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Visibly Shackled: The Supreme Court's Failure to Distinguish between Convicted and Accused at Sentencing for Capital Crimes

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Notes

Visibly Shackled: The Supreme Court's Failure to Distinguish between Convicted and Accused at Sentencing for Capital Crimes

Deck v. Missouri[1]

I. INTRODUCTION

American courts have long held that the practice of placing a criminal defendant in visible shackles during the guilt phase of trial is inherently prejudicial and have required courts to state with particularity the reason for doing so.[2] However, no bright-line rule establishes the proper procedure or the degree of discretion given to the trial courts when making their determination.[3] As a result, disparity has developed among the courts as to when and under what circumstances a criminal defendant may be shackled.

Even greater confusion arises when courts consider the issue of shackling a convicted defendant during sentencing. For instance, one line of holdings stated that the past conduct of the defendant was sufficient to establish the need for restraints at sentencing, absent any abuse of discretion by the trial court.[4] Another holding required the trial court to use the same analysis during both the guilt phase and sentencing phase when deciding whether to place a defendant in shackles.[5] Finally, other holdings have required a somewhat lesser showing than that required for shackling a defendant during the guilt phase.[6]

In *Deck v. Missouri*, the United States Supreme Court addressed the issue of shackling during the sentencing phase of capital cases.[7] The Court held that the United States Constitution forbids visible shackles to be routinely placed on defendants during sentencing for capital crimes.[8] The Court did

1. 125 S. Ct. 2007 (2005).
2. *Id.* at 2011.
3. *Id.* at 2012, 2020-21.
4. *See* discussion *infra* Part III.B.1.
5. *See* discussion *infra* Part III.B.2.
6. *See* discussion *infra* Part III.B.3.
7. *Deck*, 125 S. Ct. at 2012. The Court specifically limited its holding to the issue of shackling during the sentencing phase in *capital cases*. *Id.*
8. *Id.* at 2014.

not, however, hold this prohibition to be absolute.[9] The Court permitted the trial court to place the defendant in shackles provided that the trial court, in its discretion and on the record, considered any special circumstances or essential state interests specific to the particular defendant on trial.[10]

This holding presents a problem, not in its application, but in its reasoning. The Court based its holding on the defendant's due process rights under the Fifth and Fourteenth Amendments.[11] As a means of arriving at its conclusion, however, the Court announced three new fundamental rights to which the convicted defendant was entitled.[12]

II. FACTS AND HOLDING

In July 1996, Carman Deck and his sister went to the home of Zelma and James Long, an elderly couple.[13] Deck and his sister waited outside the home until it became dark, at which point they knocked on the front door and asked Mrs. Long for directions.[14] Mrs. Long invited them inside as she and her husband tried to help Deck and his sister.[15] When Deck and his sister went to the door to leave, Deck drew a pistol, turned around, and ordered the Longs to lie face down on their bed.[16] Mr. and Mrs. Long did so and offered Deck money and valuables in exchange for their safety.[17] After robbing the Long home, Deck returned to the bedroom, where the Longs pleaded for their lives.[18] After approximately ten minutes of contemplation, Deck shot Mr. and Mrs. Long each two times in the head.[19]

Deck was tried by the State of Missouri for the robbery and murder of the Longs.[20] At trial, the State required Deck to wear leg braces that were not visible to the jury.[21] Deck was convicted by the jury for robbery and two counts of first-degree murder and was sentenced to death.[22] The Missouri Supreme Court upheld the convictions but set aside the sentence.[23]

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9. *Id.*
10. *Id.* at 2015.
11. *Id.* at 2011.
12. *Id.* at 2013.
13. *Id.* at 2016 (Thomas, J., dissenting).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 2009-10 (majority opinion).
21. *Id.* at 2010.
22. *Id.*; State v. Deck, 994 S.W.2d 527, 531 (Mo. 1999) (en banc).
23. *Deck*, 125 S. Ct. at 2010; *Deck*, 68 S.W.3d 418, 431 (Mo. 2002) (en banc). The Missouri Supreme Court found that Deck's trial counsel was ineffective for fail-

A new sentencing proceeding was held, at which the State placed Deck in shackles.[24] The shackles included leg irons, handcuffs and a belly chain.[25] Prior to *voir dire*, Deck's counsel objected to the use of the shackles, but the court overruled the objection.[26] During *voir dire*, Deck's counsel again objected to the use of shackles.[27] The court again overruled the objection, stating that Deck "has been convicted and will remain in leg irons and a belly chain."[28] After *voir dire*, Deck's counsel objected to the use of the shackles for a third time and moved 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."[29] In overruling the objection, the court noted that Deck "being shackled takes any fear out of their minds."[30] The penalty phase continued with Deck in shackles and he was again sentenced to death.[31]

Deck appealed his sentence, claiming that his shackling violated both Missouri law and the Federal Constitution.[32] In rejecting Deck's claims, the Missouri Supreme Court held that (1) there was no evidence that the jury was aware of the shackles, (2) Deck did not claim the restraints limited his participation in the proceedings, and (3) there was evidence that Deck was a flight risk since he may have killed the Longs to avoid prosecution.[33] The court held that there was "sufficient evidence in the record to support the trial court's exercise of its discretion."[34] The court further held that Deck failed to establish any prejudice as a result of being shackled since "[n]either 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."[35] The Missouri Supreme Court affirmed Deck's sentence.[36]

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ing to include two mitigation paragraphs in the jury instruction or to object to their absence, and thus, Deck was entitled to a new penalty phase of the trial. *Id.* at 431.

24. *Deck*, 125 S. Ct. at 2010.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* (alteration in original).

30. *Id.*

31. *Id.*

32. *Id.* Deck alleged that he was deprived of his rights to due process, equal protection, a fair and reliable sentencing, to confront the evidence against him, and the freedom from cruel and unusual punishment as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 10, 18(a) and 21 of the Missouri Constitution. Appellant's Statement, Brief, and Argument at *62, State v. Deck, 136 S.W.3d 481 (Mo. 2004) (en banc) (No. SC85443).

33. *Deck*, 125 S. Ct. at 2010.

34. *Id.*

35. *Id.*

36. *Id.*

On writ of certiorari to the United States Supreme Court, the Court reversed, holding that, just as the Constitution forbids the use of visible shackles during the guilt phase of trial, it also forbids their use during the sentencing portion of trial unless the use of the shackles is justified by an essential state interest specific to the defendant awaiting sentencing.[37]

III. LEGAL BACKGROUND

A. Use of Restraints during Trial

In both this country[38] and in England,[39] the use of restraints during the guilt phase of a trial is an "inherently prejudicial practice."[40] This rule, however, is not absolute.[41] "[U]nder some circumstances, shackling 'is necessary for the safe, reasonable and orderly progress of trial.'"[42] State courts and federal circuits differ from each other in regard to what factors or circumstances necessarily require restraints.[43]

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37. *Id.* at 2009 (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986)).

