d 183, 188 (Mo. banc 2000). The trial court can better evaluate a veniremember's commitment to follow the law and has broad discretion to determine the qualifications of prospective jurors. *Id.* "[T]he trial judge evaluates the venire's responses and determines whether their views would prevent or substantially impair their performance as jurors (including the ability to follow instructions on the burden of proof)." *Id.*

[7] [8] [9] [10] [11] Accordingly, a great deal of deference is owed to the trial court's determination that a prospective juror is substantially impaired. *Uttecht v. Brown,* 551 U.S. 1, 7, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). This deferential standard applies whether the trial court has engaged in a specific analysis regarding the substantial impairment; "even the granting of a motion to excuse for cause constitutes an implicit finding of bias." *Id.* "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Id.* at 9, 127 S.Ct. 2218. The trial court's "finding may be upheld even in the absence of clear statements from the juror that he or she is impaired." *Id.* at 7, 127 S.Ct. 2218. "Thus, when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State.' " *Id.* (alteration in original) (quoting *Wainwright v. Witt,* 469 U.S. 412, 434, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)); *see also State v. Tisius,* 92 S.W.3d 751, 763 (Mo. banc 2002) (quoting *State v. Roberts,* 948 S.W.2d 577, 597 (Mo. banc 1997)) ("Where there is conflicting testimony regarding a prospective juror's ability to consider the death penalty, the trial court does not abuse its discretion by giving more weight to one response than to another and in finding that the venireperson could not properly consider the death penalty"). Even a juror's assurance that he or she can follow the law and consider the death penalty may not overcome ***536** the reasonable inferences from other responses that he or she may be unable or unwilling to follow the law. *Uttecht,* 551 U.S. at 18, 127 S.Ct. 2218.

1. The Record Regarding Veniremember Coleman

Although Veniremember Coleman said she could consider a sentence of death, she repeatedly responded with, "I don't know," when asked if she could sign a verdict of death, even knowing that she was not signing simply for herself, but on behalf of the jury as a whole. Ultimately, she said she could make no promises that she could sign a death verdict:

> [Prosecuting Attorney]: ... Ms. Coleman, if you're that juror in that situation, could you give meaningful, realistic, honest consideration to a sentence of death?
>
> [Veniremember Coleman]: Yes.
>
> [Prosecuting Attorney]: Could you give that same sort of consideration to life imprisonment without the possibility of probation or parole?
>
> [Veniremember Coleman]: Yes.
>
> [Prosecuting Attorney]: Could you, if you were the foreperson, sign a verdict?
>
> [Veniremember Coleman]: I don't know.
>
> [Prosecuting Attorney]: Well, you rolled your eyes first, so I kinda thought in my experience, you might say I don't know. Because that can be the weight to your issue. I mean some people feel sometimes that by signing that, I'm the only one responsible for that. And is it fair to say that's kind of what's going through your mind?
>
> [Veniremember Coleman]: Yes.
>
> ...
>
> [Prosecuting Attorney]: And my concern is, is that you might not be able to function as a juror. Do you understand that?
>
> [Veniremember Coleman]: I understand.
>
> [Prosecuting Attorney]: And—but so what I need you to know is, can you assure me that you can do that. Or, is your situation because of your concerns that ... I just don't know that I can sign that form. I can't promise you that I'll be able to?
>
> [Veniremember Coleman]: I don't know that I could.
>
> [Prosecuting Attorney]: Would it be fair to say that you can't promise me that you would be able to?
>
> [Veniremember Coleman]: No, I can't.

Deck's attorney did not ask Veniremember Coleman any questions. The trial court sustained the State's motion to strike Veniremember Coleman for cause apparently based on her statement—that was not followed up—that she was unable to state whether she could sign the verdict form.

2. The Record Regarding Veniremember Ladyman

Veniremember Ladyman also claimed that he could consider both punishments, but said that he would not sign a verdict imposing a death sentence because it was "like playing God":

> [Prosecuting Attorney]: Thank you. Mr. Ladyman. Sir, if you were in that circumstance, asked to consider those things, would you be able to give the same level of consideration to a sentence of death, as a life sentence?
>
> [Veniremember Ladyman]: Yes, I could.
>
> [Prosecuting Attorney]: Would you be able to, also consider or sign the verdict form, sentencing someone—or sentencing someone to die ?
>
> [Veniremember Ladyman]: No.
>
> [Prosecuting Attorney]: And—I don't—is it the same sort of thing we've talked about with others, that it's very personal, and you couldn't stand out alone?
>
> ***537** [Veniremember Ladyman]: Well, if—if its like playing God. I don't want to be a part of it, nuh-uh.
>
> [Prosecuting Attorney]: So while you might be able to deliberate and decide—
>
> [Veniremember Ladyman]: Yeah, I can decide.
>
> [Prosecuting Attorney]: And you view that part as playing God?
>
> [Veniremember Ladyman]: Yes.

Veniremember Ladyman maintained this position even though he had heard the prosecutor repeatedly tell others that the jury foreperson signs the verdict form not on behalf of himself or herself, but on behalf of the unanimous jury as a whole.

During questioning by Deck's attorney, Veniremember Ladyman said that he could follow the court's instructions and consider imposing the death penalty or life imprisonment without parole. Deck's counsel also asked him about his statement that he would refuse to sign a verdict form

imposing a death sentence. Veniremember Ladyman said that he could consider the death sentence, and also reaffirmed that he would refuse to sign a verdict form for a sentence of death:

> [Defense Counsel]: Mr. Ladyman, we also went through the process together. Unless there's something else that you want to mention to me or state that you believe would be helpful in our consideration to consider whether or not you would be appropriate for the jury?
>
> [Veniremember Ladyman]: [Shakes head.]
>
> [Defense Counsel]: You're shaking your head. I'll take that as a no.
>
> [Veniremember Ladyman]: I'm just saying I ain't signing it. I don't want to be the—
>
> [Defense Counsel]: Let me ask you about that. You talked about that you would not sign the verdict form.
>
> [Veniremember Ladyman]: Right.
>
> [Defense Counsel]: Does the fact that you do not want to sign the verdict form, or that you don't want to serve as the foreman of the jury, does that prevent you from being a jury—a juror in this case, in the sense that—my question is in your mind, I can't be a part of that. I can't be a part of that? You are there. But does that prevent you from giving a realistic consideration to the death penalty?
>
> [Veniremember Ladyman]: That's all the time.
>
> [Defense Counsel]: Sure. Is your reluctance—or I'll even call refusal to sign the verdict form, does that prevent you from considering the death penalty in this case?
>
> [Veniremember Ladyman]: No.
>
> [Defense Counsel]: You could be one of the jurors?
>
> [Veniremember Ladyman]: Yeah.
>
> [Defense Counsel]: You would just defer, as I understand it correctly, and have somebody else serve as foreperson?
>
> [Veniremember Ladyman]: Right.
>
> [Defense Counsel]: Correct me if I'm wrong, but you could realistically consider the death penalty?
>
> [Veniremember Ladyman]: Yeah.

[Defense Counsel]: And you could realistically consider the life in prison?

[Veniremember Ladyman]: Yeah.

The trial court sustained the State's motion to strike Veniremember Ladyman for cause.

Analysis

[12] [13] This Court held in *Smith* that a veniremember's unequivocal statement that he or she could not sign a death verdict can provide a basis for the trial court to sustain a motion to remove the veniremember for cause. 32 S.W.3d at 544. Both veniremembers in question, in ***538** this case, stated that they could not sign a death verdict. A prospective juror's reluctance or refusal to sign a death verdict may be considered by the trial court but need not be conclusive. The reluctance or refusal may be considered among other facts and circumstances—including the judge's observation of the veniremember—in deciding whether a prospective juror should be struck for cause.

In this case, it is not just the simple refusal to sign the verdict that may warrant removal. Where, as here, if a veniremember claims on the one hand that he or she could fairly consider both punishments but, at the same time, unequivocally states that he or she would not sign a verdict of death, the trial court is in the best position to consider whether the record contains sufficient evidence of equivocation creating a doubt as to whether that veniremember would be able to fairly consider both punishments. Here, the veniremembers' responses revealed an inability to follow the court's instructions if that person were chosen as foreman of the jury and the trial court could have concluded from the record as a whole that there was a substantial possibility that the veniremember may not be able to fairly consider both punishments despite their assurances to the contrary. The trial court was in a better position than this Court to make that determination and did not abuse its discretion in sustaining the State's motion to strike these veniremembers for cause.

IV. Point Three: Failure to Provide Notice of Argument

Deck argues the State failed to provide notice of aggravators, as required by section 565.005.1, RSMo 2000, and Rule 25.03 and that the trial court abused its discretion when it allowed the State to argue Deck's future dangerousness and bad prison conduct based on Deck's 1985 conviction for aiding an escape from incarceration.

Standard of Review

[14] [15] The trial court is vested with broad discretion to exclude or admit evidence and to control closing arguments. *State v. Baumruk,* 280 S.W.3d 600, 607 (Mo. banc 2009); *State v. Forrest,* 183 S.W.3d 218, 226 (Mo. banc 2006). Furthermore, to be entitled to relief, an appellant must show an error was so prejudicial that he or she was deprived of a fair trial. *Baumruk,* 280 S.W.3d at 607.

Analysis

The State's amended information charged that Deck was a persistent offender. One of the convictions relied on to support that allegation was Deck's 1985 conviction for aiding an escape. When the State offered a certified copy of that conviction during the penalty-phase retrial, Deck's counsel objected on the ground that the conviction was more prejudicial than probative and that the State had not provided notice it would utilize the conviction. The trial court overruled the objection and admitted the certified copy of the conviction into evidence.

Later, during closing arguments, the State discussed Deck's future dangerousness and bad prison conduct:

> [Prosecuting Attorney]: Sometimes when horrible crimes are committed by wolves, we've got to come to court, and we've got to count on our sheepdogs like for you, and you're our sheepdogs, today. You're our sheepdogs, that by your verdict, can protect the rest of society. While he's going to be in prison for the rest of his life if you let him live, remember, he knows how to escape. He aided and abetted others trying to.
>
> [Defense Counsel]: Objection; not a noticed aggravator.
>
> [The Court]: Overruled.
>
> [Defense Counsel]: Irrelevant.
>
> ***539** [The Court]: Overruled.
>
> [Prosecuting Attorney]: He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates. But I need you and our society to be the sheepdog.

Section 565.005.1(1) requires that parties, at a reasonable time before trial begins, provide each other with a list of all aggravating or mitigating circumstances that the party intends to prove at the penalty phase of trial. Rule 25.03 requires the State, on written request, to disclose certain materials and information.

It is clear from the record that the State provided notice that it intended to make arguments based on Deck's 1985 conviction. Deck's argument does not articulate any specific violation of section 565.005.1 or Rule 25.03 and, in fact, his brief concedes notice: "Before trial, the State provided Deck notice that it would offer evidence of his prior convictions, including a 1985 conviction for aiding an escape."

Instead, Deck argues the State's failure to give notice it intended to argue his future dangerousness and previous bad prison conduct violated section 565.005.1 and Rule 25.03 as well as his due process rights under *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).

[16] Section 565.005.1 and Rule 25.03 do not require the State to provide notice of arguments it plans to make. Section 565.005.1 requires disclosure of aggravating or mitigating circumstances that either party intends to prove at the penalty phase of trial. Rule 25.03 requires disclosure, on request, of certain types of evidence or information. Neither requires notice of the specific argument that is going to be made based on disclosures.

Deck's reliance on *Simmons* is misplaced. In *Simmons*, the United States Supreme Court found that the due process clause does not allow the execution of a person on the basis of information that he had no opportunity to explain or deny. 512 U.S. at 163–64, 114 S.Ct. 2187. The Supreme Court held that a defendant who was sentenced to death and whose future dangerousness was made an issue by the State was denied due process when it prevented him from providing mitigating evidence or argument during the penalty phase of trial. *Id.* The case before this Court is distinguishable. There is no evidence that Deck was prevented from making any mitigating argument.

Furthermore, the State's disclosure placed Deck on notice that the State was likely to argue his future dangerousness. In *State v. Bucklew*, 973 S.W.2d 83, 96 (Mo. banc 1998), Bucklew argued that the trial court plainly erred in permitting the State to make arguments based on aggravating circumstances because the State failed to disclose aggravating circumstances and failed to give him notice it would argue his future dangerousness based on those circumstances. This Court rejected his claim, finding that the State had given Bucklew notice of statutory and non-statutory aggravating circumstances. *Id.* This Court also found that Bucklew had notice of the State's arguments, based on its disclosure of aggravating circumstances:

> [T]he state may argue inferences from evidence. It is reasonable to infer that a

> person who escaped from jail while awaiting a first degree murder trial and who has a long criminal record would not suffer confinement well. The allegations of fact contained in the state's disclosures and the language the state used ***540** ("anti-social and criminal history") provided Bucklew with sufficient notice of the state's intent to argue future dangerousness.

Id.

V. Point Four: Allegedly Improper Closing Arguments

Deck makes multiple claims related to the State's closing argument. They include: allegedly improper appeals to the jury, allegedly improper personalization, misstatements of facts and the State's future dangerousness argument.

1. Allegedly improper appeals to the jury

Deck alleges this portion of the closing argument was improper personalization:

> [Prosecuting Attorney]: The last thing I'm gonna tell you and say to you is this: I—I've done this job long enough, and this isn't about me—but I've done this long enough that on occasion, five years after a case like this has gone—
>
> [Defense Counsel]: Objection; vouching, personalization.
>
> [The Court]: Sustained.
>
> [Prosecuting Attorney]: Often times, I'll get a phone call later on from a family member, and they'll say—
>
> [Defense Counsel]: Objection; relevance, same objection.
>
> [The Court]: Overruled.
>
> [Prosecuting Attorney]: And they'll say to me, to my granddaughter, I've told them about my loved one that was murdered. They want—they want to know what happened. Can you explain it to them. There are 19 grandchildren. 19 great-grandchildren, and I don't know how many more there'll be. And some day these people are going to be told about James and Zelma Long. And they're gonna be told about what wonderful parents they were, how they liked to fish. How

> their Grandmother got her masters and taught. They're gonna be told about these wonderful people. And you know the question they're gonna ask, is they're gonna say well, where are they now? They're gonna have to be told about this. And then they're gonna ask another question, and that question I get to some—unfortunately sometimes explain is was justice done? When you go up there, you'll tell us if justice is done. Now I'm gonna sit down and wait for your answer, so I can tell them.

Standard of Review

The trial court maintains broad discretion in controlling closing arguments. *State v. Edwards,* 116 S.W.3d 511, 537 (Mo. banc 2003). Closing arguments must be examined in the context of the entire record. *Id.* Here, Deck's claim of improper personalization was preserved and will be reviewed for abuse of discretion—whether a defendant was prejudiced to the extent that there is a reasonable probability that the outcome at trial would have been different if the error had not been committed. *Deck III,* 136 S.W.3d at 488; *Deck I,* 994 S.W.2d at 543.

Analysis

[17] [18] This argument did not constitute improper personalization. Improper personalization is established when the State suggests that a defendant poses a personal danger to the jurors or their families. *State v. Basile,* 942 S.W.2d 342, 352 (Mo. banc 1997). "Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization that can only arouse fear in the jury." *State v. Williams,* 97 S.W.3d 462, 474 (Mo. banc 2003) (internal quotations omitted). The record here shows that the State did not imply any danger to the jurors or ask the jurors to place themselves in the victims' shoes.

***541** In addition to his improper personalization argument, Deck attempts to tack on an additional claim, alleging this argument constituted an improper appeal to sympathy and that it asked jurors to consider matters outside of the record to reach their verdict. Because this additional claim differs from his objection at trial, it is not preserved for appellate review and is entitled only to plain error review. *State v. Driver,* 912 S.W.2d 52, 54 (Mo. banc 1995).

[19] Deck claims this argument was an improper appeal to sympathy akin to the argument in *Sheppard v. State,* 777 So.2d 659, 661 (Miss.2000), where the prosecutor told the jury that if they voted to acquit, he would want them to call him and explain why they found the defense witnesses credible, so he could explain it to the victim's family. The Mississippi Supreme Court found that argument was reversible error because its purpose was to inflame the jurors and make them believe

they would be held personally accountable for their verdict. *Id.* at 661–62.

The closing argument in this case is distinguishable from that in *Sheppard* because the prosecuting attorney did not tell the jurors that the victims' family would hold them accountable, nor did he attempt to make an improper appeal to sympathy. In fact, the closing argument in this case is closer to the argument upheld by this Court in *State v. Strong*, 142 S.W.3d 702, 726–27 (Mo. banc 2004), where the State argued that family members in the courtroom were victims and described the impact the crime had on them.

This Court has found that statements stronger than those made here were not plain error. *See, e.g.*, *Strong*, 142 S.W.3d at 727–28 (telling jurors the defendant would "escape justice" if death were not imposed); *State v. Ringo*, 30 S.W.3d 811, 821 (Mo. banc 2000) (telling jurors they would be rewarding the defendant if they did not impose death); *Deck I*, 994 S.W.2d at 543–44 (telling the jury the only way they could impose justice and show mercy to the people in the courtroom was to impose death).