38. *See* People v. Harrington, 42 Cal. 165, 168-69 (1871) ("[T]o require a prisoner during the progress of his trial before the Court and jury to appear and remain with chains and shackles upon his limbs, without evident necessity for such restraint, for the purpose of securing his presence for judgment, is a direct violation of the common law rule, and of the thirteenth section of our Criminal Practice Act."); Eaddy v. People, 174 P.2d 717, 718 (Colo. 1946) (en banc) ("The right of a prisoner undergoing trial to be free from shackles, unless shown to be a desperate character whose restraint is necessary to the safety and quiet of the trial, is Hornbook law.").

39. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 322 (1769) (footnote omitted) ("[I]t is laid down in our ancient 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."); 3 E. COKE, INSTITUTE OF THE LAWS OF ENGLAND 34 ("If felons come in judgment 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.").

40. *Holbrook*, 475 U.S. at 568.

41. Bryant v. State, 785 So. 2d 422, 428 (Fla. 2001).

42. United States v. Mayes, 158 F.3d 1215, 1225 (11th Cir. 1998) (quoting United States v. Theriault, 531 F.2d 281, 284 (5th Cir. 1976)).

43. *See* Marquez v. Collins, 11 F.3d 1241, 1244 (5th Cir. 1990) (rejecting the "least means" analysis and instead reviewing "whether it was reasonable [for the trial court] to conclude at the time that the restraint was necessary."); Jones v. Meyer, 899 F.2d 883, 885 (9th Cir. 1990) (requiring two-step process: "First the court must be persuaded by compelling circumstances 'that some measure was needed to maintain the security of the courtroom.' Second, the court must 'pursue less restrictive alternatives before imposing physical restraints.'") (quoting Spain v. Rushen, 883 F.2d 712, 720-21 (9th Cir. 1989)); United States v. Samuels, 431 F.2d 610, 615 (4th Cir. 1970) (expressly requiring the trial court, before placing the defendant in restraints, "to state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportu-

1. Supreme Court Decisions

In three relatively recent cases, the United States Supreme Court has addressed the issue of what constitutes a violation of a defendant's constitutional rights regarding the use of restraints or other security measures used at trial.

In *Illinois v. Allen*, the trial court removed the defendant from the courtroom after he threatened the trial judge's life and made other disruptive comments during the trial.[44] The defendant was brought back into court on several occasions for identification purposes and was advised that he would be allowed back into the proceedings if he behaved in a reasonable manner.[45]

Upon review, the court of appeals held that the defendant's Sixth Amendment right to be present at his trial was absolute, and no matter how disruptive his behavior, the defendant was entitled as a matter of right to be present.[46] Overruling the court of appeals, the Supreme Court held that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."[47] The Court further held that:

> [n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keep-

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nity to comment thereon."). *See also* Wood v. State, 699 So. 2d 965, 966 (Ala. Crim. App. 1997); People v. Anderson, 22 P.3d 347, 382 (Cal. 2001) (finding the right to appear in court without restraints may be forfeited where a defendant's past or present conduct indicates a potential escape, threat to the safety of the courtroom, or a disruption of court proceedings); *Bryant*, 785 So. 2d at 429 (minor deficiencies in the procedure used to determine the necessity for restraints should not result in a reversal if the reviewing court can conclude, from the record, that use of the restraints was justified).

44. Allen v. Illinois, 413 F.2d 232, 233-34 (7th Cir. 1969). (When the defendant refused to follow court instruction during voir dire, the court instructed the defendant's attorney to proceed with the examination. The defendant continued to talk and at the end of his remarks told the judge "when I go out for lunchtime, you're going to be a corpse here." Also, after repeated interruptions the judge warned the defendant that if there were anymore outburst he would be removed from the courtroom to which the defendant replied "[t]here's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial." Finally, the judge removed the defendant removed from the courtroom when the defendant stated that "[t]here is going to be no proceeding. I'm going to start talking and I'm going to keep talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me." *Id.*

45. *Id.* at 234.

46. *Id.* at 235.

47. Illinois v. Allen, 397 U.S. 337, 343 (1970).

ing him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.[48]

In *Estelle v. Williams*, the defendant, charged with assault with intent to commit murder with malice, was forced to wear prison attire at trial.[49] Neither the defendant nor his counsel objected to the prison clothes at any time.[50] The defendant was convicted, and a Texas court of appeals affirmed his conviction.[51] The defendant then filed a writ of habeas corpus with the United States district court, claiming it was inherently prejudicial to appear before the jury in prison attire.[52] The district court held that being forced to appear before the jury in identifiable prison clothes was prejudicial but the error was harmless.[53] The Fifth Circuit reversed, holding that the error was not harmless.[54] The Supreme Court subsequently reversed the Fifth Circuit, holding that the Fourteenth Amendment precludes states from compelling a defendant to appear before the jury in identifiable prison clothes. The Court, however, also found the failure to make any objection was "sufficient to negate the presence of compulsion necessary to establish a constitutional violation."[55]

In *Holbrook v. Flynn*, the defendant was charged with robbing a bank at gunpoint and taking approximately four million dollars.[56] At the defendant's trial, his counsel objected to the presence of four uniformed state troopers sitting in the courtroom[57] on the grounds that the presence of uniformed police would suggest to the jury that the defendant was of "bad character."[58] The defendant was convicted, and the Rhode Island Supreme Court affirmed.[59]

The defendant filed a writ of habeas corpus in federal district court claiming that the presence of the troopers at trial was prejudicial.[60] The district court rejected all of the defendant's claims.[61] The court of appeals reversed, holding that the trial court failed to consider the specific circumstances of the defendant's trial.[62] The United States Supreme Court granted

48. *Id.* at 343-44.
49. Estelle v. Williams, 425 U.S. 501, 502 (1976).
50. *Id.*
51. *Id.* at 503.
52. *See* Williams v. Beto, 364 F. Supp. 335 (D.C. Tex. 1973).
53. *Id.* at 343.
54. Williams v. Estelle, 500 F.2d 206, 212 (5th Cir. 1974).
55. *Williams*, 425 U.S. at 512-13.
56. Holbrook v. Flynn, 475 U.S. 560, 562 (1986).
57. *Id.* at 562-63. The four state troopers were supplemental security personnel at the request of the Committing Squad, which was responsible for courtroom security and which was not adequately staffed. *Id.* at 563.
58. *Id.* at 563.
59. *Id.* at 565.
60. *Id.* at 566.
61. *Id.*
62. *Id.*

certiorari and reversed the court of appeals, holding that "[w]hile shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable."[63]

These three decisions are of particular importance, not only because they are cases in which the Supreme Court began to outline what constitutes inherently prejudicial restraints or security measures, but because the Court relied heavily on dicta from the aforementioned cases in deciding the instant case.[64]

2. Trial Court Discretion – Finding on the Record

State v. Moen provides an illustrative example of allowing the trial court discretion in finding that the record substantiated the use of shackles. In *Moen*, the appellant was charged with "escape by one charged with a felony."[65] The appellant claimed he was denied a fair and impartial trial because he was forced to wear handcuffs throughout the proceedings.[66] Prior to *voir dire*, but in the presence of the entire prospective jury pool, the appellant's counsel asked the court to remove the handcuffs.[67] The court asked the bailiff for his recommendation, and upon the bailiff advising against removal of the handcuffs, the court denied the appellant's motion.[68]

The Supreme Court of Idaho held that while the trial judge may rely on the bailiff for advice, the judge "must, in fulfilling his duty to preside over the trial, decide the question for himself."[69] The court further held that, in exercising discretion, a judge need not rely only on formal evidence at trial but may consider any communication with law enforcement, official records, and any information or facts generally known.[70] The court stated:

> the information relied upon should be shown on the record before trial and out of the presence of the jury, and the defendant should be afforded reasonable opportunity to meet that information. This will provide a record on which an appellate court can determine whether the trial judge has properly exercised his discretion.[71]

The court concluded, "[a]n appellate court should not lightly second-guess a trial court in regard to such matters . . . emphasizing that shackling

63. *Id.* at 569.
64. *See* discussion, *infra* Part IV.B.
65. State v. Moen, 491 P.2d 858, 859 (Idaho 1971).
66. *Id.* at 860.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 860-61.

the accused at trial is the exception and not the rule, we find no error in the court's refusal to remove the defendant['s] handcuffs in this case."[72]

3. Shackling Prejudicial Per Se

A classic example of a holding in which the court determined that shackling a defendant is prejudicial per se is *French v. State*.[73] The appellant was convicted of murder and sentenced to death by the jury that convicted him.[74] The appellant claimed that he was prejudiced at trial as a result of being brought before the jury surrounded by numerous guards and while handcuffed with his arms shackled to a six-inch leather belt around his body.[75]

The Oklahoma appellate court noted there were two distinct and inherent rights to which the appellant was entitled.[76] First, a defendant was entitled to appear in court "with free use of his faculties, both mentally, and physically."[77] The court noted that the common law rule was that a "prisoner brought into the presence of the court for trial upon a plea of not guilty, was entitled to appear 'Free of all manner of shackles and bonds, unless there be evident danger of escape.'"[78] Second, until proven guilty, every defendant is cloaked with a "presumption of innocence."[79]

The court noted that the state statute did not give a trial judge any discretion in determining if a defendant should be shackled during trial, and stated that

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72. *Id.* at 862.

73. French v. State, 377 P.2d 501 (Okla. Crim. App. 1963) (overruled by Peters v. State, 516 P.2d 1372 (Okla. Crim. App. 1973) as to prior holdings that it is reversible error to try the defendant while in handcuffs).

74. *Id.* at 502.

75. *Id.* The appellant cited two instances during which he was brought before the jury in that condition. The first instance was the day before the trial began, in the presence of the entire jury panel. *Id.* The second time was on the second day of the trial in the presence of several jurors. *Id.*

76. *Id.* The court was interpreting a state statute, Title 22 O.S.A. § 15, which read:

> No person can be compelled in a criminal action to be a witness against himself; nor can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge, and in no event shall he be tried before a jury while in chains or shackles.

Id.

77. *French*, 377 P.2d at 502.

78. *Id.* (quoting BLACKSTONE 4th COMMENTARIES 332); *see also* Blair v. Commonwealth, 188 S.W. 390, 393 (Ky. 1916) ("At early common law when a prisoner was brought into the court for trial, upon his plea of not guilty to an indictment for a criminal offense, he was entitled to make his appearance free from all shackles or bonds. This is his right to-day in the United States.").

79. *French*, 377 P.2d at 503.

> a man brought before the court in chains and shackles was prejudiced in the minds of the jury. They would ultimately draw the conclusion that defendant was a dangerous criminal who had to be chained and shackled to prevent his escape or prohibit him from doing harm to others or any act of violence.[80]

In reversing and remanding for a new trial, the court determined that "[i]t is, therefore, highly improper to bring a person who has not been convicted of crime, clothed as a convict and bound in chains, into the presence of a venire or jury by whom he is tried for any criminal offense."[81]

4. Evidentiary Hearing Required

Another line of holdings allowed the defendant to be placed in shackles so long as the defendant had the benefit of an evidentiary hearing. This line of holdings is outlined in *Bryant v. State*, in which the appellant was convicted of murder and sentenced to death.[82] The appellant argued that the trial court erred in requiring him to wear restraints throughout the trial without the benefit of an evidentiary hearing.[83] The Supreme Court of Florida noted, "[a]s a general rule, a defendant in a criminal trial has the right to appear before the jury free from physical restraints, such as shackles or leg and waist restraints."[84] The court also stated that using shackles in view of the jury has a negative effect on an accused's presumption of innocence.[85] Additionally, "[c]ourtroom security is a competing interest that may, at times, 'outweigh[] a defendant's right to stand before the jury untainted by physical reminders of his status as an accused.'"[86] The court found that shackling is left to the trial judge's discretion when circumstances of security warrant it.[87]

The court, however, agreed that it was error to deny an evidentiary hearing to determine if restraints were necessary.[88] The court had previously determined that if the defendant timely objects to shackles and requests an evidentiary hearing, a hearing must be held to determine the necessity of the restraints.[89] The trial court was free to consider, and the defendant to chal-

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80. *Id.*

81. *Id.* (quoting Shultz v. State, 179 So. 764, 765 (Fla. 1938)).

82. Bryant v. State, 785 So. 2d 422, 425-26 (Fla. 2001).

83. *Id.* at 428.

84. *Id.*; *see also* Illinois v. Allen, 397 U.S. 337, 344 (1970).

85. *Bryant*, 785 So. 2d at 428; *see also* Diaz v. State, 408 So. 2d 1045, 1047 (Fla. 1987).

86. *Bryant*, 785 So. 2d at 428 (quoting United States v. Mayes, 158 F.3d 1215, 1225 (11th Cir. 1998)).

87. *See also* Derrick v. State, 581 So. 2d 31, 35 (Fla. 1991).

88. *Bryant*, 785 So. 2d at 429.