2. Allegedly improper personalization

[20] Deck alleges this closing argument was improper personalization:

> Fourth—or three, depravity of mind. Is this the act of a depraved mind? And the instruction goes a little bit further than this. But it tells you what depraved mind in this situation means. But he rendered these people helpless before he killed them. And I would ask you to think about this: laying on a bed for ten minutes at gunpoint, rendered you helpless.

Standard of Review

[21] [22] No objection was made to this argument. Therefore, this claim is only entitled to plain error review. *State v. Johnson*, 284 S.W.3d 561, 573 (Mo. banc 2009). Plain error relief is rarely appropriate for claims involving closing arguments because the decision to object is often a matter of trial strategy. *Id.* Closing arguments must be examined in the context of the entire record. *Id.* Under plain error review, a conviction will be reversed for improper closing argument only when it is established that the argument had a decisive effect on the outcome of the trial and amounts to manifest injustice. *State v. Middleton*, 995 S.W.2d 443, 456 (Mo. banc 1999). The burden to prove decisive effect is on the appellant. *State v. Parker*, 856 S.W.2d 331, 333 (Mo. banc 1993).

Analysis

Deck's argument relies on *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), and ***542** *State v. Rhodes*, 988 S.W.2d 521 (Mo. banc 1999).

The State in *Storey* argued:

> Think for just this moment. Try to put yourselves in Jill Frey's place. Can you imagine? And, then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

Id. at 901.

This Court held the State's argument was improper and undeniably prejudicial because graphically detailing the crime as if the jurors were in the victim's place could only serve to arouse fear in the jury. *Id.*

In *Rhodes*, the State argued:

> Try, try just taking your wrists during deliberations and crossing them and lay down and see how that feels (demonstrating). Imagine your hands are tied up.... And ladies and gentlemen, you're on the floor, and you're like that, with your hands behind your back, and this guy is beating you. Your nose is broken. Every time you take a breath, your broken rib hurts. And finally, after you're back over on your face, he comes over and he pulls your head back so hard it snaps your neck.... Hold your breath. For as long as you can. Hold it for 30 seconds. Imagine it's your last one.

988 S.W.2d at 529.

This Court, relying on *Storey*, stated that graphically detailing the crime as if the jurors were the victims was improper because it interfered with the jury's ability to make a reasoned and deliberate determination to impose the death penalty. *Id.*

The argument here is distinguishable from those made in *Storey* and *Rhodes*. In this case, the jury was not asked in any manner to place itself in the victims' shoes. This Court has denied similar claims in other cases. *See, e.g., State v. Smith*, 944 S.W.2d 901, 918 (Mo. banc 1997); *Roberts*, 948 S.W.2d at 594–95.

3. Misstatement of facts

Deck contends the State made two arguments that prejudicially misstated the facts of the case. Deck's complaint lies with the following two arguments related to his 1985 conviction for aiding escape:

> The next thing we have to do is to convince you that all this bad evidence, the aggravating evidence in this case warrants a death sentence. It does. You can consider all his prior escapes.
>
> ...
>
> He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates.

Standard of Review

No objection was made to either argument; therefore, they will be reviewed for plain error, which is established only when an argument has a decisive effect on the outcome of the trial amounting to a manifest injustice. *Johnson,* 284 S.W.3d at 573; *Middleton,* 995 S.W.2d at 456. The burden to prove decisive effect is on the appellant. *Parker,* 856 S.W.2d at 333.

Analysis

The only evidence before the jury relating to any escape attempt was the State's allegation that, in 1985, while incarcerated, Deck procured a saw blade to cut through ***543** jail bars to help two men to escape. The record also contains information that Deck attempted to escape from prison in Potosi, but that evidence was discussed at sidebar outside the presence of the jury.

[23] [24] The State has wide latitude in closing arguments, but closing arguments must not go beyond the evidence presented; courts should exclude "statements that misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury." *State v. Rush,* 949 S.W.2d 251, 256 (Mo.App.1997); *see also Storey,* 901 S.W.2d at 901 ("A prosecutor arguing facts outside the record is highly prejudicial"). But it is important to remember that "[t]he entire record is considered when interpreting a closing argument, not an isolated segment." *Johnson,* 284 S.W.3d at 573.

[25] No prejudice resulted from the first argument that suggested Deck had escaped more than one time. It appears the prosecuting attorney's comment was a simple misstatement—he used the plural rather than the singular form of the word "escape." Deck argues that based on this mistake, the jurors speculated, assumed facts outside of evidence and then imposed the death sentences based on that one comment. Comments made during closing argument must be looked at in the context of the entire record. *Id.* After review of the entire record there is no demonstration Deck was prejudiced by this misstatement.

[26] No prejudice resulted from the second argument that suggested the other inmates whom Deck attempted to help escape were serving life sentences. There was no evidence that the inmates Deck aided were "in for the rest of their lives," but the jury was aware he previously had participated in an escape. After review of the entire record, this comment was not prejudicial because there is no basis to conclude that this argument had a decisive effect on the outcome of the trial.

4. Future dangerousness argument

[27] Deck alleges this portion of the State's closing argument was improper:

> He knows how to escape, helping people that were in for the rest of their lives. I need you to be the sheepdog. I need you to protect the guards that will have to guard him so that he doesn't injure them. I need you to be a sheepdog and even protect other, more vulnerable inmates.

Standard of Review

No objection was made to this argument. Deck's claim will be reviewed for plain error—whether the argument had a decisive effect on the outcome of the trial amounting to a manifest injustice. *Johnson,* 284 S.W.3d at 573; *Middleton,* 995 S.W.2d at 456. The burden to prove decisive effect is on the appellant. *Parker,* 856 S.W.2d at 333.

Analysis

[28] Deck relies on *Schoels v. State,* 114 Nev. 981, 966 P.2d 735 (1998), and *Blake v. State,* 121 Nev. 779, 121 P.3d 567 (2005), and claims this argument impermissibly asked jurors to impose

death to prevent him from killing others in the future, thereby saving innocent victims. However, one of the purposes of capital punishment is the incapacitation of dangerous criminals and "the consequent prevention of crimes that they may otherwise commit in the future." *State v. Bolder*, 635 S.W.2d 673, 683 (Mo. banc 1982) (citing *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

In *Simmons*, the United States Supreme Court noted its approval of arguments concerning a defendant's future dangerousness, "This Court has approved ***544** the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." 512 U.S. at 162, 114 S.Ct. 2187; *see also Bucklew*, 973 S.W.2d at 96.

The facts in this case are distinguishable from *Schoels* and *Blake* in that the State, as permitted by *Bucklew* and *Simmons*, permissibly argued future dangerousness but did not suggest or imply the jurors would be directly responsible or held accountable if Deck harmed anyone else in the future.

VI. Point Five: Motion to Suppress

[29] Deck argues that the trial court erred in overruling his motion to suppress evidence—which addressed items seized from his car and subsequent statements made to police—because the police did not have reasonable suspicion to stop him. He claims that this evidence was obtained in violation of his constitutional right to be free of unreasonable searches and seizures and that the impermissible use of this evidence, first at trial and again during the most recent penalty-phase retrial, requires that his conviction and sentences be vacated and remanded for a new trial.

Standard of Review

[30] [31] When reviewing a trial court's ruling on a motion to suppress, the inquiry is limited to whether substantial evidence supports the court's decision. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998). The appellate court views the facts and any reasonable inferences in a light most favorable to the trial court and disregards any contrary inferences. *State v. Lewis*, 17 S.W.3d 168, 170 (Mo.App.2000).

Analysis

Deck unsuccessfully raised this same issue in his first direct appeal. *See Deck I,* 994 S.W.2d at 534–35. In *Deck I,* he argued that he was seized when Officer Wood approached his car and that there was no probable cause, at that time, because it was not unlawful to drive in a private parking lot without turning on his car's headlights. *Id.* at 535.

At the first trial, Officer Wood testified he parked on the road outside Deck's apartment after receiving a tip that Deck and his sister were involved in a robbery-homicide, that they were driving a gold two-door car and that they were probably armed. *Id.* Sometime after 11 p.m., Officer Wood saw Deck drive by and pull into a parking space. *Id.* Officer Wood testified the lights on Deck's car were not turned on, even though it was dark outside. *Id.* Officer Wood approached the car, identified himself and shined a flashlight on Deck. *Id.* Deck leaned down to the passenger's side of the vehicle, at which point Officer Wood ordered him to sit up and show his hands. *Id.* Officer Wood ordered Deck out of the car, searched him, found no weapons, and then searched his car, finding a pistol concealed under the front seat. *Id.* Officer Wood placed Deck under arrest for unlawful use of a weapon. *Id.* Also found in the car was a decorative tin belonging to the victims. *Id.* Deck later, after receiving the *Miranda* warning, made a full confession. *Id.*

This Court affirmed the trial court's ruling admitting the evidence because Deck was not seized, for purposes of the Fourth Amendment, until he was ordered to sit up and show his hands. *Id.* at 535–36. This seizure was based on reasonable suspicion because Officer Wood had observed Deck leaning into the passenger's seat. *Id.* Deck's search and subsequent seizure of items found in the car, as well as his confessions, were permissible, therefore, following the United State's Supreme Court's decisions in ***545** *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) and *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). *Id.*

[32] [33] The law-of-the-case doctrine[2] precludes reexamination of this issue. *State v. Johnson,* 244 S.W.3d 144, 163 (Mo. banc 2008).

Deck requests that this Court not apply the law-of-the-case doctrine, claiming the evidence on remand concerning his arrest was substantially different from the evidence supporting his conviction in the first appeal. "An appellate court has discretion to refuse to apply the doctrine where the first decision was based on a mistaken fact or resulted in manifest injustice or where a change in the law intervened between appeals." *Walton v. City of Berkeley,* 223 S.W.3d 126, 130 (Mo. banc 2007). Furthermore, the law-of-the-case doctrine has been held not to apply where the evidentiary facts on remand are "substantially different from those vital to the first adjudication and judgment." *Id.*

Deck argues the evidence on remand was substantially different because Officer Wood testified at the first trial that when Deck drove past him, the headlights on his car were off. *See Deck I,* 994 S.W.2d at 535. However, at the most recent penalty-phase trial, Officer Wood testified that Deck turned his lights off as he drove by and before he pulled into the parking spot.

This slight factual difference in Officer Wood's testimony of an event that happened more than a decade ago does not establish manifest injustice or constitute facts substantially different from the first adjudication. In *Deck I*, this Court began its search and seizure analysis at the point that Officer Wood approached Deck's car and saw him lean over to the passenger's seat. 994 S.W.2d at 535–36. Whether Deck's lights were on or off does not change this analysis; accordingly, this Court does apply the law-of-the-case doctrine.

VII. Point Six: Failure to Read Instruction

[34] Deck argues the trial court erred in failing to read MAI–CR 3d 300.03A before death qualification of the venire panel, which resulted in manifest injustice because the jury was unable to respond appropriately to questioning during death qualification.

Standard of Review

[35] [36] "Whenever there is an MAI–CR instruction applicable under the law ..., the MAI–CR instruction is to be given to the exclusion of any other instruction." *State v. Ervin*, 979 S.W.2d 149, 158 (Mo. banc 1998). Error results when a trial court fails to give a mandatory instruction. *State v. Gilmore*, 797 S.W.2d 802, 805 (Mo.App.1990). However, Deck did not object when the trial court failed to read MAI–CR 3d 300.03A at the beginning of death-qualification voir dire. Therefore, this issue has not been preserved for appeal and can only be reviewed for plain error, which requires a finding that the trial court's error resulted in manifest injustice or miscarriage of justice. *Johnson*, 244 S.W.3d at 162.

Analysis

MAI–CR 3d 313.00 Supp. Notes on Use 6(a)(1)(b) states that when a defendant has ***546** been found guilty of first-degree murder committed after August 28, 1993, but before August 28, 2001, MAI–CR 3d 300.03A, "with modification, must be read to the jury panel immediately before the commencement of the 'death qualification' phase of voir dire."[3] That instruction provides:

At this stage of the jury selection process, the attorneys are permitted to question you

concerning your views on punishment. The fact that questions are being asked about punishment at this time should not be taken by you as any indication that the defendant(s) in the case before you (is)(are) guilty of the crime(s) charged. Nothing that is said by the attorneys or by another prospective juror during this process is evidence, and you should not let any such statements influence you in any way.

The possible punishments for the offense of murder in the first degree are imprisonment for life by the Department of Corrections without eligibility for probation or parole or death. The purpose of this questioning is to discover whether or not you are able to consider both of these punishments as possible punishments.

A case in which the death penalty is a possible punishment is tried in two stages. In the first stage, the jury must decide whether the defendant is guilty or not guilty. If the defendant is found guilty of murder in the first degree, a second stage is held in which the jury must decide on appropriate punishment.

If a second stage is reached in this case, the Court will instruct the jury as to the process it must follow to reach its decision on punishment. For present purposes, you should be aware that a conviction of murder in the first degree does not automatically make the defendant eligible for the death penalty. Before the jury may consider imposing the death penalty, it may be asked to consider whether or not the defendant is mentally retarded. If the jury unanimously finds that it is more likely to be true than not true that the defendant is mentally retarded, the defendant cannot be sentenced to death.

Before the jury may consider imposing the death penalty, it must also find, unanimously and beyond a reasonable doubt, that the evidence before it establishes the existence of at least one special fact or circumstance specified by law, called a statutory aggravating circumstance. If no statutory aggravating circumstance is found, the defendant cannot be sentenced to death.

If the jury does not find at least one statutory aggravating circumstance, it still cannot return a sentence of death unless it also unanimously finds that the evidence in aggravation of punishment, taken as a whole, warrants the death penalty, and that this evidence is not outweighed by evidence in mitigation of punishment. The jury is never required to return a sentence of death.

Counsel for the State may proceed.

This instruction was not read. As a result, Deck argues the jury was not able to appropriately respond to questioning during voir dire because: (1) the jury was not instructed that a finding of aggravating circumstances had to be unanimous or that aggravating circumstances must outweigh mitigating circumstances; (2) the jury was not instructed that a first-degree murder conviction does not automatically make a defendant eligible for death or that the jury was not required to return a sentence of death; and (3) the court's failure to give these instructions gave the jury a

false impression that certain steps in the deliberation process were more important.

***547** Deck suffered no manifest injustice from the failure to read this oral instruction because the information that would have been conveyed to the veniremembers by the instruction was otherwise provided. Immediately after the jury panel was sworn, the trial court read the opening instruction to the panel, part of which stated:

> The Court instructs you that, in order to consider the death penalty, you must find one or more statutory aggravating circumstances beyond a reasonable doubt. The burden of causing you to find the statutory aggravating circumstances beyond a reasonable doubt is upon the State.

Later, during voir dire, Deck's attorney told the jury panel that "this is a capitol [sic] case" and that the panel members would be asked about the "issue specifically of life in prison without the possibility of parole or the alternative, the death penalty." Deck's attorney also told the jury panel they would "talk about the issue of the death penalty and ... life in prison without parole." After general voir dire, the trial court told the jury panel they would be questioned in smaller panels about their "attitudes regarding the punishments that are available in this case."

When each small jury panel was questioned, its members were told that a person must first be convicted of first-degree murder before a death sentence can be considered and that Deck had previously been convicted of two counts of first-degree murder. Each small jury panel was told the only available sentences were death and life imprisonment without parole and that the purpose of questioning was to determine whether they could realistically consider both punishments.

All the jury panels were told that before a death sentence can be considered: (1) the State must prove at least one statutory aggravating circumstance beyond a reasonable doubt, which the jury must unanimously agree on; (2) the jury must then also determine whether the aggravating circumstances as a whole justified a death sentence; and (3) the jurors must also conclude that the aggravating circumstances outweigh any mitigating circumstances.

All the jury panels were told that a juror is never required to vote for death and that the failure to unanimously make the required findings would automatically result in a sentence of life imprisonment without parole. Throughout this entire process, phrases and concepts unfamiliar to lay people, including statutory aggravating and mitigating circumstances, were explained in easy-to-understand language.

The only circumstance covered by MAI–CR 3d 300.03A, but not covered by the court or counsel in the form of an oral statement or instruction, was the issue of mental retardation. Because mental retardation was not an issue in this case, no prejudice results from this omission. Otherwise, the information contained in the instruction was conveyed to the jury by attorneys or the court before

death qualification began. Therefore, the trial court's failure to read MAI–CR 3d 300.03A did not result in plain error.

Other cases before this Court have reached a similar conclusion—the failure to read a mandatory instruction did not result in plain error if the jury was otherwise conveyed the information. *See, e.g., Williams,* 97 S.W.3d at 472 (failure to give the jury an instruction on notetaking was technically erroneous, but not plain error because the court read the proper instruction to the jury).