89. *Id.*

lenge, defendant's prison records and testimony from correctional and law enforcement personnel.[90]

Despite concluding that the trial court should have conducted an evidentiary hearing, the Supreme Court of Florida determined this failure was harmless error, as the appellant had previously demonstrated violent courtroom behavior and the trial judge had personal knowledge of such behavior.[91] As a result, the Supreme Court of Florida found that the trial court did not abuse its discretion.[92]

B. Use of Restraints during Sentencing

Although virtually all states agree that the use of visible restraints during the *guilt* phase of trial is inherently prejudicial to the criminal defendant, the use of restraints during the *sentencing* phase of a criminal trial is not as settled. Some jurisdictions hold that the use of restraints during sentencing is not prejudicial and is left to the discretion of the trial court.[93] Others hold that the use of restraints is not *per se* prejudicial, but that some inquiry to establish the need for such restraints must be made and proof of such a need is lower than that required at trial.[94] Still other jurisdictions apply the same analysis used to determine the necessity for restraints during trial to determine if restraints are necessary during the sentencing phase.[95]

1. Trial Court Discretion

In *Duckett v. State*, the appellant had been convicted of burglary and two counts of first degree murder and sentenced to life imprisonment without the possibility of parole.[96] The appellant alleged that he was deprived of a fair trial as guaranteed by the Fourteenth Amendment by being forced to wear shackles and prison clothes during the sentencing phase.[97]

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90. *Id.*

91. *Id.* The judge in appellant's trial witnessed appellant throw a twenty-six pound chair in the direction of the prosecuting attorney and jury in a previous trial. *Id.* The judge also witnessed appellant's forcible removal from the courtroom by bailiffs, accompanied by appellant's threats of violence and profanity. *Id.*

92. *Id.* at 430.

93. Duckett v. State, 752 P.2d 752 (Nev. 1988) (per curiam); Commonwealth v. Chew, 487 A.2d 1379, 1384-85 (Pa. Super. Ct. 1985). *Cf.* Canape v. State, 859 P.2d 1023 (Nev. 1993), *cert. denied*, 513 U.S. 862 (1994) (Nevada Supreme Court holding that trial court's decision to shackle at a capital sentencing hearing sufficiently supported by the verdict of guilty and request for death by the state).

94. Bello v. State, 547 So. 2d 914, 918 (Fla. 1989).

95. *See, e.g.*, United States v. Honken, 378 F. Supp. 2d 1010, 1031 (N.D. Iowa 2004).

96. *Duckett*, 752 P.2d at 753.

97. *Id.* at 753-54.

The Supreme Court of Nevada took note of an Eleventh Circuit decision that interpreted *Estelle v. Williams*[98] to mean that the prejudicial effect of a defendant wearing prison clothes (or restraints) applied not only to the guilt phase of the trial, but also to the sentencing phase.[99] The Nevada court rejected this interpretation, holding that "a defendant has a constitutional right to wear normal apparel at the guilt-innocence phase of trial . . . to protect the presumption of innocence[, but] . . . the presumption no longer applies after a defendant has been convicted."[100] As a result, the Nevada court determined that public safety concerns were of greater significance. Thus, "the decision concerning the necessity for physically restraining a defendant at the penalty stage of the trial must be left to the sound discretion of the trial court."[101] Absent an abuse of discretion, a trial court's ruling would not be disturbed.[102]

The appellate court found no abuse of discretion in the trial court's denial of the appellant's request to remove the shackles and prison attire.[103] The reviewing court determined that, because the appellant "stood convicted of the callous, brutal murder of his aunt and uncle," he "might have concluded that he had nothing to lose from further acts of violence" at the sentencing hearing.[104]

Likewise, in *Commonwealth v. Jasper*, the appellant was convicted of murder in the first degree, criminal conspiracy, and possession of an instrument of crime.[105] During the trial, the judge ordered the appellant shackled based on his past record as a fugitive and his record of violence.[106] The appellant was brought into the courtroom before the jury entered and seated behind a table so the jury could not see his shackles.[107] After his conviction, the trial court sentenced the appellant to death.[108] The appellant then alleged that the trial court committed reversible error by forcing the appellant to appear before the jury in shackles.[109]

The Supreme Court of Pennsylvania noted the well-settled law that it is prejudicial for defendants to appear in shackles or other physical restraints.[110] The court, however, held that "where the trial evidence shows that a violent defendant was incarcerated at the time of trial, no prejudice occurs even when

98. 425 U.S. 501 (1976).

99. *Id.* at 754-55 (citing Ellege v. Dugger, 823 F.2d 1439 (11th Cir. 1987), *modified*, 833 F.2d 250 (11th Cir. 1987)).

100. *Id.* at 755.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Commonwealth v. Jasper, 610 A.2d 949, 951 (Penn. 1992).

106. *Id.* at 955.

107. *Id.*

108. *Id.* at 951.

109. *Id.* at 955.

110. *Id.*

restraints are visible to the jury."[111] The court concluded that the trial judge did not abuse his discretion because "[t]he known violent criminal character of the accused, coupled to his record as a past fugitive, lends additional support to the court's decision. . . . The allegation of prejudice is rejected."[112]

2. Lesser Showing Required

Another approach taken by some jurisdictions to determine the necessity for shackles during the penalty phase is to require a lesser showing than that required for the guilt-innocence phase. In *Bello v. State*, the appellant was sentenced to death after his convictions for first degree murder, attempted first degree murder, and resisting arrest with violence.[113] During the penalty phase, the appellant was shackled despite the objections of his counsel, and the trial court made no finding into the necessity of using restraints.[114]

The Supreme Court of Florida found that the trial court's conduct constituted prejudicial error requiring a new trial.[115] The Florida court stated:

> most "[c]ases which concern such prejudice deal with the adverse effects that such restraints have upon the accused's presumption of innocence." For that reason, it may be that a lesser showing of necessity is required to permit the shackling of the defendant in the penalty phase than in the guilt phase.[116]

The reviewing court noted that the trial court deferred to the judgment of the sheriff and did not make its own inquiry into the necessity of restraints.[117] Because there was no evidence to support the need for such restraint, and because the court deemed shackling to be an "'inherently prejudicial practice,' and must not be done absent at least some showing of necessity,"[118] the court granted a new sentencing hearing.[119]

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111. *Id. See also* Commonwealth v. Chew, 487 A.2d 1379 (Pa. Super. Ct. 1985).

112. *Jasper*, 610 A.2d at 955-56. *See also* Patterson v. Estelle, 494 F.2d 37 (5th Cir. 1974) (defendant attempted to escape numerous times); United States v. Kress, 451 F.2d 576 (9th Cir. 1971) (defendant escaped from custody for several months); State v. Johnson, 499 S.W.2d 371 (Mo. 1973) (at the end of the State's case-in-chief, defendant attempted to escape); State v. Tolley, 226 S.E.2d 353 (N.C. 1976) (defendant attempted escape during a court hearing); Stockton v. Commonwealth, 402 S.E.2d 196 (Va. 1991) (defendant had a history of violent crime and attempted escape).