VIII. Point Seven: Instructional Error—Mitigating Evidence

Deck argues the trial court erred in submitting instructions 8 and 13 to the ***548** jury. He contends these instructions did not inform the jury that the State bore the burden of proving aggravating circumstances beyond a reasonable doubt and that aggravation had to outweigh mitigation, thereby preventing the jury from giving meaningful consideration and effect to mitigating evidence. Deck claims the instructions effectively impermissibly shifted the burden of proof.

Standard of Review

[37] This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant. *State v. Zink,* 181 S.W.3d 66, 74 (Mo. banc 2005).

Analysis

At the instructions conference, Deck objected to instructions 8 and 13 on the grounds that these instructions impermissibly shifted the burden of proof to the defendant with respect to mitigating evidence. The instructions given were patterned after MAI–CR 3d 313.44A and explained to the jurors if they found the facts and circumstances in aggravation of punishment taken as a whole warrant a death sentence, they must then determine if there were facts or circumstances in mitigation of punishment that were sufficient to outweigh those in aggravation of punishment. The instruction then explains to the jurors that they did not have to agree on mitigating facts, but that if each juror determined that the mitigating evidence outweighs the aggravating evidence, the jury must return a sentence of life without parole.

Deck concedes this Court has previously addressed this argument and rejected it. *See Johnson*, 284 S.W.3d at 588–89 (The appellant's argument that the mitigating evidence instruction "improperly shifts the burden of proof has been rejected by the United States Supreme Court [in *Kansas v. Marsh*, 548 U.S. 163, 170–71, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006)] and this Court."); *see also Forrest*, 183 S.W.3d at 228–29; *Zink*, 181 S.W.3d at 74. Deck offers no meritorious reason why this Court should reconsider its holding in those cases.

[38] Furthermore, in *Deck III*, Deck challenged the mitigating evidence instructions and this Court rejected his claim; Deck's claim is barred by the law-of-the-case doctrine. *Deck III*, 136 S.W.3d at 486; *Johnson*, 22 S.W.3d at 189.

IX. Point Eight: Instructional Error—Burden of Proof

Deck argues the trial court erred in submitting instructions 3, 7, 8, 12 and 13 to the jury.[4] He contends these instructions failed to instruct jurors that the State bore the burden of proving beyond a reasonable doubt that the aggravating facts and circumstances warranted a death sentence and that the evidence in mitigation was insufficient to outweigh the evidence in aggravation.

Standard of Review

This Court will reverse on a claim of instructional error only if there is an error in submitting an instruction and that error results in prejudice to the defendant. *Zink*, 181 S.W.3d at 74. The instructions given were patterned after MAI–CR 3d and are presumptively valid under Rule 28.02(c). *Id.* ("MAI instructions are presumptively valid and, when applicable, ***549** must be given to the exclusion of other instructions").

Analysis

During the instructions conference, Deck objected to instructions 3, 7, 8, 12 and 13. Instruction 3 was patterned after MAI–CR 3d 313.30A and instructed the jury that the burden is on the State to prove statutory aggravating circumstances beyond a reasonable doubt. Instructions 7 and 12, patterned after MAI–CR 3d 313.41A, instructed the jury that if it had determined that one or more aggravating circumstances existed, it was next to consider whether the facts and circumstances in

aggravation of punishment taken as a whole were sufficient to warrant imposing a sentence of death. Instructions 8 and 13, patterned after MAI–CR 3d 313.44A, instructed the jury that if it had found that the facts and circumstances in aggravation of punishment taken as a whole warranted a death sentence, it must then determine if there were facts or circumstances in mitigation of punishment sufficient to outweigh those in aggravation of punishment. They then instructed jurors that they did not have to agree on mitigating facts, but that if each juror determined that the mitigating evidence outweighed the aggravating evidence, the jury must return a sentence of life in prison without parole.

Deck concedes this Court has previously addressed this argument and rejected it. *See Johnson*, 284 S.W.3d at 584–85 (holding that the reasonable doubt standard does not apply to mitigating evidence or non-statutory aggravating factors and that under *Ring* and *Apprendi* only evidence functionally equivalent to an element, including statutory aggravating circumstances, must be found beyond a reasonable doubt); *see also State v. Johnson*, 207 S.W.3d 24, 47 (Mo. banc 2006).

X. Point Nine: Statutory Aggravating Circumstances Not Pleaded in the Information

Deck alleges the trial court erred in sentencing him to death because the State failed to plead statutory aggravating circumstances in the information.

The State's amended information did not allege which statutory aggravating circumstances the State intended to prove. Prior to trial, pursuant to section 565.005.1, the State provided written notice to Deck of the statutory aggravating circumstances it would attempt to prove at trial.

Before trial, Deck filed a motion to quash the information, to require the State to include statutory aggravating circumstances in the information or to preclude the State from seeking the death penalty on constitutional grounds due to the State's failure to include the statutory aggravating circumstances in the information. The trial court overruled this motion.

Analysis

[39] Deck raised an identical claim in *Deck III*, which this Court rejected:

> This Court has addressed this claim numerous times before. The omission of statutory aggravators from an indictment charging the defendant with first degree murder does not deprive the sentencing court of jurisdiction to impose

> the death penalty. Missouri's statutory scheme recognizes a single offense of murder with maximum sentence of death, and the requirement that aggravating facts or circumstances be present to warrant imposition of death penalty does not have the effect of increasing the maximum penalty for the offense.

136 S.W.3d at 490. This claim is barred by the law-of-the-case doctrine. *Johnson*, 22 S.W.3d at 189.

***550** Furthermore, this Court has consistently rejected this argument. *See, e.g., Johnson*, 284 S.W.3d at 589; *Baumruk*, 280 S.W.3d at 617–18; *Zink*, 181 S.W.3d at 74–75. Deck concedes this point and offers no meritorious reason why this Court should reconsider its holdings in those cases.

XI. Point Ten: Proportionality Review

Standard of review

This Court independently reviews Deck's death sentences under section 565.035, RSMo 2000. This Court must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Section 565.035.3.

[40] This Court's proportionality review is designed to prevent freakish and wanton application of the death penalty. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993).

1. Influence of prejudice

Three separate juries—thirty-six jurors in all—viewing essentially the same evidence have

unanimously concluded that death is the appropriate sentence for Deck. Nothing in the record suggests Deck has been sentenced under the influence of prejudice, passion, or any other improper factor.

2. Aggravating factors

The evidence supports the jury's finding beyond a reasonable doubt of six statutory aggravating factors. In fact, all three juries—thirty-six jurors—have found the same six factors:

(1) Each murder was committed while the defendant was engaged in the commission of another unlawful homicide, § 565.032.2(2).

(2) The murders were committed for the purpose of receiving money or any other thing of monetary value, § 565.032.2(4).

(3) The murders were outrageously and wantonly vile, horrible, and inhuman in that they involved depravity of mind, § 565.032.2(7).

(4) The murders were committed for the purpose of avoiding a lawful arrest, § 565.032.2(10).

(5) The murders were committed while defendant was engaged in the perpetration of burglary, § 565.032.2(11).

(6) The murders were committed while defendant was engaged in the perpetration of robbery, § 565.032.2(11).

Moreover, in both previous appeals, this Court held that, from its review of the record, the evidence "amply supports the statutory aggravators found by the jury." *Deck I*, 994 S.W.2d at 545; *Deck III*, 136 S.W.3d at 489–90.

3. Proportionality

Deck argues this Court should apply the same *de novo* review—based on the Eighth Amendment's prohibition against excessive fines—utilized by the United States Supreme Court in *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 436, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), to review the constitutional validity of a jury's award of punitive damages. This argument is not supported by precedent of the United States Supreme Court and this Court and will not be adopted.

***551** **[41]** This Court's proportionality review was "designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and

consistent imposition of death sentences." *Ramsey*, 864 S.W.2d at 328; section 565.035. This Court simply reviews the sentence and, while giving due deference to the factual determinations reached below, decides whether the sentence is disproportionate as a matter of law.

Deck also claims this Court's proportionality review is fatally flawed because it considers only cases in which death was imposed instead of all factually similar cases. This argument has been repeatedly rejected by this Court. *See, e.g.*, *Johnson*, 207 S.W.3d at 50–51; *Smith*, 32 S.W.3d at 559; *State v. Clay*, 975 S.W.2d 121, 146 (Mo. banc 1998). Deck does not base this argument on the statutory language of section 565.035 and offers no meritorious reason why this Court should reconsider its holding in those cases.

The concurring opinion of Judge Stith contends that this Court has incorrectly conducted proportionality review beginning in 1993 with *Ramsey*. The concurring opinion concedes that *Ramsey* correctly held that the United States Supreme Court had held proportionality review was not constitutionally required. The issue in *Ramsey* that the concurring opinion disagrees with is the holding that proportionality review only requires review of similar cases that resulted in a death sentence. This holding in *Ramsey* was unanimous and has not been questioned in any principal, concurring, or dissenting opinion by any member of this Court in seventeen years.

The gist of the concurring opinion, which was not an argument articulated in Deck's brief, is that because section 565.035.6 requires the assistant appointed to accumulate the records of all cases in which the sentence of death or life imprisonment without probation or parole was imposed, then the legislature must have intended that this Court's proportionality review require comparisons of cases where both a death sentence and a life sentence without probation and parole was imposed.

That is not the case. Section 565.035.5 simply states that this Court's "decision [makes] reference to those similar cases which it took into consideration." Section 565.035.6 provides that the assistant to this Court shall provide whatever extracted information the Court desires with respect to the information it collects. Finally, that section provides that the Court shall determine what staff and methods are necessary to compile "such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence." Read as a whole, these provisions demonstrate that the legislature expressly left to this Court the determination of what cases are similar. Quite simply, the language of the statute relied on by the concurring opinion merely reflected nothing more than the methodology this Court was then using to compile records and is still contained in Rule 29.08(c).[5]

Further, an additional obvious response to the concurring opinion's statement of what the legislature's intention was, as it relates to this issue, is that the legislature ***552** is presumed to be aware of this Court's 17–year–old decision in *Ramsey*. *Ramsey* expressly stated the statutory review provided for in section 565.035 "merely provides a backstop against the freakish and wanton application of the death penalty" and only requires consideration of similar cases in which

a death sentence was imposed. *Ramsey*, 864 S.W.2d at 328.[6]

The circumstances concerning the appropriateness of imposing the death sentence is a very serious and ongoing public concern. It would certainly be a rare scenario that the legislature would leave these express statements in the *Ramsey* case unaddressed for 17 years if this Court's holdings in *Ramsey* were contrary to what the legislature intended. Our legislature has, in fact, been quick to make clear its intent in response to this Court's pronouncements. *See, e.g., Schoemehl v. Treasurer of Missouri*, 217 S.W.3d 900 (2007).

[42] In this case, the sentence of death is not excessive or disproportionate. The retrial of the penalty phase in this case involves virtually the same evidence as prior trials. In Deck's previous appeals, this Court held that his previous death sentences were not excessive or disproportionate. *Deck I*, 994 S.W.2d at 545 ("[I]mposition 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"); *Deck III*, 136 S.W.3d at 490 ("The death sentences in this case are neither excessive nor disproportionate to the penalty imposed in similar cases, considering the crime, the strength of the evidence, and the defendant").

Furthermore, this Court's opinions in *Deck I* and *Deck III* cite numerous opinions in which the death penalty was imposed when "the defendant murdered multiple victims, acted for pecuniary gain, or when the defendant sought to eliminate possible witnesses to avoid a lawful arrest." *Deck III*, 136 S.W.3d at 490 n. 30 (citing *Ringo*, 30 S.W.3d at 811; *State v. Worthington*, 8 S.W.3d 83, 93 (Mo. banc 1999); *State v. Middleton*, 998 S.W.2d 520 (Mo. banc 1999)); *see also Deck I*, 994 S.W.2d at 545 ("There are numerous Missouri cases where, as here, the death penalty was imposed on defendants who murdered more than one person.") (citing *State v. Johnson*, 968 S.W.2d 123 (Mo. banc 1998); *State v. Clemons*, 946 S.W.2d 206 (Mo. banc 1997); *Ramsey*, 864 S.W.2d at 320; *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); and *State v. Young*, 701 S.W.2d 429 (Mo. banc 1985)).

[43] Deck suggests the mitigating evidence presented at trial warrants sufficient grounds to set aside his death sentences. The mitigating evidence offered was similar to that offered in the previous trials. That evidence did not provide sufficient grounds to set aside the death sentences. *Deck I*, 994 S.W.2d at 545; *Deck* ***553** *III*, 136 S.W.3d at 490. In this retrial, a child psychiatry expert and a child development expert testified that Deck's childhood experience had an adverse effect on his development. Both experts, however, testified Deck knew right from wrong and committed these crimes by choice. A bad or difficult childhood does not provide sufficient grounds to set aside a death penalty. *State v. Brooks*, 960 S.W.2d 479, 503 (Mo. banc 1997).

Deck argues his sentence is disproportionate when compared to *State v. McIlvoy*, 629 S.W.2d 333

(Mo. banc 1982), in light of the fact that he confessed to his crimes. In *McIlvoy,* the defendant was convicted of capital murder and sentenced to death for his role in the murder of Gilbert Williams. *Id.* at 334–35. Gilbert Williams' murder was planned by his wife, Vicky Williams, and executed by five men. *Id.* at 335. In return for the murder, Vicky Williams had promised money and drug connections. McIlvoy participated in the murder by shooting Gilbert Williams five times. *Id.* at 335–36.

This Court's proportionality review set aside McIlvoy's death sentence, finding the sentence excessive and disproportionate considering the crime and the defendant. *Id.* at 341–42. The court noted that Vicky Williams, the leader of the plot to kill her husband, was sentenced only to life imprisonment. *Id.* at 341. Moreover, the Court noted that McIlvoy had a low IQ (81), a ninth-grade education, a minimal juvenile record and that, at the time of the murder, McIlvoy was under the influence of large amounts of alcohol and drugs that further diminished his subnormal intellect. *Id.* The Court also found facts in his favor that he turned himself in and waited dutifully for St. Louis police officers to pick him up in Dallas, Texas. *Id.* at 341–42.

Deck claims his case is comparable to *McIlvoy* because he, like McIlvoy, confessed to the crimes. Such a comparison is without merit, as the facts show that McIlvoy turned himself in and waited for the police to pick him up. Deck, however, was apprehended while attempting to hide evidence and gave two false alibis before he eventually confessed to the crime. *Id.* Additional distinguishing facts in this case are that Deck planned the robbery based on his knowledge of the victims, robbed the victims at gun point, forced them to the floor, deliberated for ten minutes and then shot them at point-blank range. *Deck I,* 994 S.W.2d at 531–32. Deck was the mastermind of his crime in contrast to McIlvoy, who was a weak follower.

The death sentences given Deck were neither excessive nor disproportionate.

XII. Conclusion

For the foregoing reasons, the judgment and sentences of death are affirmed.

PRICE, C.J., and RUSSELL, J., concur; BRECKENRIDGE, J., concurs in part and concurs in result in separate opinion filed; STITH, J., concurs in result in separate opinion filed; WOLFF, J., concurs in opinion of STITH, J.; TEITELMAN, J., concurs in result only.

PATRICIA BRECKENRIDGE, Judge, concurring in part and concurring in result.

While I concur with the principal opinion's conclusion that the imposition of the death penalty on Carman L. Deck in this case was neither excessive nor disproportionate, I do not agree that the proportionality review under section 565.035, RSMo 2000, only requires review of factually similar cases that resulted in a death sentence. The legislature's directive in section 565.035.6 that records be compiled of "all cases in which the sentence of death or life imprisonment without probation or parole was imposed" clearly communicates its intent that factually similar cases with ***554** sentences of life imprisonment be considered in the proportionality review. The fact that the legislature granted this Court discretion to determine what information from those two types of cases is relevant to conducting the mandated proportionality review does not indicate its intent that the Court should limit the review to only death-penalty-imposed cases. I believe that, as a matter of law, this Court does not have the discretion to eliminate from the proportionality review all cases in which the jury imposes the sentence of life imprisonment without the possibility of probation or parole.

The principal opinion states that the holding in *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993), that proportionality review only requires review of similar cases that resulted in a death sentence, was unanimous and has gone unquestioned by any member of this Court for 17 years. While the *Ramsey* decision was unanimous, it is noteworthy that the Court overturned prior case law *sub silentio* and adopted its new standard of proportionality review without any analysis or discussion of the language of section 565.035. *See, e.g., State v. Mallett*, 732 S.W.2d 527, 542–43 (Mo. banc 1987) ("The issue when determining the proportionality of a death sentence is not whether any similar case can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole."). I also am not persuaded that the legislature's failure to respond to the *Ramsey* decision should be interpreted as its approval of that decision. This Court recently has questioned such a conclusion: "An incorrect judicial interpretation of a statute may also stand simply because the legislature has paid no attention to it. Thus, it is speculative to infer legislative approval from legislative inaction." *Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, 334 (Mo. banc 2005).

I am committed firmly to the principle of stare decisis but, where the issue being addressed is life or death, it is more important to correct a prior erroneous decision of the Court and to undertake the proportionality review as it is intended by the legislature.