113. Bello v. State, 547 So. 2d 914, 915 (Fla. 1989). Appellant was also convicted of delivery of cannabis, and possession of cannabis. *Id.*

114. *Id.* at 918.

115. *Id.*

116. *Id.* (quoting Elledge v. State, 408 So. 2d 1021, 1022 (Fla. 1981)).

117. *Id.* at 918.

118. *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 568 (1986)) (citations omitted). *See also* Lovell v. State, 702 A.2d 261, 268 (Md. 1997) (requiring individualized deter-

3. Same Analysis for Guilt and Sentencing Proceedings

In *Elledge v. Dugger*, the Eleventh Circuit addressed the question of whether shackling a defendant during the sentencing phase is inherently prejudicial.[120] The appellant pleaded guilty to three murders and was sentenced to death by a jury.[121] Prior to sentencing, the trial judge informed both parties that while in jail, the appellant stated that "because he had nothing to lose," he intended to assault the bailiff.[122] Additionally, the court learned that while incarcerated, the appellant had become proficient at karate.[123] As a result, the trial court had the appellant placed in leg irons during the sentencing hearings.[124]

The Eleventh Circuit noted that traditionally, the prohibition on shackling a defendant in the courtroom is based on the presumption of innocence.[125] If that were the sole rationale, the court admitted, the appellant would have had no case; "[t]he jury knows he is not innocent. Having just convicted him of a crime that makes him a candidate for capital punishment, he is no longer entitled to a presumption of innocence."[126] As the court saw it, however, the United States Supreme Court had "not bottomed the prohibition against shackling on presumption of innocence alone."[127] Indeed, the court determined that full consideration must be given to a broader concern.[128]

By "[p]utting the case in the same posture as it would be had the shackling occurred at the guilt-innocence stage of the trial," the court determined that resentencing was required.[129] The court based this determination on two issues. First, the appellant "was denied the required procedure when the court refused him an adequate opportunity to challenge the untested information that served as the basis for the shackling."[130] Second, "the State at no time made any showing that the shackling was necessary to further an essential state interest."[131]

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mination to establish state interest outweighs any prejudicial effect); State v. Young, 853 P.2d 327, 351 (Utah 1993) (stating that the trial court should look at particular facts of the case and balance the need for safety and security against potential prejudice).

119. *Bello*, 547 So. 2d at 918.

120. Elledge v. Dugger, 823 F.2d 1439, 1450 (11th Cir. 1987), *modified* 833 F.2d 250 (11th Cir. 1987).

121. *Id.* at 1441-42.

122. *Id.* at 1450.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1451.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1452. *See also* Illinois v. Allen, 397 U.S. 337, 343-44 (1970); Estelle v. Williams, 425 U.S. 501, 503-04 (1976); Holbrook v. Flynn, 475 U.S. 560 (1986).

As is clear from the cases above, no clear rule elucidating the proper test or procedure to determine the necessity of utilizing restraints on a defendant during the sentencing phase exists. Jurisdictions have a varying array of standards and judicial discretion to apply to such determinations. The United States Supreme Court, by virtue of its ruling in *Deck v. Missouri*, has given clarity to this conflicting case law and determined to what extent procedural safeguards must be followed when determining if a defendant will appear shackled before a jury during sentencing.

IV. THE INSTANT DECISION

A. The Majority

In *Deck v. Missouri*, the United States Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibited the use of visible restraints during the penalty phase of a capital criminal trial unless such use was justified by an essential state interest specific to the defendant being sentenced.[132] In its analysis, the Court pointed out that its recent opinions regarding the traditional prohibition of visible shackling of criminal defendants have not focused on the need to prevent physical discomfort but have emphasized the importance of recognizing three fundamental legal principles.[133]

The first principle is that "the criminal process presumes that the defendant is innocent until proved guilty."[134] The second fundamental legal principle is that "the Constitution, [] help the accused secure a meaningful defense."[135] Finally, the third principle is that "judges must seek to maintain a judicial process that is a dignified process."[136]

The Court conceded that the first principle – the presumption of innocence – was less obviously related to the penalty phase than the other two principles but concluded that shackles at the penalty phase raised related concerns.[137] "Although the jury is no longer deciding between guilt and innocence," the Court reasoned, "it is deciding between life and death, [and] . . . given the 'severity' and 'finality' of the sanction, [it] is no less important than the decision about guilt."[138] Noting that a convicted defendant's character is certainly portrayed in a negative light by appearing before the sentencing jury

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Although these cases did not involve the penalty phase of trial, they articulate the analysis to be used in determining whether the use of shackles during the guilt or penalty phase is appropriate.

132. Deck v. Missouri, 125 S. Ct. 2007, 2014-15.

133. *Id.* at 2013.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 2014.

138. *Id.* (quoting Monge v. California, 524 U.S. 721, 732 (1998)).

in shackles, the Court held that this possible prejudice subverts the jury's ability to subjectively consider all relevant factors when deciding if the sanction should be death. Therefore, the Court found shackling might skew the accuracy of the jury's sentencing.[139]

After considering all three fundamental legal principles, the Court held that a trial court cannot place defendants in shackles or other visible restraints when appearing before a jury if the possible sentence is death.[140] The Court allowed an exception for cases in which a particularized reason for shackling is present, such as the safety of the defendant or the court or a risk of escape.[141]

After issuing its holding, the Court addressed three claims relied on by the State in arguing that the Missouri Supreme Court's decision complied with the constitutional requirements.[142] Missouri argued that the record lacked any evidence that the jury saw the restraints, that the trial court properly acted within its discretion, and that the defendant suffered no prejudice.[143] The Court dismissed the State's first argument by stating that whether the jury actually saw the restraints was not important[144] the issue was the jury's awareness of the restraints.[145]

The Court also rejected the State's second argument – that the trial court acted within its discretion.[146] The Court found no record made from the trial court, by way of a formal or informal finding, that discretion was required in this case.[147] The only reason the trial court gave for its decision, the Court noted, was that Deck had already been convicted and restraints would "take any fear out of the juror's [sic] minds."[148] The Court specifically noted the trial court's lack of explanation for why a juror might have such a fear.[149]

Finally, the Court summarily dismissed the State's third argument – that the defendant suffered no prejudice – by noting that the Missouri Supreme Court failed to consider the United States Supreme Court's ruling in *Holbrook v. Flynn* that shackling is inherently prejudicial.[150] The Court clarified the holding in *Holbrook* by stating

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139. *Id.*
140. *Id.*
141. *Id.* at 2015.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* (quoting Brief for Respondent at *7, Deck v. Missouri, 125 S. Ct. 2007 (2005) (No. 04-5293)).
149. *Id.* (quoting Brief for Respondent at *7, Deck v. Missouri, 125 S. Ct. 2007 (2005) (No. 04-5293)).
150. *Id.* (citing Holbrook v. Flynn, 475 U.S. 560 (1986)).