I write separately from Judge Stith because of her additional criticism of the principal opinion's statement that the proportionality review in section 565.035.3 is intended for this Court to consider only whether the imposition of the death penalty was a "freakish or wanton application of the death penalty." She notes that the language "freakish or wanton" came from *Ramsey* and not from the statute. While such language is not found in section 565.035, I think the principal opinion is correct that the language of section 565.035.3 supports the conclusion that proportionality review is intended for this Court to identify and correct only the imposition of aberrant death sentences.

I do not read the statute as requiring that the Court act as a super-juror by substituting its judgment of the appropriate punishment for that of the jury and the trial court. While the principal opinion would be served by better utilizing the statute's terms when discussing its review, its use of the language "freakish or wanton" does not indicate the Court is applying an incorrect standard or not undertaking the review required by section 565.035.3.

Although the principal opinion applied an erroneous standard in conducting its proportionality review, a review including similar cases where the jury imposed the sentence of life imprisonment without the possibility of probation or parole does not change this Court's conclusion that Mr. Deck is not entitled to relief. As Judge Stith demonstrates in her opinion concurring in result, the consideration of cases where a sentence of life imprisonment was ***555** imposed would not change the finding that Mr. Deck's sentence was not disproportionate or excessive to the sentences imposed in similar cases. Accordingly, I concur in the result reached by the principal opinion in its proportionality review and concur in the remainder of the opinion.

LAURA DENVIR STITH, Judge, concurring in the result.

I concur in the result of the principal opinion but respectfully disagree with that portion of the opinion holding that proportionality review under section 565.035.3 RSMo 2000 requires this Court to review only other cases in which the death penalty was imposed under similar facts. Section 565.035 requires consideration of all "other similar cases," which includes those in which a life sentence resulted, in determining whether the sentence of death is excessive or disproportionate in light of the crime, the defendant and the strength of the evidence. To the extent that this Court's cases decided between 1994 and the present suggest otherwise, they are contrary to the statute and to cases decided under it from 1979 until 1993 and no longer should be followed.

I. HISTORY OF PROPORTIONALITY REVIEW IN MISSOURI

A. Until 1994, Review Was of Both Death and Life Imprisonment Cases

In *Gregg v. Georgia*, 428 U.S. 153, 197–199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the United States Supreme Court held that the death penalty is constitutional if not imposed arbitrarily and if procedural safeguards against improper imposition of the death penalty were followed. The Supreme Court noted that the Georgia death penalty procedures analyzed in *Gregg* met these requirements because, among other things, they compared "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." *Id.* at 198, 96 S.Ct. 2909.

In reliance on *Gregg,* Missouri's legislature re-enacted the death penalty in 1977. § 565.001 et

seq., RSMo Supp.1977**.** Section 565.008.1 made persons convicted of capital murder eligible for one of two possible sentences—either death or life in prison without eligibility for probation or parole for 50 years. Section 565.014 also noted a right of direct appeal to this Court in all cases in which the death penalty was imposed and required that in all such cases:

> 3. With regard to the sentence, the supreme court shall determine:
>
> (1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance ...
>
> (3) Whether the sentence of death is excessive or ***disproportionate to the penalty imposed in similar cases,*** considering both the crime and the defendant.

§ 565.014.3, RSMo Supp.1977 (emphasis added).

Missouri's legislature also required that, in conducting this proportionality analysis, "*the supreme court shall include in its decision a reference to those similar cases which it took into consideration.*" § 565.014.5, RSMo 1977 (emphasis added). It provided this Court with an attorney assistant to accumulate "the records of *all capital cases* in which sentence was imposed after May 26, 1977, or such earlier date as the court may deem appropriate." § 565.014.6 (emphasis added). This assistant was directed to "provide the court with whatever extracted information the court desires with respect thereto." *Id.*

***556** The first capital murder case in which this Court applied the proportionality analysis required by the Missouri legislature was *State v. Mercer,* 618 S.W.2d 1 (Mo. banc 1981). The Court was clear at that time that the duty imposed on it by these provisions to review similar cases in deciding proportionality meant it was required to review all cases in which the death penalty was submitted, whether the sentence actually imposed was life imprisonment or death, stating:

> The records of all capital cases in which sentence was imposed after the effective date, accumulated pursuant to § 565.014.6, have been reviewed. *Those cases in which both death and life imprisonment were submitted to the jury, and which have been affirmed on appeal are considered as similar cases,* [section] 565.014.5.

Mercer, 618 S.W.2d at 11 (emphasis added).

Indeed, the only controversy at that time was whether the Court also should consider cases in which the death penalty was *not* sought but in which it *might have* been sought, with Judge Seiler

arguing in dissent that:

> I do not agree that we discharge our duty under section 565.014.2(3) to determine "(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases" by restricting our consideration to cases in which both death and life imprisonment were submitted to the jury and which have been affirmed on appeal. This is too limited in scope. It eliminates from consideration all cases in which the state waived the death penalty, all cases in which life imprisonment was given and no appeal taken, all capital cases pending before us [but not as of that time affirmed] in which life imprisonment was given, and all cases in which capital murder was charged but the jury found defendant guilty of a lesser crime than capital murder.... The purpose of appellate review of the death penalty is to serve "as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It is our solemn duty, in my opinion, to guarantee that similar aggravating and mitigating circumstances do not bring about a death sentence in one case and life imprisonment in another.

Mercer, 618 S.W.2d at 20–21 (Seiler, J., dissenting).

The next year, this Court reaffirmed in *State v. Bolder*, 635 S.W.2d 673 (Mo. banc 1982), that "similar cases" included all cases in which the fact-finder was required to choose between death or life imprisonment, stating:

> *Relevant cases for a review* of the appropriateness of the sentence *are those in which the judge or jury* first found the defendant guilty of capital murder and *thereafter chose between death or life imprisonment* without the possibility of parole for at least fifty years.

Id. at 685 (emphasis added).

In 1983, the legislature modified the proportionality review statute to add the requirement that this Court consider "the strength of the evidence" in addition to the crime and the defendant as a part of its proportionality review. § 565.035.3, RSMo Supp.1983**.** And, importantly here, it revised section 565.035.6 so that instead of stating that the Court's assistant should accumulate the records of "all capital cases," the statute expressly required that records of both death and life imprisonment cases be accumulated for comparison purposes in determining what are similar cases, stating:

> The court shall accumulate the records *of all cases in which the sentence of death or life imprisonment without probation or parole was imposed* after [the ***557** reinstitution of the death penalty on] May 26, 1977, or such earlier date as the court may deem appropriate.

§ 565.035.6, RSMo Supp.1983 (emphasis added).

The proportionality review statute has remained essentially unchanged in relevant respects since that time.[1] So too did this Court's approach to the proportionality analysis for the next decade. In case after case, this Court considered other cases with similar facts, regardless of whether the penalty imposed was death or life imprisonment.

For instance, *State v. Lashley,* 667 S.W.2d 712 (Mo. banc 1984), found that the imposition of the death penalty was not arbitrary in light of the entire record, after comparing the case to other "lying in wait" cases in which the choice of life imprisonment or the death penalty was submitted. *Id.* at 716. *Lashley* cited to *State v. McDonald,* 661 S.W.2d 497 (Mo. banc 1983), *overruled on other grounds by, State v. Barton,* 936 S.W.2d 781 (Mo. banc 1996), which had approved the death penalty in a "lying in wait" case after taking into account both the crime and the defendant, stating, "In arriving at this conclusion we have reviewed the cases decided since the enactment of our current capital murder statute ... where the death sentences were affirmed, one case which reversed the death sentence because of its disproportionality, and capital cases in which the choice of death or life imprisonment without possibility of parole for fifty years was submitted to the jury." *McDonald,* 661 S.W.2d at 507.

Similarly, in *State v. Wilkins,* 736 S.W.2d 409, 417 (Mo. banc 1987), this Court compared the defendant, his crime and the strength of the evidence to that in other cases in which life imprisonment had been imposed, as well as those in which death had been imposed, in finding that the death sentence was not disproportionate.[2]

Again, in *State v. Six,* 805 S.W.2d 159, 169 (Mo. banc 1991), this Court held that "for purposes of § 565.035.3(3), this Court has examined those capital murder and first degree murder cases in which death and the alternative sentence of life imprisonment have been submitted to the jury and the sentence has been affirmed on appeal."

B. Beginning with Ramsey, this Court Strayed From a Proper Application of the Proportionality Review Required by Section 565.035

Despite this long-settled interpretation of what constituted similar cases under section 565.035, in *State v. Ramsey,* 864 S.W.2d 320 (Mo. banc 1993), this Court began undertaking a different—and much more limited—proportionality review. *Ramsey* correctly noted that the United States Supreme Court had held, "Proportionality review is not constitutionally required. It is designed by the legislature as an additional safeguard against arbitrary and capricious sentencing and to promote the evenhanded, rational and consistent imposition of death sentences." *Id.* at 328, *citing Pulley v. Harris,* 465 U.S. 37, 47–48, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984).

Pulley held that the Eighth Amendment to the United States Constitution does not require that a

court undertake a proportionality review. ***558** *Pulley,* 465 U.S. at 50–51, 104 S.Ct. 871. It did not address, however, the kind of analysis that is required under Missouri's proportionality review statute. Nonetheless, without distinguishing or overruling any of this Court's many cases (including those noted above) stating that proportionality review requires consideration of all prior capital cases, regardless of whether a death sentence was imposed, *Ramsey* rejected what it called the argument that it should be "parsing through homicide cases" by examining and weighing different facts. 864 S.W.2d at 327. Rather, it said, section 565.035 proportionality review "merely provides a backstop against the freakish and wanton application of the death penalty.... If the case, taken as a whole, is plainly lacking circumstances consistent with those in similar cases in which the death penalty has been imposed, then a resentencing will be ordered." *Id.* at 328.

Although *Ramsey* briefly mentioned that cases imposing a life sentence "had been examined" and found to differ in regard to the presence of aggravating circumstances and the lack of mitigating ones, *id.*, it did not cite or discuss such cases. Thereafter, in reliance on *Ramsey*'s statement that the purpose of proportionality review is to provide a "backstop against the freakish and wanton application of the death penalty," *id.* at 328, with rare exceptions[3] this Court's cases began to compare the facts of the defendant's case against only other cases in which imposition of the death penalty had been approved. *See, e.g., State v. Parker,* 886 S.W.2d 908, 933–34 (Mo. banc 1994); *State v. Richardson,* 923 S.W.2d 301, 330 (Mo. banc 1996); *Lyons v. State,* 39 S.W.3d 32, 44 (Mo. banc 2001); *State v. Johnson,* 207 S.W.3d 24, 50–51 (Mo. banc 2006); *State v. Barton,* 240 S.W.3d 693, 709–11 (Mo. banc 2008).

Few of these cases actually analyze the language of section 565.035, however, or compare the analysis this Court undertakes to that required by the statute. Instead, they cite to the statement in *Ramsey* that the purpose of proportionality review is to protect against the freakish or wanton imposition of a death sentence and then note that prior cases have imposed death on similar facts so the death sentence is not disproportionate.

C. Section 565.035 Requires Consideration of Both Death and Life Imprisonment Cases

Section 565.035 does not permit this Court to limit its analysis to a determination whether imposition of the death penalty was "freakish or wanton," however. That language comes from *Ramsey,* which notes the minimum standard that is constitutionally required to be met in order to avoid the arbitrary imposition of the death penalty. I agree that this is the ultimate constitutional issue, but the statute sets out a more specific, and I believe more stringent, proportionality analysis: the Court is required to determine whether the sentence of death is excessive or disproportionate after considering similar cases in light of three factors—the crime, the defendant and the strength of the evidence. § 565.035.3.[4] Whether a death sentence ***559** is imposed is not a listed factor. To the contrary, after stating that this Court is to list "those similar cases which it took into consideration," § 565.035.5, the statute requires that this Court appoint an assistant to

"accumulate the records of all case in which the sentence of death *or life imprisonment* without probation or parole was imposed." § 565.035.6 (emphasis added).

It would be pointless for section 565.035.6 to require this Court to accumulate records of cases in which life imprisonment is imposed if life imprisonment cases are inherently dissimilar to this Court's proportionality review under the statute. That is why the cases interpreting section 565.035 and its predecessor prior to *Ramsey* considered both death and life imprisonment cases, for both may constitute "similar cases" under section 565.035.[5]

Although this type of proportionality review is required by statute, rather than by the Eighth Amendment, the duty is no less important. Cases in which a life sentence was imposed should be included in this Court's proportionality analysis. That is not to say that the existence of a large number of cases in which a death sentence was imposed on similar facts may not be more persuasive or that cases that did not compare the case before them to those in which a life sentence was imposed reached the wrong result. Rather, the analysis simply is incomplete unless one also looks at cases in which life imprisonment resulted, and there is a risk that this lack of complete analysis, in the rare case, may have prevented this Court from identifying a case in which the death penalty was disproportionate when considered as against similar cases as a whole.

Further, it is worthwhile to note that United States Supreme Court Justice John Paul Stevens, in a statement respecting the denial of a petition for writ of certiorari in *Walker v. Georgia*, —— U.S. ——, —— – ——, 129 S.Ct. 453, 454–55, 172 L.Ed.2d 344 (2008), recently expressed concern about Georgia's current failure to consider cases in which a life sentence was imposed, stating that consideration of the latter cases seems "judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court."

In *Walker*, the defendant argued that Georgia's capital punishment scheme was unconstitutionally arbitrary because it failed to conduct a meaningful proportionality review. Justice Stevens noted that this issue was not preserved properly; ***560** therefore, he concurred in the denial of certiorari but said, "I write separately to emphasize that the Court's denial has no precedential effect." *Id.* at 454. The reason he wanted to emphasize this point, he said, was his concern that *Gregg* and similar cases had affirmed the lack of arbitrariness of Georgia's death penalty procedures partly in reliance on Georgia's statutory requirement that its supreme court independently review the imposition of the death penalty and its proportionality to similar cases in which death or a life sentence without parole had been imposed. *Id.* at 454.

Justice Stevens noted there is a "special risk of arbitrariness" in cases in which the victim and defendant are of different races, such as in *Walker;* therefore, it greatly troubled him that Georgia had carried out only a "perfunctory" proportionality review and had not considered cases in which death was not imposed, despite the heightened risk of arbitrariness, stating, "had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence,

it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment." *Id.* at 455–56.

Justice Stevens further found such cases to be "eminently relevant to the question whether a death sentence in a given case is proportionate to the offense," *id.* at 456, and that, "failure to acknowledge ... cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that [the reviewing court] will overlook a sentence infected by impermissible considerations." *Id.* In other words, if one limits one's consideration only to cases in which a similar penalty was imposed, then it is almost preordained that the cases will be found to be similar, but this says nothing about whether the case also is similar to cases outside the orbit of the court's analysis.

While it is unclear whether the other justices share Justice Stevens' viewpoint, the concern he raises is a realistic one that, by categorically refusing to look at cases in which a life sentence was imposed, a court may be excluding from consideration cases that are in fact similar to the one before it. It therefore is not surprising that Missouri's legislature expressed its intent that cases in which a life sentence was imposed are to be a part of this Court's proportionality review.

Such a review does not impose a new requirement on this Court to count good and bad facts or to become a super-juror and second-guess the jury's consideration of the evidence. Such a review requires the Court only to continue doing what it now does in regard to cases in which death was imposed—review them to determine whether the sentence of death is disproportionate in light of the crime, the defendant and the strength of the evidence, *see, e.g., State v. Chaney,* 967 S.W.2d 47, 59–60 (Mo. banc 1998) (finding death sentence disproportionate in light of strength of the evidence after comparing to other death cases)—but to include similar cases in which a life sentence was imposed in that analysis. *See, e.g., State v. McIlvoy,* 629 S.W.2d 333, 341–42 (Mo. banc 1982) (finding death sentence disproportionate to the penalty imposed in similar cases after considering both death and life sentence cases). The Court now simply must apply its already existing analysis to the broader universe of cases required by statute—those in which either death or a sentence of life without parole were imposed.[6]

***561** The principal opinion already considers similar cases in which a death penalty resulted. Therefore, this separate opinion determines whether the death sentence here is disproportionate in light of similar cases by additionally reviewing the cases Mr. Deck cites as similar but in which a life sentence was imposed, and also by reviewing other cases in which a life sentence was imposed that also involved multiple murders during the course of a robbery or burglary.

II. PROPORTIONALITY REVIEW

The facts of Mr. Deck's case are chilling. He and his mother's boyfriend originally decided to rob

the home of an older couple, James and Zelma Long, while the couple was at church. But because they wanted the money sooner for a trip, Mr. Deck and his sister went to the Longs' rural home in DeSoto, Missouri, on a weekday night. After gaining entry through a ruse, Mr. Deck pulled a pistol from his waistband and ordered the Longs to lie face down on their bed. They did so. Mrs. Long opened their home safe and gave Mr. Deck the paper and jewelry inside as well as $200 from her purse and additional cash in the house. Mr. Deck then forced the Longs to lie back down while he stood at the foot of the bed trying to decide what to do for ten minutes, as they begged for their lives. When his sister got tired of acting as a lookout and left the house for the car, he put the gun to Mr. Long's head and shot him twice, then did the same to Mrs. Long. Neither survived. During the penalty phase of the trial, the Longs' son read a statement the family had prepared addressing the impact of the deaths on their family.