> 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."[151]

The Court reversed the judgment of the Missouri Supreme Court and remanded for further proceedings in conformance with their opinion.[152]

B. The Dissent

In his dissent, Justice Thomas rejected the majority's view that Deck's constitutional rights were violated when he appeared before the sentencing jury in visible restraints.[153] Justice Thomas first discussed the historical necessity for a rule precluding criminal defendants from appearing before the court and jury in shackles.[154] He suggested that the rationale was related to the pain and suffering that early-day restraints imposed on defendants rather than any constitutional requirements.[155]

Justice Thomas next analyzed the extent of modern state practices of shackling defendants in order to determine whether there was a "deeply rooted tradition [that] supports the conclusion that the Fourteenth Amendment's Due Process Clause limits shackling."[156] In his analysis, Justice Thomas identified three different levels of state practice regarding the shackling of defendants,[157] none of which were couched in terms of due process concerns.[158] Indeed, Jus-

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151. *Id.* (quoting Chapman v. California, 386 U.S. 18, 24 (1967)) (alteration in original).

152. *Id.* at 2016.

153. *Id.* (Thomas, J., dissenting). Justice Thomas was joined in his dissent by Justice Scalia. *Id.*

154. *Id.* at 2017-18.

155. *Id.*

156. *Id.* at 2018-21.

157. The first classification Justice Thomas identified was the state model that provided "great deference . . . [to] the trial court's decision to put the defendant in shackles." *Id.* at 2020. The second classification was a more restrictive model, which required justification for the use of visible shackles before they could be used on the defendant. *Id.* at 2021; *see also* People v. Harrington, 42 Cal. 165 (1871); State v. Kring, 64 Mo. 591, 593 (1877); State v. Williams, 50 P.2d 580, 581-82 (Wash. 1897). The third classification identified by Justice Thomas was an intermediate position taken by the state of Texas, which allowed for shackling at the discretion of the sheriff. *Deck*, 125 S. Ct. at 2021 (Thomas, J., dissenting); *see also* Rainey v. State, 20 Tex. Ct. App. 455, 472 (1886).

158. *Deck*, 125 S. Ct. at 2020 (Thomas, J., dissenting).

tice Thomas concluded "there was no consensus that supports elevating the rule against shackling to a federal constitutional command."[159]

Turning his attention to modern cases, Justice Thomas found that states have a growing preference for shackling defendants, but they disagree on the level of discretion to give to trial courts when deciding whether to shackle.[160] Applying the traditional factors used in contemplating the use of visible shackles, the dissent noted that several of those factors were present in the instant case.[161] In fact, the dissent noted that the only basis on which the majority relied in reversing the Missouri Supreme Court was that "the requirement of specific on-the-record findings by the trial judge" was absent.[162]

Addressing the majority's view that three modern cases have suggested a notion of fundamental fairness as part of the due process guarantee provided through the Fifth and Fourteenth Amendments,[163] the dissent suggested the Court was engaged in bootstrapping.[164] Justice Thomas noted:

> [i]n recent years, more of a consensus regarding the use of shackling has developed, 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 . . . . The current consensus that the Court describes is one of its own making. It depends almost exclusively on the dicta in this Court's opinions in *Holbrook*, *Estelle*, and *Allen*.[165]

The dissent distinguished the constitutionality of shackling a defendant at a capital trial versus shackling a defendant who has been found guilty, concluding that the requirement that a defendant be free of shackles had no traditional or modern basis.[166] The dissent argued that "[t]reating shackling at sentencing

159. *Id.* at 2021.

160. *Id.* at 2021-22. The dissent also suggested that states differ on what information to take into consideration when determining whether to use shackles and what probability of risk needs to be proven. *Id.* at 2022. The dissent cited a small minority of states that use shackles based on the defendant's conduct during the particular trial or based on some imminent threat. The dissent then noted that the majority of states allowed courts to use information from outside the particular trial such as, past escape, prior conviction, the nature of the crime of which the defendant was accused, the conduct of the defendant while incarcerated awaiting trial, the defendant's propensity towards violence, and the physical attributes of the defendant. *Id.* at 2022-23.

161. The dissent argued that Deck had "killed two people to avoid arrest, . . . aided prisoners in an escape attempt[, and that] . . . a jury had found Deck guilty of two murders, the facts of which not only make this crime heinous but also demonstrate a propensity for violence." *Id.* at 2023.

162. *Id.* at 2023.

163. *See* discussion *supra* Part III.A.1.

164. *Deck*, 125 S. Ct. at 2024 (Thomas, J., dissenting).

165. *Id.* at 2023-24. *See* discussion *supra* Part III.A.1.

166. *Deck*, 125 S. Ct. at 2025 (Thomas, J., dissenting).

as inherently prejudicial ignores the commonsense distinction between a defendant who stands accused and a defendant who stands convicted."[167] As evidence of this distinction, Justice Thomas noted that modern courts have determined that the rule of using visible restraints does not apply to the sentencing phase because courts are able to recognize the difference between a person accused and a person convicted.[168] Additionally, the dissent noted:

> [c]apital sentencing jurors know that the defendant has been convicted of a dangerous crime. It strains credulity to think that they are surprised at the sight of restraints. . . . It blinks reality to think that seeing a convicted capital murderer in shackles in the courtroom could import any prejudice beyond that inevitable knowledge.[169]

In response to the majority's assertion that a particular state interest must be articulated prior to placing a defendant convicted of a capital crime in visible restraints during sentencing, the dissent argued that it is inherently appropriate for a defendant in that situation to be confined by restraints.[170] By that point, the defendant is at his most desperate moment because at the least he faces a lifetime of confinement and at most he faces the possibility of death.[171]

Addressing the majority's view that visible shackles might skew the accuracy in sentencing, the dissent derisively noted "shackles may undermine the factfinding process only if seeing a convicted murderer in them is prejudicial."[172] The dissent quickly dismissed the majority's view that visible restraints restrict a defendant's ability to participate in his own defense, by noting that the majority presented no evidence that shackles preclude a defendant

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167. *Id.*

168. *Id. See* Duckett v. State, 752 P.2d 752, 755 (Nev. 1998) (per curiam); State v. Franklin, 776 N.E.2d 26, 46-47 (Ohio 2002); State v. Young, 853 P.2d 327, 350 (Utah 1993).

169. *Deck*, 125 S. Ct. at 2026 (Thomas, J., dissenting). The dissent noted that in the instant case the jury had already decided Deck was dangerous, as they had just convicted him of killing two people while committing a robbery. Clearly, the jurors who sentenced Deck to death knew he was incarcerated; they had just found him guilty of a double murder, and it was not likely that someone who is convicted of such a crime would be allowed to go free pending sentencing. *Id.*

170. *Id.*

171. *Id.*

> 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.

Id. (citations omitted).

172. *Id.* at 2026-27.

from participating or taking the stand in his defense.[173] Finally, Deck never asserted that the shackles caused him pain or prevented him from communicating with his counsel or that he would have taken the stand to beg for his life.[174]

The third rule the majority cited – the protection of courtroom decorum[175] – was also dismissed by Justice Thomas, who wrote that "[t]he power of the courts to maintain order . . . is not a right personal to the defendant, much less one of constitutional proportions. . . . The concern for courtroom decorum is not a concern about defendants, let alone their right to due process."[176]

The dissent criticized the majority's newly minted holding because "[c]onfining the analysis to trial-specific circumstances precludes consideration of limits on the security resources of courts. . . . Forbidding courts from considering such circumstances fails to accommodate the unfortunately dire security situation faced by this Nation's courts."[177] The dissent concluded by suggesting that the holding of the instant case jeopardized the lives of courtroom personnel throughout the country, with little benefit accorded to the defendant. This, the dissent opined, "is a risk that due process does not require."[178]

V. COMMENT

In *Deck v. Missouri*, the United States Supreme Court enunciated a series of new rights to which a convicted defendant in a capital case is entitled under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court held that a criminal defendant who has been found guilty of a capital crime still enjoys – albeit to a limited degree – the benefit of the presumption of innocence.[179] The Court further held that such a defendant is permitted to secure a meaningful defense and is entitled to dignified courtroom proceedings during sentencing.[180] Using these three "fundamental legal principles" the Court extended the common law doctrine that an accused should not be brought before the court in shackles during the innocent-guilt phase of trial to the sentencing phase of trial.[181]

This decision is of profound significance. It confers upon a defendant who was just *convicted* of a capital crime constitutional rights never before granted in criminal proceedings. In effect, the Court has established that the criminal defendant who has not yet been found guilty of a capital crime and the criminal defendant who stands convicted of a capital crime are equals.

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173. *Id.* at 2027.
174. *Id.*
175. *Id. See supra* note 136.
176. *Deck*, 125 S. Ct. at 2027-28 (Thomas, J., dissenting).
177. *Id.*
178. *Id.* at 2029.
179. *Id.* at 2014 (majority opinion).
180. *Id.*
181. *See id.* at 2013; discussion *supra* Part IV.A.

The net effect of this decision will be far reaching with possibly tragic consequences in the nation's courtrooms.[182] For instance, *Deck* requires a trial court to make either an informal or formal finding specific to the particular case demonstrating that shackling is required.[183] Further, the record should reflect that the court did not abuse its discretion in making such a determination.[184] This requirement essentially disregards the jury's declaration of guilt, which is underlined by a finding that the defendant is a dangerous individual who is statistically likely to be a repeat offender or to have committed a particularly heinous crime with aggravating circumstances.[185]

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182. In *Annals of the American Academy of Political and Social Science* by Don Hardenbergh and Neil Alan Weiner, the authors provided several instances of the type of tragic consequences that will likely be more prevalent as a result of *Deck*. For example, in California a judge was murdered by two prisoners during a courthouse escape attempt. In Florida, a defendant attempted to shoot a judge but instead shot the courtroom bailiff who was attempting to intervene. On one particularly tragic day, a North Dakota man shot and seriously wounded a judge; while in Missouri, a man shot and killed his estranged wife and wounded her attorney; and in Alabama, during a courtroom argument, a man was shot in the shoulder. In Virginia, at the end of a pretrial hearing, the defendant, who was charged with murdering a young boy, attacked his attorney and knocked him unconscious before he was wrestled to the floor by five deputies. Don Hardenbergh & Neil A. Weiner, *Courthouse Violence: Protecting the Judicial Workplace*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 9 (2001). For another compilation, see also *Violence Against Lawyers: The Increasingly Attacked Profession* by Stephen Kelson in the Boston University Public Interest Law Journal, which cites numerous cases of courtroom violence directed against attorneys. For example, a defendant accused of murdering a young boy in Washington State punched his attorney until he was unconscious; in California, a defendant (previously dubbed the "Koreantown Slasher") stabbed his attorney in front of the jury; also in California, during the reading of the guilty verdicts, three defendants attempted to go after the prosecutor; and a Texas defendant shot and killed two attorneys and wounded a third attorney and two judges. 10 B.U. PUB. INT. L.J. 200, 262-65 (2001).

183. *Deck*, 125 S. Ct. at 2014-15.

184. *Id.* at 2015.

185. In the latest report by the U.S. Department of Justice, of the 3,374 prisoners under the sentence of death in 2003, 2,007 had prior felony convictions, 272 had a prior homicide conviction, 239 had charges pending, 327 were on probation, 501 were on parole, forty-two were prison escapees, and ninety-five were incarcerated. Thomas P. Bonczar & Tracy L. Snell, *Capital Punishment, 2003*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (Nov. 2004), at 8, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf. The same study reveals that of the 38 states providing for capital punishment, a vast majority require murder or homicide plus an additional, statutorily defined, aggravating circumstance in order for the defendant to be eligible for death. *See, e.g.*, Alabama, intentional murder with eighteen aggravating factors (ALA. CODE §§ 13A-5-40(a)(1)-(18) (1975)); Connecticut, capital felony with eight forms of aggravated homicide (CONN. GEN. STAT. §§ 53(a)-54(b) (2001)); Indiana, murder with sixteen aggravating circumstances (IND. CODE § 35-50-2-9 (1999)); Kentucky, murder with aggravating factors; kidnapping with aggravating factors (KY. REV. STAT. ANN. § 532.025 (1999)); Montana, capital murder with one of

Deck stands for the proposition that once a defendant in a capital case has been found guilty of a capital crime, he still enjoys fundamental legal rights once only reserved for the accused.[186] Such a claim is not founded on any previously recognized legal or equitable principles, and thus, the Court's claim is not sensible.

A. The Presumption of Innocence

The majority's first "fundamental legal principle" is that a convicted defendant enjoys the presumption of innocence.[187] In support of this principle, the majority proposed that shackling a convicted defendant "suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'"[188] This argument ignores the fact that the jury, by finding the defendant guilty, has essentially already recommended that the defendant be removed from the community at large. It is complete fiction to suggest that a defendant who has just been found guilty by a jury somehow retains any degree of innocence. Yet, this is exactly what the majority implied in *Deck*.

Although the Court admitted that the traditional presumption of innocence no longer applies after the defendant has been found guilty, it outlined a "related concern" in that shackling adversely affects the jury's perception of the defendant and therefore "undermines the jury's ability to weigh accurately all relevant considerations . . . when it determines whether a defendant deserves death."[189] The Court also stated that the jury's perception is altered because a convicted defendant's character is portrayed in a negative light by appearing before the jury in visible shackles.[190] The Court, however, deftly sidestepped the obvious question – is a shackled defendant portrayed any more negatively than an unshackled defendant who the jury knows has been convicted of a capital crime? A jury having knowledge of the defendant's conviction is arguably more prejudicial than the defendant appearing before

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nine aggravating circumstances (MONT. CODE ANN. § 46-18-303 (2005)) and capital sexual assault (*Id.* § 45-5-503); Nevada, first-degree murder with at least one of fourteen aggravating circumstances (NEV. REV. STAT. §§ 200.030, 200.033, 200.035 (2003)); New York, first-degree murder with one of thirteen aggravating factors (N.Y. PENAL LAW § 125.27 (McKinney 2004)); Oklahoma, first-degree murder in conjunction with a finding of at least one of eight statutorily defined aggravating circumstances (OKLA. STAT. tit. 21, §§ 701.9, 701.11, 701.12 (1991)); Tennessee, first-degree murder with one of fifteen aggravating circumstances (TENN. CODE ANN. § 39-13-204 (2003)); and Virginia, first-degree murder with one of thirteen aggravating circumstances (VA. CODE ANN. § 18.2-31 (2004)). Bonczar, *supra*, at 2.

186. *See* discussion *supra* Part IV.A.

187. *Deck*, 125 S. Ct. at 2013.

188. *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986)).

189. *Deck*, 125 S. Ct. at 2014.

190. *Id.* at 2014.

the jury in shackles.[191] The majority argued that seeing a convicted defendant in shackles would diminish the objectivity of the sentencing jury, which could preclude them from making an educated and proper determination of the defendant's fate.[192] Logic and common sense, however, indicated a tremendous difference between an accused defendant and a convicted defendant, and the jury is most definitely aware of such a distinction.[193]

B. Right to Secure a Meaningful Defense

The Court's second "fundamental legal principle," that the convicted defendant enjoys the constitutional right to secure a meaningful defense,[194] is not as far-fetched as the first principle, but nonetheless rests on shaky ground. The Court noted that restraints can limit the defendant's ability to communicate with his counsel or to participate in his own defense.[195] The Court, however, did not illustrate the manner in which a *convicted defendant* suffers any constitutional violation in this regard. Instead, the Court makes an illogical leap, equating the accused defendant on trial with the convicted defendant.[196]

The Court also failed to address the fact that in the instant case, Deck declined to put on any evidence during the sentencing portion of the trial.[197] Deck was satisfied to file a motion for a life sentence or, in the alternative, a new trial.[198] After the motion was denied, Deck read a statement professing his innocence.[199] Deck could have presented any relevant information or evidence which might have mitigated his punishment, but he chose not to do so.[200] The

191. The prosecutor in *Deck* presented numerous witnesses and exhibits from the trial to the sentencing jury to acquaint it with the nature of the murders for which Deck was convicted. The prosecutor also presented evidence of prior felony convictions, including an escape attempt. Brief for Respondent at *8, *Deck*, 125 S. Ct. 2007 (No. 04-5293).

192. "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." *Deck*, 125 S. Ct. at 2014. (quoting Monge v. California, 524 U.S. 721, 732 (1998)).

193. "A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. . . . Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees." People v. Long, 38 Cal. App. 3d 680, 689 (Cal. Ct. App. 1974).

194. *Deck*, 125 S. Ct. at 2013.

195. *Id.*

196. "The use of physical restraints diminishes [the right to counsel]. Shackles can interfere with the *accused's* 'ability to communicate' with his lawyer." *Id.* (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970)) (emphasis added).

197. Brief for Respondent at *10, *Deck*, 125 S. Ct. 2007 (No. 04-5293).

198. *Id.*

199. *Id.*

200. During closing arguments at sentencing, Deck's counsel told the jury that his client had a troubled childhood. *Id.* at *8. Other than this, no evidence was presented.

Court seemed to infer that in order for Deck to present such evidence, he necessarily would have had to take the stand in his defense. The inference is misguided. Deck could have called witnesses such as friends, family, or even medical experts to testify on his behalf, without ever testifying himself.

C. The Right to Dignified Proceedings

The Court's third "fundamental legal principle" – the convicted defendant is entitled to a dignified courtroom proceeding[201] – created a new constitutional right seemingly derived from thin air. The Court did not glean this right from the Fifth Amendment.[202] Rather, it was crafted from the Court's notion that

> 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. . . . The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives.[203]

Again, the Court's conclusion that this fundamental legal principle applies to a convicted defendant lacks any support beyond the fact that the principle embodies a right of the accused. The Court itself has previously noted that jurors are fully aware that the defendant is not appearing before them voluntarily or by chance.[204] Furthermore, the Court

> never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him . . . . To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system . . . ."[205]

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201. *Deck*, 125 S. Ct. at 2013.

202. U.S. CONST. amend. V. ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment or a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.")

203. *Deck*, 125 S. Ct. at 2013 (emphasis added).

204. Holbrook v. Flynn, 475 U.S. 560, 567 (1986).

205. *Id.*

The Court has also previously stated that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations."[206]

VI. CONCLUSION

The Court's holding in Deck does not completely foreclose the use of visible restraints.[207] The holding permits a trial judge to exercise discretion and make a factual finding that the use of restraints is necessary in the specific case due to concern about either the defendant's or the court's safety or possible escape attempts by the defendant.[208]

While it is not difficult to appreciate the Court's concern for ensuring that criminal defendants be free of restraints during sentencing in criminal cases, *Deck* was not a common criminal case. *Deck* stood convicted of a calculated, callous, and heartless crime.[209] Had the Court limited its holding to non-capital crimes, there would likely be minimal objection. The Court however, did just the opposite. It limited its holding to capital cases, cases in which the defendant is either facing death or life imprisonment. Evidence of defendant's conviction by a unanimous jury in these cases should be sufficient alone to establish an essential state interest necessitating the use of restraints at sentencing.[210]

The rationale behind the holding of *Deck* confers upon the convicted offender rights once reserved for the benefit of the accused. In so doing, the Court seems to be attempting to erase from the jury's mind the fact that the defendant stands convicted of a capital crime. The Court's logic and reasoning do not adequately distinguish between the convicted and the accused, a common sense distinction the Court clearly fails to grasp. *Deck* exemplifies the maxim: logic is not always logical nor is common sense necessarily common.

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206. Illinois v. Allen, 397 U.S. 337, 343 (1970).
207. *Deck*, 125 S. Ct. at 2014.
208. *Id.* at 2014-15.
209. *Id.* at 2009-10, 2016.
210. *See* Canape v. State, 859 P.2d 1023 (Nev. 1993), *cert denied*, 513 U.S. 862 (1994) (trial court's decision to shackle at a capital sentencing hearing was sufficiently supported by the verdict of guilty and the request for death by the state).