Mr. Deck offered mitigation evidence that it was not a planned murder, that he made a "lousy" decision while scared and nervous, and that he confessed and cooperated with police. As the majority notes, he presented additional mitigation evidence, which in a prior case was described this way:

> 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.

Deck v. State, 68 S.W.3d 418, 430 (Mo. banc 2002). He also presented expert evidence in this trial as to the effect of his difficult childhood, evidence which the jury heard and considered before deciding to impose the death penalty, as had the 24 jurors in his two prior penalty-phase trials.

The jury found six aggravators—that each murder was committed while the defendant was engaged in the commission of another homicide; that the murders were committed for the purpose of receiving money or any other thing of monetary value; that the murders were outrageously and wantonly vile, horrible and inhuman in that they involved depravity of mind; that they were committed for the purpose of avoiding a lawful arrest; that they were ***562** committed while the defendant was engaged in the perpetration of a burglary; and that they were committed while the defendant was engaged in the perpetration of a robbery.

Mr. Deck argues the facts were insufficient to support imposition of the death penalty because persons in other cases with similar facts were sentenced to life in prison. He relies most heavily on *State v. Dulany*, 781 S.W.2d 52 (Mo. banc 1989), and *Conn v. State*, 769 S.W.2d 822 (Mo.App.1989). Mr. Conn and his girlfriend, Ms. Dulaney, acted together to rob and murder Mr. Conn's aunt and uncle, possibly because his aunt and uncle had refused to loan him money for

bail. In *Conn,* although the State had announced its intent to seek the death penalty, the State and defendant reached a plea agreement of a life sentence, and a jury never heard the case. 769 S.W.2d at 823–24. This Court always has held that cases in which the State agrees not to seek the death penalty are not considered in the proportionality analysis. *See, e.g., State v. Mercer,* 618 S.W.2d at 11.

Dulany did go to trial. But the State had no direct evidence that Ms. Dulaney actually committed the murders, and she testified that she merely assisted Mr. Conn, who actually murdered both victims. The State argued, therefore, that she should be found guilty either as the perpetrator or as an accomplice to Mr. Conn. 781 S.W.2d at 53–55. The jury may have found that Ms. Dulaney acted only as an accomplice to her boyfriend, particularly in light of the evidence of her dependence on him. By contrast, in *Deck* the evidence is not ambiguous as to who directly killed the victims. Mr. Deck was the mastermind; he committed the two murders himself—his role is like that of Mr. Conn, not of Ms. Dulaney.

Mr. Deck also relies on *State v. Owens,* 827 S.W.2d 226 (Mo.App.1991), in which the defendant was convicted of two counts of first-degree murder for shooting two persons during the course of a burglary yet received a life sentence. *Id.* at 227. While both cases involve multiple murders in the course of a robbery, there were five co-conspirators in *Owens,* three of whom pleaded guilty and blamed the murders on the defendant. *Id.* at 232. The jury may have found that testimony self-serving and not credible in light of their plea agreements. Further, a jury deadlocked as to the fifth defendant, and the court imposed a death sentence. *State v. Griffin,* 756 S.W.2d 475 (Mo. banc 1988).

The remaining cases Mr. Deck cites in support of his argument are substantially factually disparate from Mr. Deck's case. *See State v. Merrill,* 990 S.W.2d 166 (Mo.App.1999) (conviction was based largely on testimony of girl who was four years old at time of murders); *State v. Holcomb,* 956 S.W.2d 286 (Mo.App.1997) (murders did not take place in the course of a robbery); *State v. Futo,* 932 S.W.2d 808 (Mo.App.1996) (same); *State v. Clark,* 859 S.W.2d 782 (Mo.App.1993) (same).

Although Mr. Deck does not cite to them, consideration also has been given to other cases in which multiple murders were committed during the course of a robbery or burglary but in which the jury decided to impose a life sentence. In most of these cases, multiple persons were involved in the crimes, each of whom either denied involvement or claimed that their co-defendants were the ones who actually killed the victims. In such circumstances, the jury might well have concluded that the defendant was involved in the crime but that the evidence was unclear whether the defendant personally caused the death or acted merely as an accomplice.

This is an important distinction from Mr. Deck, who clearly was the mastermind of the crime and admits committing the ***563** murders himself. *Compare State v. Downs,* 593 S.W.2d 535 (Mo. banc 1980) (youthful defendant without priors denied involvement, and statements of co-defendants sometimes implicated him but at other times inconsistently implicated others as

actually committing murders in the course of robbery); *State v. Harper*, 713 S.W.2d 7 (Mo.App.1986) (credibility of co-defendant who claimed defendant actually shot victims during home robbery undermined by plea deal he made in return for his testimony; testimony of surviving victim identifying defendant arguably was inconsistent with co-defendant's testimony that defendant just shot once and unsure if hit anyone, and defendant strongly argued credibility issues); *State v. Jennings*, 815 S.W.2d 434 (Mo.App.1991) (multiple co-conspirators pointed fingers at each other as actual killers in multiple homicide store robbery). *See also State v. Clark*, 711 S.W.2d 928 (Mo.App.1986) (19–year–old defendant did not confess to the crime and presented evidence that one of two murders occurred during a struggle for his gun in a robbery gone wrong and that he had a two-year-old daughter).

While these cases in which a life sentence was imposed are comparable in some ways to Mr. Deck's case, they differ from it in important respects in regard to the age of the defendant, the strength of the evidence and whether the defendant actually committed the murder or acted as an accomplice. It is also appropriate to consider that Mr. Deck admitted committing a multiple homicide after deliberating over the victims and placing them in fear for 10 minutes, that he did so to hide his crime in the course of a robbery, and that the jury found his conduct vile and outrageous. As noted by the principal opinion, there are many cases in which a person has received a death sentence when the crime involved multiple murders during the course of a robbery and, as here, involved acts of brutality and showed depravity of mind, or was committed to avoid detection or arrest. *See also Deck,* 136 S.W.3d at 490; *Deck,* 994 S.W.2d at 545.

For all of these reasons, while I believe the principal opinion errs in failing to consider similar cases in which a life sentence was imposed, I conclude that consideration of these cases would not change the result and that imposition of the death penalty is not disproportionate or excessive to the sentence imposed in similar cases.

All Citations

303 S.W.3d 527

Footnotes

1 A full recitation of the facts regarding Deck's conviction is available at *Deck I.*

2 A previous holding is the "law-of-the-case," precluding re-litigation of issues on remand and subsequent appeal. " '[T]he decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not.' " *State v. Graham*, 13 S.W.3d 290, 293 (Mo. banc 2000) (citing *Shahan v. Shahan*, 988 S.W.2d 529, 533 (Mo. banc 1999)).

3 In this case, modifications would have removed references to the guilt phase of trial.

4 Deck's challenge to instructions 8 and 13 formed the basis for his claim raised in his seventh point.

5 Rule 29.08(c) states:

> When there is a conviction for a crime for which a punishment provided by statute is death, the judge shall file a report in this Court not later than ten days after the final imposition of sentence regardless of the sentence actually imposed. The report shall be on a form prescribed by this Court and shall be accompanied by any presentence investigation report.

6 Judge Stith's concurring opinion, without discussion of *State v. Edwards*, 116 S.W.3d 511, 549 (Mo. banc 2003), states "section 565.035 does not permit this Court to limit its analysis to a determination whether imposition of the death penalty was freakish or wanton." *State v. Edwards*, authored by Judge Stith, notes that this Court's role in proportionality review is "to act as a safeguard by ensuring that a sentence of death is not imposed in a case in which to do so is freakish and disproportionate...." The statute has not changed since *Edwards* was decided.

1 Accordingly, all statutory references for the remainder of this opinion shall be to RSMo 2000, unless otherwise indicated.

2 The Court rejected the view of the three dissenting judges that the defendant's age—he was a minor at the time of the offense—as well as his cognitive-emotional disorder and his extensive drug abuse made him categorically ineligible for the death penalty. *Id.* at 422–23.

3 *See, e.g., State v. Shurn*, 866 S.W.2d 447, 467 (Mo. banc 1993) (without mentioning *Ramsey*, which had been decided just a few months earlier, the Court said it "examines capital murder and first degree murder cases in which the sentencer considers death and life imprisonment to determine whether the sentence is proportionate to other cases").

4 The principal opinion notes that *State v. Edwards*, 116 S.W.3d 511, 549 (Mo. banc 2003) (written by Stith, J.) states that this Court's role is, "to act as a safeguard by ensuring that a sentence of death is not imposed in a case in which to do so is freakish and disproportionate to the sentence given in similar cases considered as a whole." That statement is accurate, although to the extent that it could be read to suggest that this is the only analysis this Court must undertake, it would be incomplete. *Edwards* also quotes the portion of the statute requiring this Court to consider similar cases and to determine whether the sentence is proportionate to them in light of the crime, the defendant and the strength of the evidence, however. It also notes that under the statute this Court's duty is to examine similar cases as a whole, not to simply identify a single similar case in which a particular sentence was imposed, and then examines similar cases in which either a death sentence or a sentence of life imprisonment was imposed, before determining that the death sentence is not disproportionate.

5 The principal opinion notes that the legislature has not changed section 565.035 since *Ramsey* was decided over 16 years ago and therefore must approve of *Ramsey*'s decision not to consider similar cases that resulted in a sentence of life imprisonment. I would note that the legislature also did not change section 565.035 during the more than 14 years that this Court interpreted that section to require consideration of similar cases that resulted in either death or life in prison without parole. Indeed, since the statute unambiguously has required consideration of both types of cases, if similar, for all 30 years since it was enacted, there would be no reason for it to change; it is this Court's recent jurisprudence which is incorrect.

6 I agree with the principal opinion that the statute simply requires the Court to gather information about all of these cases and that it leaves to the Court the discretion to determine which of these constitute similar cases to which the current case should be compared. If the Court exercised such discretion when it found similar life sentence cases, then it would be fulfilling its statutory duty, and, in fact, in the past it has done this *sub silencio*. But *Ramsey* itself says, and the principal opinion nominally appears to affirm, that cases in which a life sentence was imposed are categorically dissimilar and so will not be examined. That is not an exercise of discretion but a refusal to exercise it and makes the statutory requirement to gather life sentence cases pointless.

End of Document

381 S.W.3d 339
Supreme Court of Missouri,
En Banc.

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

No. SC 91746. | July 3, 2012. | Rehearing Denied Aug. 14, 2012.

Synopsis

Background: Defendant moved for postconviction relief after his convictions for first-degree murder and other offenses and his sentences of death were affirmed, 994 S.W.2d 527. The motion was denied, and defendant appealed. The Supreme Court affirmed in part, reversed in part, and remanded for a new penalty-phase trial, 68 S.W.3d 418. On remand, defendant received two death sentences. Appeal followed. The Supreme Court affirmed, 136 S.W.3d 481. The United States Supreme Court granted certiorari and reversed and remanded for a new penalty phase trial, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953. On remand, defendant again received two death sentences. He appealed. The Supreme Court, 303 S.W.3d 527, affirmed. Defendant filed motion for postconviction relief. The Circuit Court, Jefferson County, Gary P. Kramer, J., denied motion. Defendant appealed.

Holdings: The Supreme Court, Mary R. Russell, J., held that:

[1] defense counsel did not render ineffective assistance, and

[2] trial court's alleged destruction of jury questionnaires did not prejudice defendant, and, thus, he was not entitled to a new trial on this basis.

Affirmed.

West Headnotes (29)

[1] **Criminal Law** Judgment, sentence, and punishment

110Criminal Law
110XXIVReview
110XXIV(M)Presumptions
110k1144Facts or Proceedings Not Shown by Record
110k1144.17Judgment, sentence, and punishment

On appeal from the denial of post-conviction relief, the motion court's findings are presumed correct.

[2] **Criminal Law** Interlocutory, Collateral, and Supplementary Proceedings and Questions
Criminal Law Post-conviction relief

110Criminal Law
110XXIVReview
110XXIV(L)Scope of Review in General
110XXIV(L)10Interlocutory, Collateral, and Supplementary Proceedings and Questions
110k1134.90In general
110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.36Post-conviction relief

On appeal from the denial of post-conviction relief, the motion court's judgment will be reversed if it clearly erred in its findings of fact or conclusions of law. V.A.M.R. 29.15(k).

[3] **Criminal Law** Questions of Fact and Findings

110Criminal Law
110XXIVReview
110XXIV(O)Questions of Fact and Findings
110k1158.1In general

A "clear error" is a ruling that leaves the appellate court with a definite and firm impression that a mistake has been made.

[4] **Criminal Law** Deficient representation and prejudice

110Criminal Law
110XXXPost-Conviction Relief
110XXX(B)Grounds for Relief
110k1511Counsel
110k1519Effectiveness of Counsel
110k1519(4)Deficient representation and prejudice

To establish ineffective assistance of counsel meriting post-conviction relief, the movant must show that counsel's performance was deficient by falling below an objective standard of reasonableness, and if counsel's performance was deficient, the movant must then prove that he was prejudiced by counsel's deficiency. U.S.C.A. Const.Amend. 6.

[5] **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

For purposes of a claim of ineffective assistance of counsel, "prejudice" is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

1 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

On a claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct was reasonable and effective; to overcome this presumption, the movant must point to specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of effective assistance. U.S.C.A. Const.Amend. 6.

[7] **Criminal Law**Strategy and tactics in general

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)1In General
110k1879Standard of Effective Assistance in General
110k1884Strategy and tactics in general

The choice of one reasonable trial strategy over another is not ineffective assistance; strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable. U.S.C.A. Const.Amend. 6.

[8] **Sentencing and Punishment**Factors Related to Offense
Sentencing and Punishment Offender's character in general
Sentencing and Punishment Other Offenses, Charges, Misconduct

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(D)Factors Related to Offense
350Hk1665In general
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1702Offender's character in general
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(E)Factors Related to Offender
350Hk1703Other Offenses, Charges, Misconduct
350Hk1704In general

When imposing the death penalty, the sentencer must consider the character and record of

the defendant and the circumstances of the particular offense.

1 Cases that cite this headnote

[9] **Sentencing and Punishment**Aggravating or mitigating circumstances

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(A)In General
350Hk1622Validity of Statute or Regulatory Provision
350Hk1625Aggravating or mitigating circumstances

To meet constitutional Eighth and Fourteenth amendment requirements, a death penalty statute cannot preclude consideration of relevant mitigating evidence. U.S.C.A. Const.Amend. 8.

[10] **Sentencing and Punishment**Mitigating circumstances in general

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1653Mitigating circumstances in general

A death penalty sentencer may not, as a matter of law, refuse to consider any relevant mitigating evidence.

[11] **Jury**Punishment prescribed for offense

230Jury
230VCompetency of Jurors, Challenges, and Objections
230k104Personal Opinions and Conscientious Scruples
230k108Punishment prescribed for offense

A juror in a death penalty case may not refuse to consider mitigating evidence outright.

[12] **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

Defense counsel's failure to ask prospective jurors for penalty phase of capital murder prosecution whether they could look at defendant's childhood experience and give it meaningful consideration as a reason to vote against the death penalty was not deficient performance, and, thus, was not ineffective assistance, as such a question would have been improper, in that it asked jurors to commit to the weight they would give the evidence before they heard it.

[13] **Sentencing and Punishment** Mitigating circumstances in general
Sentencing and Punishment Manner and effect of weighing or considering factors

350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1653Mitigating circumstances in general
350HSentencing and Punishment
350HVIIIThe Death Penalty
350HVIII(C)Factors Affecting Imposition in General
350Hk1658Manner and effect of weighing or considering factors

Although a sentencer in a death penalty case may not give mitigating evidence no weight by excluding such evidence from consideration, he may determine the weight to be given relevant mitigating evidence.

[14] **Criminal Law** Presentation of witnesses

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1921Introduction of and Objections to Evidence at Trial
110k1924Presentation of witnesses

Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[15] **Criminal Law** Presentation of witnesses

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1921Introduction of and Objections to Evidence at Trial
110k1924Presentation of witnesses

To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1) counsel knew or should have known of the existence of the witness, (2) the witness could be located through reasonable investigation, (3) the witness would testify, and (4) the witness's testimony would have produced a viable defense. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[16] **Criminal Law** Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure to call additional mitigating witnesses to testify during penalty phase of capital murder prosecution was not ineffective assistance, as defendant failed to

show that, had these additional witnesses been called to testify, their testimony would have outweighed the aggravating evidence so that there was a reasonable possibility the jury would have voted for life imprisonment; witnesses' testimony, including testimony that defendant's grandfather was "verbally abusive," was so lacking in substance that it would not have had an impact on the jury in their decision. U.S.C.A. Const.Amend. 6.

[17] **Criminal Law**Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure to call additional mitigating witnesses to testify during penalty phase of capital murder prosecution was not ineffective assistance, as the testimony of these witnesses would have offered was cumulative to the mitigation testimony heard by the jury from the expert witnesses and prior depositions presented. U.S.C.A. Const.Amend. 6.

[18] **Criminal Law**Introduction of and Objections to Evidence at Trial

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1921Introduction of and Objections to Evidence at Trial
110k1922In general

Counsel is not ineffective for not presenting cumulative evidence. U.S.C.A. Const.Amend. 6.

[19] **Criminal Law**Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Capital murder defendant was not prejudiced during penalty phase by counsel's decision to tell the story of his childhood through expert witnesses rather than presenting a piecemeal picture of his childhood through additional mitigation witnesses, and, thus, counsel's decision was not ineffective assistance, as these witnesses were either uncooperative and had written defendant out of their lives, could not be located, or were of questionable competence to testify. U.S.C.A. Const.Amend. 6.

[20] **Criminal Law**Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure during penalty phase of capital murder prosecution to present mitigating testimony from defendant's former fiancee did not prejudice defendant, and, thus, was not ineffective assistance; counsel made reasonable efforts to locate former fiancee, as defense counsel made reasonable efforts to locate former fiancee, but was thwarted by her then husband, and much of her testimony was cumulative. U.S.C.A. Const.Amend. 6.

[21] **Criminal Law**Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation

110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Counsel's decision during penalty phase of capital murder prosecution not to call defendant's sister to provide mitigation testimony was a matter of reasonable trial strategy, and, thus, was not ineffective assistance, as sister was also a co-defendant in the underlying murders, counsel did not want to put co-defendant on the stand because counsel did not want to allow the prosecution to cross-examine her about the murders, and counsel was concerned that sister might be viewed as an additional victim because she was in prison for the crimes that she committed with defendant. U.S.C.A. Const.Amend. 6.

[22] **Criminal Law**Presentation of evidence in sentencing phase

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1961Presentation of evidence in sentencing phase

Defense counsel's failure during penalty phase of capital murder prosecution to present a neuropsychologist's testimony concerning defendant's prior head injuries did not prejudice defendant, and, thus, was not ineffective assistance; defendant failed to present any evidence that counsel was aware that defendant's head injuries caused brain damage, and counsel conducted a thorough investigation into defendant's childhood, but there was no evidence of brain damage or impaired psychological functioning. U.S.C.A. Const.Amend. 6.

[23] **Criminal Law**Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Defense counsel's decision during penalty phase of capital murder prosecution not to object to improper hypothetical posed by prosecutor to expert witness on cross-examination in which defendant called himself a "no-good s.o.b." was a matter of reasonable trial strategy, as counsel did not want to highlight the prosecutor's statement. U.S.C.A. Const.Amend. 6.

[24] **Criminal Law** Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Defense counsel's decision during penalty phase of capital murder prosecution not to object to improper hypothetical posed by prosecutor to expert witness on cross-examination in which defendant called himself a "no-good s.o.b." did not prejudice defendant, and, thus, was not ineffective assistance, as prosecutor's statement was a brief one that was subsequently "shut down" by counsel's objection. U.S.C.A. Const.Amend. 6.

[25] **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

The standard of prejudice on a claim of ineffective assistance of counsel is less exacting than the plain error standard. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[26] **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

Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative.

[27] **Criminal Law** Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Counsel's failure to object during penalty phase of capital murder trial to prosecutor's improper suggestion during closing argument that defendant had escaped from incarceration more than one time did not prejudice defendant, and, thus, was not ineffective assistance, given the context of the entire record. U.S.C.A. Const.Amend. 6.

[28] **Criminal Law** Argument and comments

110Criminal Law
110XXXICounsel
110XXXI(C)Adequacy of Representation
110XXXI(C)2Particular Cases and Issues
110k1958Death Penalty
110k1962Argument and comments

Defense counsel's failure to object during penalty phase of capital murder trial to prosecutor's statement that defendant, during his prior attempt to escape from prison, helped individuals escape that were in for the rest of their lives, when there was no

evidence as to how long the individuals' sentences were, did not prejudice defendant, and, thus, was not ineffective assistance, as the length of the sentences of the individuals whom defendant aided in escape was not consequential or significant. U.S.C.A. Const.Amend. 6.

[29] **Criminal Law**—Operation and effect

110Criminal Law
110XXIVReview
110XXIV(G)Record and Proceedings Not in Record
110XXIV(G)11Defects and Objections
110k1109In General
110k1109(3)Operation and effect

Trial court's alleged destruction of jury questionnaires did not prejudice capital murder defendant, and, thus, he was not entitled to a new trial on this basis, as regardless of whether the questionnaires were destroyed by the trial court, copies of the questionnaires for the jurors who served during penalty phase had been filed with Supreme Court and stipulated to by both parties, and jurors provided no additional information on their questionnaires other than their basic personal information and the answers to the yes or no questions contained in the questionnaire.

Attorneys and Law Firms

***342** Jeannie Willibey, Public Defender's Office, Kansas City, for Deck.

Evan J. Buchheim, Attorney General's Office, Jefferson City, for the State.

Opinion

MARY R. RUSSELL, Judge.

This is the fifth action to come before this Court involving murders committed in 1996 by Carman Deck ("Movant"). Movant filed this Rule 29.15 post-conviction proceeding, asserting that his

counsel at the penalty phase of his capital murder trial was ineffective for failing to call certain witnesses and for other alleged deficient performance. He also alleges that the motion court erred in denying his motion for a new trial. This Court finds no error and affirms the denial of Rule 29.15 relief and the denial of Movant's request for a new trial.

I. Background

In February 1998, a jury found Movant guilty 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 for the 1996 ***343** robbery and shooting deaths of James and Zelma Long. He received two death sentences. This Court affirmed those convictions and sentences in *State v. Deck,* 994 S.W.2d 527 (Mo. banc 1999) ("*Deck I* ").[1] Movant filed a motion for post-conviction relief pursuant to Rule 29.15, which was overruled by the circuit court. On appeal, this Court reversed the death sentences but affirmed the findings of guilt for his convictions. *Deck v. State,* 68 S.W.3d 418 (Mo. banc 2002) ("*Deck II* "). At the penalty phase retrial, he was again sentenced to two death sentences. This Court affirmed the death sentences in *State v. Deck,* 136 S.W.3d 481 (Mo. banc 2004) ("*Deck III* "), but the United States Supreme Court granted certiorari and found Movant was denied a fair trial because he appeared in shackles in the presence of the jury during the penalty phase without a showing of circumstances that required shackling for the safety of those in the courtroom. *See Deck v. Missouri,* 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). This Court ordered a second penalty phase retrial, and Deck again received two death sentences. This Court affirmed the death sentences. *See State v. Deck,* 303 S.W.3d 527 (Mo. banc 2010) ("*Deck IV* "). Movant filed a Rule 29.15 motion for post-conviction relief on multiple grounds, claiming that his penalty phase counsel was ineffective for (1) failing to ask specific questions during voir dire, (2) failing to call additional mitigation witnesses, (3) failing to conduct neuropsychological testing on Movant, and (4) failing to object during the cross-examination of Movant's expert and during the prosecutor's closing arguments. The motion court denied Movant post-conviction relief on all points. He now appeals. Movant also asserts that the motion court erred in denying him a new trial because the trial court improperly destroyed the jury questionnaires from his penalty phase hearing.[2]

II. Standard of review for Rule 29.15

[1] [2] [3] On appeal from the denial of post-conviction relief, the motion court's findings are presumed correct. *Zink v. State,* 278 S.W.3d 170, 175 (Mo. banc 2009). The motion court's judgment will be reversed if it clearly erred in its findings of fact or conclusions of law. *Id.;* Rule 29.15(k). A clear error is a ruling that leaves the appellate court with a definite and firm impression that a mistake has been made. *Id.*

III. Ineffective assistance of counsel

[4] [5] To establish ineffective assistance of counsel meriting post-conviction relief, the movant must satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the movant must show that counsel's performance was deficient by falling below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. If counsel's performance was deficient, the movant must then prove that he was prejudiced by counsel's deficiency. *Id.* at 687, 104 S.Ct. 2052. Prejudice, in the *Strickland* context, is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*

[6] [7] There is a strong presumption that counsel's conduct was reasonable and effective. *Id.* at 689, 104 S.Ct. 2052. To ***344** overcome this presumption, the movant must point to specific acts or omissions of counsel that, in light of all the circumstances, fell outside the wide range of effective assistance. *Id.* at 690, 104 S.Ct. 2052. Further, the choice of one reasonable trial strategy over another is not ineffective assistance. *Zink*, 278 S.W.3d at 176. Strategic choices made after a thorough investigation of the law and the facts are virtually unchallengeable. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

A. Penalty phase counsel was not ineffective during voir dire

Movant alleges that penalty phase counsel failed to adequately ask questions of the venire panel to expose potential bias. Specifically, Movant contends that counsel was ineffective for failing to ask the veniremembers "whether they could look at [Movant]'s childhood experience and give that meaningful consideration as a reason to vote against the death penalty."

[8] [9] [10] When imposing the death penalty, the sentencer must consider the character and record of the defendant and the circumstances of the particular offense. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). To meet constitutional Eighth and Fourteenth amendment requirements, a death penalty statute cannot preclude consideration of relevant mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Further, a sentencer may not, as a matter of law, refuse to consider any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

[11] A juror in a death penalty case may not refuse to consider mitigating evidence outright. *Morgan v. Illinois*, 504 U.S. 719, 728–29, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). In *Morgan*,

the Supreme Court held that the trial judge's refusal to allow defense counsel to ask the venire panel whether they would automatically vote for death if the defendant was convicted of first-degree murder violated the defendant's right to an impartial jury. *Id.* at 735–40, 112 S.Ct. 2222. A juror who would automatically impose the death penalty, the Court reasoned, is not an impartial juror, and the Fourteenth Amendment mandates such a juror be removed for cause. *Id.* at 728–29, 112 S.Ct. 2222. The Court held:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Id. 729, 112 S.Ct. 2222. Jurors who would automatically vote to impose the death penalty "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it." *Id.* at 736, 112 S.Ct. 2222.

Movant argues that *Morgan* prohibits the empaneling of any juror who would not view childhood evidence as a reason to vote against the death penalty. Movant essentially contends that *Morgan* requires that counsel be permitted to ask the venire panel how certain mitigating evidence ***345** would impact their deliberations and, further, that counsel was ineffective for failing to do so. Movant's contention is that failing to ask the venire panel during voir dire, "whether they could look at [Movant]'s childhood experience and give that meaningful consideration *as a reason to vote against the death penalty* " was a violation of Rule 29.15.

[12] [13] Movant's proposed question is not essential to his effective assistance of counsel, as asking the potential jurors whether they would view Movant's childhood experience *as a reason to vote against the death penalty* is improper because it asks the potential jurors to commit to the weight they would give the evidence before they hear it. Although the jury is clearly required to consider mitigating evidence in deciding whether to impose the death penalty under *Lockett*, *Eddings*, and *Morgan*, the court and the parties may not inquire as to *how* such evidence will affect the potential jury's decision. Although a sentencer may not give mitigating evidence no weight by excluding such evidence from consideration, he or she may determine the weight to be given relevant mitigating evidence. *Eddings*, 455 U.S. at 114–115, 102 S.Ct. 869. Under these facts, counsel's performance was not deficient.

Although the questioning that Movant proposes is improper, exploration of juror biases regarding

certain types of evidence is appropriate during voir dire. It is possible that a juror could be biased by the introduction of childhood evidence. The prosecution here adequately explored this possibility when it asked the following question to the venire panel:

> And I guess the question I want to ask you is that you'll hear—I anticipate you'll hear some evidence concerning [Movant]'s childhood, his upbringing.
>
> ...
>
> Is there anybody here, that if you start hearing evidence about troubled childhoods, things like that, it's going to [a]ffect your ability to be fair in this case, one way or the other?

No venireperson indicated that such evidence would affect his or her ability to be fair in the case.

The prosecution's question adequately probed the potential jurors' bias without asking them to improperly commit to how certain evidence would affect their deliberations. The duty of counsel and the court in voir dire is to uncover biases of potential jurors to ensure an impartial jury. It is not the duty of counsel to ensure that biased jurors partial to their side are empaneled.

Because Movant failed to prove defense counsel's performance was deficient, Movant did not satisfy the first prong of *Strickland*'s ineffective assistance of counsel test. The motion court did not clearly err in denying Movant post-conviction relief on this issue.[3]

B. Counsel was not ineffective by not calling additional mitigation witnesses

Movant argues that counsel was ineffective by failing to call the following mitigation witnesses: Michael Johnson, Carol and Arturo Misserocchi, Latisha Deck, Elvina Deck, Wilma Laird, Rita Deck, Stacey Tesreau–Bryant, and Tonia Cummings. He also contends that counsel was deficient for failing to present the deposition testimony of D.L. Hood and Pete Deck. ***346** Movant argues that the additional mitigation witnesses would have provided "additional detail" about (1) the abuse and neglect suffered by Movant, (2) the care that Movant provided his younger siblings during their childhood, and (3) the bad character of Movant's caregivers during his childhood. Further, Movant argues that counsel was ineffective for choosing to present mitigating evidence through experts and prior deposition testimony rather than "live lay witnesses." Movant states that "live lay witnesses" would have conveyed to the jury that his life had value.

[14] [15] Counsel's decision not to call a witness is presumptively a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). To prevail on a claim of ineffective assistance of counsel for failure to call a witness, a defendant must show that: (1)

counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense. *Id.; State v. Harris*, 870 S.W.2d 798, 817 (Mo. banc 1994).

Because Movant is challenging counsel's failure to call certain witnesses during the penalty phase, a "viable defense" is one in which there is a reasonable probability[4] that the additional mitigating evidence those witnesses would have provided would have outweighed the aggravating evidence presented by the prosecutor resulting in the jury voting against the death penalty. *See Storey v. State*, 175 S.W.3d 116, 138 (Mo. banc 2005) (stating that the introduction of additional mitigating evidence of the same nature as the evidence that was presented would not have outweighed the particularly disturbing photographs introduced as aggravating evidence).

1. The motion court did not clearly err in finding that counsel was not ineffective for not calling additional witnesses

a. Testimony of mitigation witnesses presented to the jury

At the penalty phase hearing, counsel presented the live testimony of Dr. Wanda Draper, a child development expert, and Dr. Eleatha Surratt, a psychiatrist. Counsel also presented the videotaped depositions of Mike Deck (Movant's brother) and Mary Banks (Movant's aunt). Finally, counsel read aloud the depositions of Major Puckett (Movant's short-term foster parent) and Beverly Dulinsky (Movant's aunt). The jury heard the following testimony.

Movant's parents were unmarried when he was born. They had three other children, Tonia, Latisha, and Mike. Neither parent was willing to accept responsibility for Movant's poor upbringing.

As an infant, Movant suffered physical problems as the result of being kept in a home with no air conditioning in August. His parents had been feeding Movant powdered commodity milk instead of baby formula. Relatives purchased baby formula for Movant and would mix it up before they gave it to Movant's parents because his parents would use the canned cream in their coffee and cereal.

The experts detailed Movant's difficult childhood. When Movant was three months old, he was taken to the hospital ***347** for dehydration and possible pneumonia because he did not have enough liquid or food. His mother had an explosive temper, and she would beat Movant often during his early years, leaving marks on him. Dr. Draper stated that Movant's mother was "quite

abusive."

In addition to the physical abuse, Movant also did not have much emotional stability during his early years. Movant and his siblings were often left with relatives and babysitters while his parents went to nightclubs and bars. Movant's parents frequently brought their children to the bars, where they would sit in the bar, be left in the car, or be permitted to run free in the parking lot.

There were several times when the children were left at home alone. They did not know where their mother was, they were dressed "shabby," and there was no food in the house.

Movant's mother neglected the children because she was busy pursuing sexual relationships with various men. She would even have sex in her car in front of her children. Eventually, Movant's parents separated, and his mother moved in with her band member and boyfriend, D.L. Hood. Hood did not want anything to do with the children, so Movant's mother left the children with the Division of Family Services ("DFS").

During periods of extreme neglect, Movant took on the primary parenting role for his brothers and sisters. He was their major caregiver and the only person on whom they could count. Movant's brother testified that Movant "pretty much took care of [the Deck children]." He would steal food or go door-to-door to beg for food so that the Deck children would have something to eat. Movant's mother also taught Movant how to steal and encouraged him to do so. The children were also sexually abused.

From reading the depositions of Movant's brother and father, Dr. Draper related to the jury that one Thanksgiving, the sheriff's office discovered that Movant and his siblings had been left alone for a couple of days without food or supervision. While being fed Thanksgiving dinner by relatives, Movant's brother was so hungry that he ate his food too fast, causing him to vomit onto his plate. He was so desperately hungry that he tried to eat his own vomit off the plate.

When Movant was in fourth grade, Pete Deck, Movant's father, began living with a woman named Rita. Movant's father left Rita and married a woman named Marietta who was an alcoholic and did not want the children. Marietta would feed her own children a regular meal but would give the Deck children cold bologna and hot dogs without bread for dinner. Movant's brother stated that she would also "torture" the children by making them kneel on broomsticks "just because she didn't like us" and that "[s]he pretty much wanted my dad to herself."

Dr. Draper and Dr. Surratt also related to the jury one of Marietta's particularly disturbing abusive acts. When 11– or 12–year–old Movant was riding in the car with Marietta, he told her that he needed to go to the bathroom. Marietta told him to wait, but he could not, so he defecated in his pants. Marietta was so furious that she took off his clothes, took his own fecal matter, and smeared it on his face. She made him keep the fecal matter there so long that it began to dry. She also took a photograph of Movant with the feces smeared on his face and showed it to others. Movant's

brother corroborated Marietta's actions. Mary Banks, Movant's aunt, stated that Movant's mother showed her the picture. She described the picture in her deposition. Eventually, Marietta ***348** drove the Deck children to DFS and left them there. Movant was placed with a foster family, separated from his younger siblings.

Movant was initially placed with Carol and Arturo Misserocchi, but he did not stay with them very long. He did not make a connection with the Misserocchis. When Movant was about 13 years old, his aunt and uncle, Mary Banks and Norman Deck, sought to adopt him. His mother refused to allow the adoption unless they paid her the same sum she was receiving in government assistance. Because his aunt and uncle could not afford to do so, Movant was not adopted and he was again placed in foster care. From the time he was removed from the Misserocchis' home, he was placed in three different homes before he was placed in the care of Major and Linnie Puckett.

The Pucketts provided Movant with a regimented environment, and he thrived in that environment. The Pucketts would establish a routine for all of their foster children of homework and chores, and they would always have dinner together so that they could talk about whatever was on their minds. Movant had such a good relationship with Linnie Puckett that he began to call her "mom." About a year after Movant was placed with the Pucketts, however, Movant's mother showed up without warning and took him away. He begged her not to take him, saying that "if you take me away, you are killing me inside."

Movant's mother took him to live with her and Ron Wurst, her boyfriend at the time, who physically abused Movant's mother. About three months after he was removed from the Pucketts' home, Movant returned to their home asking to stay because his mother knocked him through a plate glass door. When Movant was 17, he dropped out of school and moved into his own living quarters. He asked his mother to move in with him to protect her from Wurst.

When Movant was 29 he became engaged to Stacey Tesreau–Bryant. She had a child with whom Movant had a good relationship.

Dr. Draper opined that all of Movant's childhood experiences made him the person he was at the time of the crime. Although "he was of normal intelligence" and "had potential," he had "no way to develop into a responsible, caring citizen." She also stated that she believed Movant suffered an "extreme case of a horrendous childhood" because he moved 22 times in 21 years, along with the abuse, neglect, and lack of guidance. Dr. Surratt opined that Movant's childhood was similar to one of the "most extreme cases of child abuse ever described."

Movant's brother testified that he and the rest of the Deck children were separated from Movant during their childhood. The rest of the Deck children went to live with Norman and Elvina Deck, but Movant continued to live with his mother. Movant's brother testified that if Movant had been afforded the same opportunities as himself, namely to live in a stable environment with Norman and Elvina for seven years, things might have turned out differently for Movant. Major Puckett

also testified that if Movant had been allowed to stay with him, he believed that Movant would have been a "wonderful man."

Dr. Draper studied the depositions of Movant's parents, Movant's brother, Tonia Cummings, Mary Banks, Elvina and Norman Deck, Stacey Tesreau–Bryant and her son, Major Puckett, and the Misserochis.

Dr. Surratt interviewed Movant's parents, Movant's brother, Tonia Cummings, Latisha Deck, Mary Banks, Elvina Deck, ***349** Rita Deck, Wilma Laird, Stacey Tesreau–Bryant, and Beverly Dulinsky. She also read the depositions of D.L. Hood, Major Puckett, and the Misserochis.

b. The testimony of Michael Johnson, the Misserochis, and D.L. Hood was inconsequential

The motion court did not clearly err in finding that the testimony of the following four witnesses would have been inconsequential.

Michael Johnson

Michael Johnson was Marietta's son and Movant's stepbrother. He would have testified that Movant's grandfather did not like him and that he was verbally abusive. He also would have testified that the Deck children were "closed off."

Carol Misserocchi

Carol Misserocchi, Movant's short-term foster parent, would have testified that Movant was placed with her family for about six to eight months when he was 10 or 11 years old. She would have testified that Movant's family made no attempt to contact him, and that Movant showed very little emotion and that he did not bond with her. The other children at the Misserochis' did not like Movant, and he was "sassy."

Arturo Misserocchi

Arturo Misserocchi, Carol's husband, would have testified that he believed Movant's parents might have tried to call Movant when he lived at his and Carol's home. Movant also did not bond with Arturo, although he described Movant as "a cute little kid," with a "wonderful personality."

D.L. Hood

D.L. Hood, who is now deceased, was a former band-mate and boyfriend of Movant's mother. His previous deposition stated that Movant's mother was "crazy" and that she tried to stab Hood one night. He also stated that Movant's mother was promiscuous. Movant's mother also told him that she had taken the kids to the welfare office and left them on the steps.

[16] Movant failed to show that, had the additional mitigating witnesses been called to testify, their testimony would have outweighed the aggravating evidence so that there was a reasonable probability the jury would have voted for life. The additional witnesses' testimony would not have produced a "viable defense." *Hutchison*, 150 S.W.3d at 304. Michael Johnson only added that Movant's grandfather was "verbally abusive." The Misserocchis had a brief interaction with Movant in the distant past. Hood only spoke to the interactions he had with Movant's mother and recounted the same stories the jury had heard from other witnesses about the mother's sexual promiscuity and neglect of her children. These witnesses' testimony was so lacking in substance that it would not have had an impact on the jury in their decision. The motion court did not clearly err in finding that these four witnesses' testimony would not have been compelling.

c. The testimony of Latisha Deck, Elvina Deck, Wilma Laird, Rita Deck, and Pete Deck was cumulative

The motion court did not clearly err in finding that the testimony of the following five witnesses would have been cumulative to the evidence presented by counsel at the penalty phase.

***350 *Latisha Deck*[5]**

Latisha Deck, Movant's mentally disabled sister, would have testified that Movant took care of her when she was little.

Elvina Deck

Elvina Deck, Movant's aunt, would have testified that Movant's mother beat him. She also would have testified that his mother was very promiscuous—so much so that she even prostituted herself. She would have told her account of the incident in which the Deck children were brought to her home, dirty and starving, on Thanksgiving Day. She also would have provided her account of Marietta, Movant's stepmother, making the children kneel on broomsticks and her account of the "feces incident." She would have testified that Marietta encouraged Movant and his sister to steal for her. Elvina also would have testified that she still loved Movant very much. Counsel hired an investigator and made attempts to contact Elvina Deck to testify at the penalty phase, but she could not be found.

Wilma Laird

Wilma Laird was Movant's aunt. She would have testified that she saw Movant's mother hit Movant in the temple with a flip-flop when he was one or two years old, although she downplayed the incident as "nothing drastic." She also would have testified that Movant's parents could be "good" parents. She stated that Movant's father tried to do the best he could for his children.

Rita Deck

Rita Deck, Movant's stepmother, would have given her account of the Thanksgiving Day incident. She would have testified that when Movant's father left her, she continued to care for the Deck children because she did not know where Movant's mother was. Movant's aunt came for the children one day and gave them to Movant's father and his new wife, Marietta. Rita was upset that the children were in Movant's father's and Marietta's care because Rita "really cared for the kids."

Rita would have testified that Movant was "a good kid" and that he did not give her any trouble. She also would have testified that the four Deck children were very close.

Counsel subpoenaed Rita, but she was not cooperative and did not comply with her subpoena. Counsel stated that Rita did not want to be involved in the third retrial.

Pete Deck

Pete Deck, Movant's father, would have testified that, after he left Movant's mother and the Deck children, he continued to take money to Movant's mother to provide for the children. He also would have testified regarding the incident in which the sheriff called him to pick up his children from Movant's mother's house on Thanksgiving Day because they had been left alone. He also would have testified to his former wife Marietta's poor treatment of the children, including the "feces incident." He would have testified that Marietta suggested foster care in front of Movant, and when Movant's father asked Movant how he felt about foster care, he stated that he would rather live in foster care than live with Marietta.

***351** When Movant's father was asked how many places Movant had lived from birth to age 16, he responded "four or five." He was surprised to hear that Movant had lived in more than 20 places in that time period.

Movant's father attended Movant's first trial, but Movant's counsel in the first penalty phase hearing did not call him to testify because he was in poor health and had high blood pressure. Movant's second post-conviction counsel subpoenaed Movant's father to testify at the penalty phase. At that time, he was living with Rita again, and she called counsel to report that he was too ill to testify. Counsel then received a doctor's note that stated testifying in court would be hazardous to his health. Counsel considered Rita and Movant's father to be uncooperative and had doubts about his medical condition. Rita and Movant's father did not comply with their subpoenas.

[17] [18] The testimony that these five witnesses would have offered was repetitive to the mitigation testimony heard by the jury from the expert witnesses and previous depositions presented. Movant's argument that these five witnesses would have provided "additional detail" of his case in mitigation all but concedes that their testimony would have been cumulative. Counsel is not ineffective for not presenting cumulative evidence. *Skillicorn v. State,* 22 S.W.3d 678, 683 (Mo. banc 2000).

[19] Neither was counsel ineffective for failing to provide the jury with "live lay witnesses" rather than the experts' testimony that included the lay witnesses' statements. Significantly, the motion court noted:

> While Movant claims that the live testimony of these witnesses would bolster the believability of his claims of a difficult childhood, the [c]ourt has already indicated that the testimony was not compelling. Most of these witnesses were family members whose perceived motive to exaggerate was just as great as the experts, if not significantly greater.

Movant's contention that counsel was ineffective for failing to call live "lay witnesses" to provide "additional detail" of Movant's childhood is similar to the claims of the movant in *Storey,* 175

S.W.3d 116. In *Storey,* counsel presented the testimony of Storey's family members as well as a clinical forensic psychologist to show "all of the bad influences and discord that surrounded Storey's childhood." *Id.* at 123–24. His counsel also presented the testimony of an expert in the field of corrections and criminal justice to testify about Storey's nonviolent prison record. *Id.* at 123. In his motion for post-conviction relief, Storey claimed, *inter alia*, that his counsel was ineffective for failing to call additional mitigation witnesses. *Id.* at 137. Specifically, Storey claimed his counsel was ineffective for failing to call non-family witnesses to testify about his childhood because non-family evidence would have been inherently more credible than the family evidence presented by counsel. *Id.*

This Court held that Storey's counsel was not ineffective for failing to call additional non-family mitigation witnesses because additional witnesses would "reiterate the same stories already presented by witnesses who testified at trial." *Id.* at 138. Storey also argued that his counsel should have presented more family mitigation witnesses who would have provided additional details of his childhood and additional details of his good character. *Id.* This Court found that Storey's counsel had introduced this type of mitigation evidence through other family members, and that he failed to show that any of the additional witnesses ***352** would have presented a viable defense. *Id.* at 137–38. "Counsel was not 'ineffective for not putting on cumulative evidence.' " *Id.* at 138 (quoting *Skillicorn*, 22 S.W.3d at 683).

The motion court here did not clearly err in finding that Movant was not prejudiced by counsel's strategic decision to tell the story of his childhood through experts rather than presenting a piecemeal picture of his childhood through uncooperative witnesses who had written Movant out of their lives (such as Movant's father and Rita Deck), through a witness who could not be located (Elvina Deck), or through a witness of questionable competence to testify (Latisha Deck). Additionally, Wilma Laird would have undermined counsel's strategy to highlight Movant's parents' horrible parenting by painting them in a favorable light.

Counsel's decision not to call cumulative "live lay witnesses" was an exercise of reasonable trial strategy. The motion court did not clearly err in finding that counsel was not ineffective for failing to call these five witnesses.

d. Counsel made reasonable efforts to locate Stacey Tesreau–Bryant

[20] Stacey Tesreau–Bryant, Movant's former fiancée, would have testified that she previously dated and lived with Movant for one year. At the time they dated, her son Dylan was approximately two years old. Movant helped take care of Dylan, and he treated him like a son. Dylan even called Movant "Daddy P." Movant continued to have a relationship with Dylan after Movant and Stacey's relationship ended. Movant told Stacey that his mom used to date a lot of

men when he was young and that he had been molested by some of the men. She also would have testified that Movant shared with her that he was raped in prison.

Penalty phase counsel sent an investigator to Stacey's home. Stacey's husband at the time was hostile to the investigator and refused to provide Stacey's employer or work phone number. Counsel testified that given the husband's hostile nature and the tangential nature of Stacey's testimony, they decided to bring out Stacey's information through the experts.

Because Stacey has since separated from her husband, post-conviction counsel was able to locate her. Stacey testified that the only way for Movant's counsel to contact her would have been to ask her husband because she was disabled and unemployed, and her husband was always home. He was "totally against" Stacey's involvement in Movant's penalty phase hearing. Movant did not carry his burden to show that Stacey could have been located through reasonable investigation to testify at the penalty phase.

Additionally, much of Stacey's testimony was cumulative, and that Movant was raped in prison called attention to his adult criminal life rather than focusing on his traumatic childhood. Movant did not carry his burden to show that, had Stacey been located and testified at Movant's third penalty phase hearing, there was a reasonable probability the jury would have voted for life instead of imposing the death penalty.

e. Counsel's decision not to call Tonia Cummings was reasonable trial strategy

[21] Tonia Cummings, Movant's sister, was also his codefendant in the murders underlying this case. Tonia would have largely given the jury another account of the same testimony that they heard at trial. To that extent, Tonia's testimony would have been cumulative. However, Tonia did provide a few additional details. ***353** She stated that Marietta would make the Deck children stay outside all day long and that she would make them use the bathroom outside as well. They were constantly thirsty and hungry in her care. She recounted a particular incident in which Movant found a big bag of dog food and fed it to the Deck children because they were so hungry. Marietta would also squirt dish soap in the children's mouths and make them swallow it. She also would have testified that Marietta was particularly hard on Movant, saying that "he's never going to amount to nothing, he's a piece of shit, we're bastards, our mother's a whore."

Tonia would have testified that when Movant was a teenager, their mother would fist-fight him. Movant also told Tonia that he was a "worthless piece of shit, that he's never going to amount to anything, that nobody ever loved him, all he wanted was for somebody to love him."

Although Tonia's testimony helped provide a complete picture of Movant's traumatic childhood,

the decision not to call her as a witness at the penalty phase was undoubtedly reasonable trial strategy. Counsel did not want to put Movant's codefendant on the stand because counsel did not want to allow the prosecution to cross-examine her about the murders. Also, counsel was concerned that Tonia may be viewed as an additional victim because she was in prison for the crimes that she committed with Movant. "Generally, the selection of witnesses and the introduction of evidence are questions of trial strategy and virtually unchallengeable." *Anderson v. State*, 196 S.W.3d 28, 37 (Mo. banc 2006); *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable...."). As counsel's decision not to call Tonia Cummings was one of reasonable trial strategy, counsel was not ineffective for deciding not to put her on the stand.

C. Movant was not prejudiced by counsel's decision not to present a neuropsychologist's testimony

Movant claims that counsel was ineffective because they were aware that he had sustained multiple head injuries and was malnourished as a child, yet they did not request funding to conduct neuropsychological testing on Movant. Movant's hospital records reflected the following head injuries: a "laceration on his forehead" when Movant was 6 years old, a "possible concussion" when he was in a car accident at age 13, an incident where he hit his head on the bars in prison when he was 19 that caused him temporary blurred vision and a "spinning" head, and a laceration on his head in 1992. Movant also told counsel that he hit his head during a car accident and that he had been struck in the head with a baseball bat during a fight. Finally, there was evidence that Movant woke up one morning with a knot on his head, not able to remember the previous night.

[22] Although Movant presents a list of injuries to his head, he does not present any evidence that his counsel was aware that those injuries caused brain damage. Further, he does not present any evidence, independent of his own post-conviction expert's testimony, that these injuries caused permanent damage at all. Because counsel did not have any reason to believe that Movant suffered from a neuropsychological impairment, counsel did not explore presenting that type of evidence in mitigation. Movant fails to prove that counsel was ineffective for failing to do so because he was not prejudiced by the decision.

In an attempt to prove prejudice, Movant presented the testimony of a neuropsychologist, Dr. Gelbort, at the post-conviction ***354** hearing. Dr. Gelbort's findings, however, did not suggest that Movant suffered from impaired mental functioning. The results of testing showed that Movant had an IQ score of 91, which is within the normal range. Movant admits that "Dr. Gelbort did not find significant or moderate impairment on any of the [IQ tests, and his] scores were grossly

within the normal range." Dr. Gelbort also stated in his testimony, "And for what it's worth, and to be ... very upfront with it, I've not described significant or even moderate impairment on any of these [IQ] tests." Dr. Gelbort also described Movant as performing in the "borderline defective range" on the Category Test. Movant admits, however, that "[i]n and of itself, the borderline impairment score on the Category Test does not mean anything."

To support his contention that counsel was ineffective in deciding not to pursue evidence of impaired neuropsychological functioning, Movant relies on *Hutchison*'s statement that "evidence of impaired intellectual functioning is inherently mitigating...." 150 S.W.3d at 308. Dr. Gelbort admitted, however, that he did not find significant or even moderate impairment on any IQ tests.

Further, Movant's case is readily distinguishable from *Hutchison. Hutchison* involved a movant who displayed objective signs of impaired intellectual functioning that his counsel failed to investigate. Hutchison's records showed that he had been diagnosed with significant mental disabilities and had an IQ of 78. *Id.* at 306; *id.* at 309 (Limbaugh, J., dissenting). Further, Hutchison's counsel was woefully unprepared for the penalty phase because they failed to conduct an investigation into Hutchison's life history, troubled background, and mental and emotional deficits. *Id.* at 297. Counsel obtained a cursory report from a mental health expert that identified some problems but failed to follow up on the issues uncovered in that report. *Id.* at 306. This Court held that counsel was ineffective for failing to conduct a thorough investigation and evaluation of these possible mitigators. *Id.* at 307–08.

In contrast, counsel in Movant's case conducted a thorough investigation into Movant's childhood, and there was no evidence of brain damage or impaired psychological functioning. Counsel made a decision not to pursue neuropsychological testing based on the facts they had gathered from their investigation. This Court, however, need not address whether this decision was one of reasonable trial strategy because Movant fails in his burden to show a reasonable probability that, had a neuropsychologist like Dr. Gelbort testified at his penalty phase hearing, the jury would have voted for life. Dr. Gelbort's testimony shows that Movant was not intellectually impaired, and his "borderline defective" score on the Category Test "did not mean anything" by itself. Movant was not prejudiced by counsel's decision not to conduct neuropsychological testing.

D. Counsel was not ineffective for failing to object to the prosecutor's cross-examination of Dr. Surratt

During Movant's penalty phase hearing, the prosecutor and Dr. Surratt engaged in the following transaction on cross-examination:

Prosecutor: —Well I'm asking you—I didn't mean to cut you off—but I'm asking you about you being here today. Not prior work in this case, but being here today, you're here today to explain his behavior?

Dr. Surratt: Yes.

Prosecutor: And wouldn't it be easy or helpful to explain his behavior, if you had asked him why did you put a gun ***355** against these people's head and kill them?

Dr. Surratt: And it could have, yes.

Prosecutor: It could have, but it also could have been pretty detrimental to Mr. Deck, if he said, the reason I killed them is *because I'm a no-good s.o.b. and wanted them dead,* because I didn't want to go to prison. That wouldn't be a very good answer for Mr. Deck, would it?

Dr. Surratt: It would have went along with my findings of how he responds to things; is it good or bad, not for me to say, but it certainly would have been fitting.

Prosecutor: He wanting these people dead just because he wanted their money fits along with what you believe?

Counsel Tucci: Objection; asked and answered.

The Court: Sustained; move on, please.

(Emphasis added).

Movant contends that the prosecutor's question to Dr. Surratt, including the statement that "it also could have been pretty detrimental to Mr. Deck, if he said, the reason I killed them is because I'm a no-good s.o.b. and wanted them dead," was improper name-calling and an ad hominem personal attack on Movant designed to inflame the passions of the jury. Movant argues that his counsel was ineffective for failing to object to the statement.

In support of this proposition, Movant cites *State v. Banks,* 215 S.W.3d 118 (Mo. banc 2007). In *Banks,* during rebuttal to the defense's closing argument, the prosecutor stated:

> And, ladies and gentlemen, when the scene is set and held[6] and we have to go and catch the Devil, there are no angels as witnesses. This is Hell. He is the Devil. They aren't angels. He is guilty beyond a reasonable doubt.

Id. at 119.

The trial court permitted the prosecutor's argument over the defense's objection. *Id.* On appeal,

this Court held that the trial court abused its discretion in overruling the defense's objection because the prosecutor's remark was "pure hyperbole, an ad hominem personal attack designed to inflame the jury." *Id.* at 121. Although *Banks* is instructive about what constitutes improper prosecutorial argument, it does not provide guidance as to when counsel's failure to object to such an argument would constitute ineffective assistance of counsel.

More on point, *State v. Storey,* 901 S.W.2d 886 (Mo. banc 1995), addresses when counsel is ineffective for failing to object. In *Storey* the prosecutor made multiple objectionable statements during opening and closing arguments. *Id.* at 900–02. The prosecutor argued facts outside the record by declaring that "[t]his case is about the most brutal slaying in the history of this county." *Id.* at 900. He also improperly personalized his argument to the jury:

> Think for just this moment. Try to put yourselves in [the victim]'s place. Can you imagine? And, then—and then, to have your head yanked back by its hair and to feel the blade of that knife slicing through your flesh, severing your vocal cords, wanting to scream out in terror, but not being able to. Trying to breathe, but not being able to for the blood pouring down into your esophagus.

Id. at 901. He also argued:

> I want you to think about that guy right there on the front row, [the victim's ***356** brother]. What if he had happened onto this brutal thing and seen his very close sister in the process of murdered? Would he have been justified in taking the Defendant's life? Yes. Without question. Without question.

Id. at 901–02. The victim's brother did not see the murder, and suggesting that he did only served to inflame the jury. *Id.* at 902. The argument also improperly equated the jury's sentencing function with self-defense by asking if the victim's brother would have been justified in taking the defendant's life if he was, in fact, present during the victim's murder. *Id.*

Finally, the prosecutor improperly weighed the value of the defendant's life against the value of the victim's, stating:

> Why do we have the death penalty? The reason we have the death penalty is because the right of the innocent people to live outweighs—by huge leaps and bounds, outweighs the right of the guilty not to die. The right of the innocent completely outweighs the right of the guilty not to die, and, so, it comes down to one basic thing. Whose life is more important to you? Whose life has more value? The Defendant's or [the victim]'s?

Id.

In spite of the fact that the prosecutor's arguments were obviously objectionable, Storey's counsel failed to object to any of them. *Id.* This Court held that "counsel's failure to object cannot be justified as trial strategy." *Id.* "A reasonably competent lawyer would have objected to the obviously improper arguments." *Id.* Further, this Court found that the counsel's failure to object was prejudicial and reversed Storey's death sentence. *Id.* at 902–03.

Storey was an extreme case of multiple inflammatory improper prosecutorial arguments that were presented at key junctures in the penalty phase hearing. Storey's counsel's failure to object under those circumstances clearly amounted to ineffective assistance of counsel. In this case, Movant's counsel did not fail their client as counsel in *Storey* did.

State v. Tokar, 918 S.W.2d 753 (Mo. banc 1996), is more analogous to Movant's counsel's performance in this case. In *Tokar,* the prosecutor stated that the "jurors might pray that their children will not have to experience what the [victim's] children went through with the murder of their father." *Id.* at 768. This Court reasoned that the movant correctly argued that the prosecutor's statement improperly personalized the argument and was error. *Id.* The prosecutor's error, however, did not justify reversal. *Id.* Applying *Strickland,* the movant was still required to prove that "trial counsel's failure to object did not conform to the degree of skill, care, and diligence of a reasonably competent attorney and that he was prejudiced." *Id.* This Court noted:

> In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good.

Id. Tokar held that the movant failed to overcome the presumption that the failure to object was a strategic choice by competent counsel. *Id.* This Court also held that the movant failed to prove prejudice. *Id.* "The level of aggravating circumstances in this case overcomes any reasonable probability that the outcome of the sentencing phase would have been any different in the absence of this remark by the prosecutor when considered in the context of the trial as a whole." *Id.*

Finally, this Court noted:

> ***357** [T]he alleged mistakes in this case do not equate to the "egregious errors, each compounding the other" that we found in *State v. Storey,* 901 S.W.2d 886, 902 (Mo. banc 1995). In that case, we reversed the defendant's sentence of death and remanded the cause for a new sentencing proceeding because defense counsel was ineffective in failing to object to the prosecutor's repeated argument of facts outside the record, personalization of the argument, and misstatement of the law. *Storey,* 901 S.W.2d at 902–03. The statements argued here simply do not compare.

Id. at 769.

[23] [24] Although the movant in *Tokar* failed to present any evidence during the post-conviction hearing regarding his counsel's failure to object to the prosecutor's improper argument, the testimony of Movant's counsel in this case only bolsters the conclusion that counsel's decision not to object was the exercise of reasonable trial strategy. *See id.* at 768.

Counsel Tucci could not specifically remember why he did not object to the prosecutor's statement, but he did state that he must have had a reason. Counsel Reynolds did not object because it was Tucci's witness, but he believed that Tucci may have not objected because he did not want to highlight the issue for the jury. He further noted that Tucci did object very quickly after the prosecutor's statement in question to "shut down" the prosecutor's argumentative line of questioning.

Although the hypothetical posed to Dr. Surratt in which Movant called himself a "no-good s.o.b." was improper on behalf of the prosecutor, counsel exercised reasonable trial strategy in not objecting to the statement. Counsel did not want to highlight the prosecutor's statement. Movant fails to overcome the presumption that counsel's failure to object was an exercise of reasonable trial strategy.

Further, Movant was not prejudiced by the prosecutor's statement when considering it within the context of the entire record. It was a brief statement that was subsequently "shut down" by counsel's objection. Just as in *Tokar*, "the alleged mistakes in this case do not equate to the 'egregious errors, each compounding the other' that we found in *State v. Storey*." *Id.* at 769 (quoting *Storey*, 901 S.W.2d at 902). "The statements argued here simply do not compare." *Id.* The motion court did not clearly err in concluding that counsel's decision not to object was an exercise of reasonable trial strategy.

E. Counsel was not ineffective for failing to object to the prosecutor's arguments about Movant's prior conviction for aiding escape

Movant was convicted of aiding an escape from prison in 1985. This evidence was introduced at trial in the form of Movant's sentence and judgment for the crime. No other evidence was admitted. During closing argument, the prosecutor told the jury: "You can consider all his prior escapes." The transcript also reads:

> **Prosecutor:** While he's going to be in prison for the rest of his life if you let him live, remember, he knows how to escape. He aided and abetted others trying to.
>
> **[Movant's Counsel]:** Objection; not a noticed aggravator.
>
> **The Court:** Overruled.

[Movant's Counsel]: Irrelevant.

The Court: Overruled.

Prosecutor: He knows how to escape, helping people that were in for the rest of their lives.

Movant contends that his counsel was ineffective for failing to object to: (1) the prosecutor's use of the term "all his prior ***358** escapes," when Movant was, in fact, only convicted once of aiding others in their escape; and (2) the prosecutor's statement that Movant helped individuals escape "that were in for the rest of their lives," when there was no evidence as to how long the individuals' sentences were.

On direct appeal, this Court reviewed these same prosecutorial statements for plain error and found that after reviewing the entire record, movant was not prejudiced by those statements. *Deck IV,* 303 S.W.3d at 542–43.

[25] [26] This Court's determination that no plain error prejudice resulted from the prosecutor's statements does not end the inquiry in this case, as the *Strickland* standard of prejudice is less exacting than the plain error standard. *Deck II,* 68 S.W.3d at 425–29. Plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative. *Id.* at 427. In contrast, *Strickland* prejudice requires a *reasonable probability* that the result would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. However, "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...." *Deck II,* 68 S.W.3d at 428. There are only a "small number of cases in which the application of the two tests will produce different results." *Id.* Movant's case is not one of those cases.

[27] [28] Looking at the prosecutor's misstatement in the context of the entire record, the failure of counsel to object to the prosecutor's simple misstatement in using the plural form did not prejudice Movant under the plain error standard or the *Strickland* standard. Further, in the context of the entire record, the motion court did not clearly err in determining that the length of the sentences of the individuals whom Movant aided in escape was not "consequential or significant." Movant fails to prove that, but for counsel's failure to object to these prosecutorial misstatements, there was reasonable probability that the result of Movant's sentencing phase would have been different. The motion court did not clearly err in denying Movant relief on this point.

IV. Movant is not entitled to a new trial based on the trial court's alleged destruction of the juror questionnaires

[29] Movant argues that the motion court erred in denying his motion for a new trial because the trial court destroyed the juror questionnaires in violation of Court Operating Rule 4.21 and Rule 27.09(b). Movant contends that if he had been able to review the juror questionnaires of three particular jurors, he would have been able to determine whether their responses to the questions showed any bias against the defense. He contends that two of the jurors in question may have been biased because counsel noted juror Wheeler was "staring down [Movant]" and that Movant "does not like" juror Hayden. He also contends that the juror questionnaire may have provided more insight into why juror Holt knew a few Jefferson County bailiffs.[7]

Movant contends that, under the standard set forth in *In re R.R.M v. Juvenile Officer,* 226 S.W.3d 864, 866 (Mo.App.2007), a defendant is entitled to a new trial if he exercised due diligence in attempting to obtain a complete record and is prejudiced by the incomplete nature of the record. ***359** It is not clear from the record whether the juror questionnaires were actually destroyed by the trial court, but the motion court's denial of Movant's request to review the juror questionnaires stated they had been destroyed.[8] Regardless of whether the questionnaires were destroyed by the trial court, copies of the juror questionnaires for the 12 jurors who served during the penalty phase trial have been filed with this Court and stipulated to by both parties. The questionnaires asked general questions about the juror's personal information, including name, address, employer, marital status, duration of residence in the county, persons living with the juror, and contact information. Additionally, each questionnaire asked the juror to check "yes" or "no" in response to the following questions:

3. Have you previously served as a juror anywhere?

....

6. Have you or members of your immediate family ever suffered an accidental physical injury?

....

7. Have you or members of your immediate family ever been a party to any lawsuit for damages?

....

8. Has a CLAIM for personal injury ever been made against YOU?

....

9. Have you ever made any CLAIM for personal injury?

....

10. Are you related to or close friends with any law enforcement officer?

Movant fails to prove prejudice as required by *In re R.R.M.* Jurors Wheeler and Hayden provided no additional information on their juror questionnaires other than their basic personal information and the answers to the yes or no questions contained in the questionnaire. Nothing in their responses indicates they would be biased against the defense. Juror Holt's juror questionnaire also contained no information beyond the yes or no responses requested on the form. Movant was not prejudiced because the juror questionnaires did not provide evidence that any juror was biased against the defense. Movant was not entitled to a new trial.

V. Conclusion

Movant has failed to prove that the motion court clearly erred in denying him post-conviction relief or erred in denying his request for a new trial. The judgment is affirmed.

All concur.

Footnotes

1 A full recitation of facts underlying Movant's conviction is available in *Deck I.*

2 Because the death penalty was imposed, this Court has jurisdiction pursuant to article V, section 3 of the Missouri Constitution.

3 Because counsel's performance was not deficient, there is no need to address Movant's argument that the motion court's refusal to permit him to interview the jurors prevented him from proving prejudice under the second prong of *Strickland.*

4 A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

5 Movant also contends that the trial court abused its discretion in determining that Latisha Deck was not competent to testify due to her mental disabilities. This Court need not address whether the trial court abused its discretion because Latisha's testimony would have been cumulative.

6 It was noted in *Banks* that this was likely a transcription error and should have read "the scene is set in Hell." *Id.* at 119 n. 2.

7 Movant also stated that he wanted access to the juror questionnaires to obtain juror contact information so that he could contact the jurors. As discussed above, Movant was not entitled to contact the jurors. The failure to obtain contact information did not result in prejudice.

8 In Movant's motion below, his counsel explained:

Counsel then called Division 2 and explained that she was trying to get a copy of the questionnaires, and she was forwarded to

> Pam with the Circuit Clerk's office. Counsel explained the specific circumstances of the case. Pam informed counsel that the questionnaires had been destroyed. As such, counsel had not been able to locate the questionnaires or obtain all of the jurors' correct addresses and information. On Thursday afternoon, August 26, counsel learned that the questionnaires are in the court file (a public defender investigator went to Division 2, and the clerk then discovered that the questionnaires were in the file but could not release them without the Judge's approval). Counsel had court out of town on Friday, August 27, and so will not be able to seek to obtain copies of the questionnaires, by motion, on or after the due date of this amended motion (August 30,2010).

Then, on October 12, 2010, the motion court denied Movant's motion to review juror questionnaires because "the questionnaires have been destroyed."

End of Document

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2055

Carman L. Deck

Appellee

v.

Richard Jennings and Eric Stephen Schmitt

Appellants

Linda Long Davis, et al.

Amici on Behalf of Appellant(s)

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:12-cv-01527-CDP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender and Judge Benton did not participate in the consideration or decision of this matter.

January 13, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1617

Carman L. Deck

Petitioner - Appellant

v.

Troy Steele; Joshua D. Hawley, Missouri Attorney General

Respondents - Appellees

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:12-cv-01527-CDP)

JUDGMENT

Before LOKEN, COLLOTON and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

August 20, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans