IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

CARMAN L. DECK, :

Petitioner :

v. : No. 04-5293

MISSOURI. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, March 1, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

ROSEMARY E. PERCIVAL, ESQ., Assistant Public Defender, Kansas City, Missouri; on behalf of the Petitioner.

CHERYL C. NIELD, ESQ., Assistant Attorney General, Jefferson City, Missouri; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

JUSTICE STEVENS: We'll hear argument in Deck against the State of Missouri.

Ms. Percival.

ORAL ARGUMENT OF ROSEMARY E. PERCIVAL

ON BEHALF OF THE PETITIONER

MS. PERCIVAL: Justice Stevens, and may it please the Court:

The question before the Court today is whether the trial court violated Carman Deck's rights to due process and a fair and reliable sentencing proceeding, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments, when the trial court forced him to appear handcuffed to a belly chain and shackled in legirons before the jury which would determine whether he was to live or to die.

Counsel objected to the restraints and filed a motion asking for the procedures set forth by this Court in Holbrook v. Flynn. Holbrook described shackling as an inherently prejudicial practice and set forth a procedure by which courts would exercise their discretion in maintaining courtroom security while protecting the rights of the defendant.

If the court is to impose an inherently

prejudicial practice like shackling, it first must determine that the shackles are necessary to further an essential State interest specific to the trial and must find that no lesser means is available to meet those State interests.

The court abused its discretion in failing to apply the Holbrook standard in penalty phase.

JUSTICE GINSBURG: Did the -- did counsel suggest less intrusive restraints?

MS. PERCIVAL: Counsel had filed an extensive motion in which it set forth a number of different ways in which courts in Missouri and in other jurisdictions had dealt with the problem where the -- where the courts minimized the effect of the shackles on the jury by hiding them from view such as by placing boxes around counsel table, ensuring that the defendant was already in place in the courtroom before the jurors entered, that sort of thing. And the court summarily overruled that motion.

JUSTICE SOUTER: What was the basic justification in the first place for shackling? I mean, were there insufficient bailiffs or -- or why did they do it in -- even in -- during the trial itself?

MS. PERCIVAL: The court did not establish a record for why the shackles were -- were warranted. The only justification that the court gave was -- at this

penalty phase retrial was that Deck had been convicted, but there's nothing else in the record as to what justification the court had.

JUSTICE SOUTER: Is there any indication that there were or were not present court security officers?

MS. PERCIVAL: There's nothing in the record as to security officers in the courtroom.

JUSTICE SCALIA: Who -- who should -- whose responsibility should it be to get something like that into the record? I mean, I read it. I don't -- I have no idea whether there was a good reason for the shackling or not.

MS. PERCIVAL: Once defense conviction objects to the use of shackling, it is incumbent upon the State to show that the restraints were harmless, and by doing so, they would need to make a record that --

JUSTICE O'CONNOR: What's the authority for the burden of proof question? What -- what -- which of our cases do you rely on for that?

MS. PERCIVAL: Well, it's basically Chapman because shackling is an inherently prejudicial procedure, and when the court imposes that without justification, the burden falls on the State to show that it was, in fact, justified or that the shackling was -- was harmless and that the jurors could not see it or that sort of thing.

JUSTICE KENNEDY: So the principle is there's a right not to be shackled, and when the State says that that right has to be compromised, then the State has to have the burden of proof?

MS. PERCIVAL: Yes.

JUSTICE KENNEDY: And I looked -- and I find that rule in Chapman?

MS. PERCIVAL: No, it would not be in Chapman. It would -- it's -- it flows from Holbrook and Illinois v. Allen and Estelle v. Williams. Those cases set up the standard that is really enunciated in Holbrook.

JUSTICE SCALIA: Those -- those are all, are they not, cases involving the -- the guilt phase of -- of a trial? Right?

MS. PERCIVAL: Yes, Your Honor.

JUSTICE SCALIA: Well, this is a little different. He -- I mean, when you shackle somebody who hasn't yet been convicted, you -- you send a message to the jury that, you know, this -- this person belongs in irons. But the jury had already found this person guilty.

MS. PERCIVAL: Yes, Your Honor.

JUSTICE SCALIA: He was -- he was convicted.

MS. PERCIVAL: Yes, and --

JUSTICE SCALIA: Should that make no difference?

MS. PERCIVAL: The reason that this presumption

applies in penalty phase as well, the presumption of -- that shackles are inherently prejudice, it stems from -- we could start the analysis in guilt phase. In guilt phase, courts have held that shackles are inherently prejudicial because they make the defendant appear --

JUSTICE SCALIA: Guilty.

MS. PERCIVAL: -- dangerous, violent, untrustworthy, and then hence, they are more likely to be guilty.

Notably in -- in guilt phase, there's no question as to character. In penalty phase, however, where the State still has a burden of establishing that the defendant is worthy of a death sentence by evidence presented in court, the question of character is a key factor that the jury considers.

JUSTICE SCALIA: Can -- can I ask you? You say counsel proposed some alternatives to -- to the visible shackling. Did counsel object that there shouldn't have been any shackling at all?

MS. PERCIVAL: Counsel filed a motion saying that there should not be restraints at all, but within that motion, he explained how courts in Missouri had accommodated --

JUSTICE SCALIA: Okay.

MS. PERCIVAL: -- both interests successfully.

JUSTICE SCALIA: But he did take the position that there was no need for shackles at all.

MS. PERCIVAL: Yes, yes.

JUSTICE KENNEDY: Back on your earlier part of your answer to Justice Scalia, that it's inherently prejudicial in the sentencing stage, if one of us were to agree or the whole Court, the majority, were to agree with your position and write the opinion out, what would we cite for that, other -- other than our -- our own assumptions as to how the system worked, judicial notice?

MS. PERCIVAL: Well, I think that you could follow Holbrook pretty closely and that I think what you'd need to -- to deal with is there's a whole bunch of precedent regarding how prejudicial shackling is. We know that character is essential in penalty phàse, and the other characteristic of penalty phase is the heightened for reliability which is not present in the guilt phase.

JUSTICE KENNEDY: With -- with character, we know -- we know he's a murderer.

MS. PERCIVAL: We know that on that day 7 years prior that Carman Deck was dangerous to those people in that situation. But what the jury is being asked to consider is whether his acts on that day were really in conformity with what his character is and what it -- how he would behave if he were sentenced to life without

parole.

JUSTICE SCALIA: Are you sure that it's as -- as prejudicial in the -- in the penalty phase as it is in the guilt phase? I mean, in the guilt phase, it does make the person look like a criminal. In the penalty phase, I -- I'm really not sure if I -- if I were a prosecutor whether I would prefer to have the defendant shackled or not. The issue before the jury is whether to leave this person in his -- in his current incarcerated state for life or to execute him. And I -- I might think that showing, you know, what -- what kind of an existence it is to be -- to be a life prisoner walking around with the legirons and chains -- I'm not sure that that is going to cut in favor of the jury's giving the death penalty or -- or to the contrary, make the juror think, boy, what a wretched life this is and -- and that ought to be enough.

MS. PERCIVAL: Well, Your Honor, in Beck v. Alabama, a similar situation arose. In Beck, the question was whether Alabama's statute which prohibited the jury from getting lesser included offense instructions in a first degree murder case was constitutional. And Justice Stevens in his opinion writing for the Court stated that there may be factors that cut in favor of the defendant and factors that cut against the defendant, but the uncertainty and unreliability that is forced into the

fact-finding process is what the problem is.

So as in this situation, perhaps some jurors would -- would think, you know, he's wearing these shackles just because he was convicted. Others might -- may, as well, say he's wearing them because he's particularly dangerous. We don't know, and there's that unreliability of the -- the fact-finding process since the defense has not been able to confront this evidence and it hasn't come in from the stand.

JUSTICE O'CONNOR: What are the factors in Missouri that the State would be trying to prove to urge the imposition of death versus life imprisonment? What are the things in Missouri that are deemed relevant?

MS. PERCIVAL: Well, there are statutory aggravating circumstances, and the jurors are also allowed to consider non-statutory evidence.

JUSTICE O'CONNOR: Is future dangerousness an issue in Missouri?

MS. PERCIVAL: It is not a specific aggravating circumstance, but it's something that is -- is certainly relevant and that the jurors can consider.

JUSTICE KENNEDY: Does your whole case turn on how shackling affects the argument that you're -- that the accused is making that he's not dangerous, et cetera, or is there some other different standard that we could use

to the effect, say, that it's just not consistent with the dignity in an American courtroom, something like that?

MS. PERCIVAL: Well --

JUSTICE KENNEDY: Does your whole case turn on whether or not this is prejudicial to the fact-finding process on the specific issues or is there some more general standard?

MS. PERCIVAL: Well, there are certainly other considerations that shackling affects. Shackling impedes participation in the trial by affecting how the client can communicate with counsel and that sort of thing, how the jurors will gauge his demeanor, whether his mental faculties will be diminished through the shackling. Our argument here -- because counsel did not specifically object on grounds of right to be present, our argument here focuses on how the jury viewed the defendant, given the fact that he was in these -- this extreme form of restraints, and these extreme restraints were unjustified.

JUSTICE GINSBURG: In the prison setting, does he wear such restraints? Justice Scalia suggested the jury might say, wow, that's the way he has to go around the rest of his life with the -- all chained up. But in -- do we know whether in the prison he would be routinely wearing these restraints?

MS. PERCIVAL: No, he would not be unless he was

a very disorderly inmate or something like that, but I think most of the jurors would -- would know from seeing jail shows and jail movies that inmates are typically not restrained in that fashion so that --

JUSTICE SCALIA: It's --

JUSTICE KENNEDY: Well, I mean, I think the --

JUSTICE SCALIA: -- it's still an oppressive reminder of -- of how this individual, if sentenced to life, is -- is subject to -- to the orders of prison authorities which on some occasions will subject him to this kind of restraint.

I -- once again, if I were a prosecutor, I'd rather have him dressed up in a nice, new suit and his hair combed and smiling. I would much prefer that to having him in shackles.

JUSTICE STEVENS: Are you aware of any cases in which prosecutors have objected to shackling?

MS. PERCIVAL: No, I am not, Your Honor.

JUSTICE STEVENS: So Justice Scalia would have, I suppose, but he's unusual as a prosecutor I think.

(Laughter.)

MS. PERCIVAL: No.

JUSTICE KENNEDY: Well, I -- I think there is -- is something to the point that if I'm a juror and the defendant is sitting about as close to me as you are at

the counsel table and I see that he can't suddenly jump out at me, I have a certain -- certain security in making a deliberated judgment. I -- I do think it may cut both ways. And that's why I'm asking you is if there are some other considerations here.

MS. PERCIVAL: Well, I think -- I don't think there's other considerations other than, you know, this is penalty phase of a capital trial where we have to have the reliability of the fact-finding process. And the jurors are gauging the character of this defendant. And as you mentioned in your concurring opinion in Riggins, the jury is searching to discover the heart and mind of this defendant, and considerations such as character or future dangerousness are very important and may, in fact, be determinative of what sentence the defendant receives.

Shackling a defendant basically places a thumb on death's side of the scale and dehumanizes the defendant, making it easier for the jury to find that he is worthy of a death sentence.

The Holbrook standard that this Court established is a great standard. It has been in effect for -- for decades and it works. It is efficient and it is just as easily applied in penalty phase.

Holbrook promotes the reliability of a death determination by limiting the risk that impermissible

considerations will come into play. It also allows consideration of the individual circumstances of the case that is so crucial in the penalty phase.

Holbrook --

JUSTICE KENNEDY: Let me ask you this. You, of course, would object to having to show prejudice in any individual case. Then it seems to me, to follow, that that's prejudice -- that that means because prejudice is difficult to show. And if prejudice is judicial -- difficult to show, why should we rule for you anyway?

MS. PERCIVAL: Because we are concerned with the reliability of the death sentence. If -- if shackles are inherently prejudicial in guilt phase where character isn't even at issue and that has a lesser standard of reliability, then they certainly are inherently prejudicial in the guilt -- in the penalty phase where the defendant's life is at stake.

And as Justice O'Connor has recognized in her concurrence in the Eddings v. Oklahoma case, this Court goes to extraordinary measures to ensure that the defendant sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Shackling opens the door to prejudice and

mistake by giving the jury the impression that the defendant is particularly dangerous and therefore worthy of a death sentence.

JUSTICE BREYER: Is --

JUSTICE GINSBURG: What do you make of the judge -- well, the jury, already having been polled, and every one of them said this would not affect our judgment?

MS. PERCIVAL: This Court in Holbrook dealt with the same situation, and the Court in that case held that when a procedure presents such a probability of prejudice that it is inherently lacking in due process, little stock need be placed in jurors' claims to the contrary because jurors may not even be conscious of the effects that shackling will have.

And at that point in the proceedings, the jurors had not been instructed as to what specific factors they would be looking at. They did not know that Missouri has four steps in their sentencing procedure. They did not know how this would play into it. So their response that they would not be affected really should have little bearing here.

JUSTICE BREYER: Suppose the judge had said this defendant has just been convicted of killing two people. He convicted them -- as the jury knows, he was convicted of having killed them because he wanted to avoid being

sent back to prison. The jury may sit there and think, well, if he killed two people to avoid being sent back to prison and we've just voted him guilty, maybe he's going to try to lunge out in the courtroom and get us. And therefore, I want him shackled. Now, suppose the judge had said that. Would that be an adequate reason?

MS. PERCIVAL: No, I don't think it would. I guess what you're saying is if the jurors believe that the shackling is done for their protection. Then that gives the jurors the idea that -- that this man is going to -- has done something to indicate --

JUSTICE KENNEDY: I -- I think you have to give that answer to Justice -- to Justice Breyer, and that's why I'm asking. I -- I think you just have to say that this is inherently inconsistent with the atmosphere we want to have in a courtroom. It seems to me -- I -- I'm not quite sure I can find a lot of authority for that, but it seems to me that has to be your argument.

MS. PERCIVAL: Yes, it is.

JUSTICE O'CONNOR: Well, Ms. Percival, would you still be here today with this argument if the defendant had simply had shackles around his ankles that would have prevented him, in -- in effect, from running or lunging at anyone, but that that had been concealed by appropriate covers around the table where he was sitting so that the

jury was unaware of that situation?

MS. PERCIVAL: Yes.

JUSTICE O'CONNOR: Would you still be here --

MS. PERCIVAL: No. I --

JUSTICE O'CONNOR: -- making this argument that it's inherently prejudicial even though the jury couldn't see it?

MS. PERCIVAL: I would not be here arguing that if the court had gone to -- had -- had balanced both interests and had limited the risk that this impermissible factor would come into play. And in fact, at the first trial and penalty phase, Deck wore leg braces underneath his clothing and he behaved perfectly fine. It was only when he came back on --

JUSTICE O'CONNOR: That wasn't obvious or visible particularly to the jury.

MS. PERCIVAL: No, it was not.

JUSTICE KENNEDY: Well, but then you're giving away the Riggins argument, which is that this somehow affects the psyche of the defendant and he can't fully participate, et cetera, which I thought was your argument.

MS. PERCIVAL: Well, that -- that is one of the problems with excessive shackling. I think with -- with leg braces -- there's -- there's a balance with -- with Holbrook. And the court is balancing the State's

interests and courtroom security with the defendant's interest in a fair trial. The leg braces was an effective balance because it protected the courtroom security, but it also enabled Deck to be judged on -- just on the evidence presented in court and to have the freedom necessary to --

JUSTICE KENNEDY: So can every defendant have leg braces in every case?

MS. PERCIVAL: No, Your Honor. No.

JUSTICE SOUTER: Well, is -- you -- you have -- Justice Kennedy alluded to one of your earlier arguments, and that is the -- somehow the -- the shackling affects the capacity to participate. I thought you meant by that if the -- the hands are shackled, he can't write notes to counsel. Do you mean something else?

MS. PERCIVAL: Well, there are two different angles on that. First, there's the ability to communicate with counsel, such as by taking notes. The other aspect is if the shackles are so distracting to the defendant or causing him pain that he will not be able to concentrate on what is going on at the trial to enable him to help his attorney and participate.

JUSTICE SOUTER: Well, I -- I would grant you if -- if they -- they are so tight that it's causing pain, you've got a separate problem, but short of that, does the

so-called capacity to participate suffer simply because he's -- he's in irons? I mean, the only participation that he's going to do, I presume, is -- is sit there and -- and communicate with his lawyer. It's going to affect his capacity to write a note to his lawyer. What else is it going to do?

MS. PERCIVAL: If the shackles are -- are very obvious, it might deter the defendant from coming to court in the first place, lest he be characterized as this dangerous person.

JUSTICE SOUTER: Do you know of any instance of that?

MS. PERCIVAL: I cannot cite to any right now, Your Honor. But --

JUSTICE GINSBURG: But he does have to stand up when the judge comes in --

MS. PERCIVAL: Yes, when the --

JUSTICE GINSBURG: -- and presumably when the jury files in.

MS. PERCIVAL: Yes. When the judge comes in, when the jury comes in, the defendant would stand up. And so --

JUSTICE SOUTER: But your -- your problem with that, as I understand it, is simply that at that point with all these chains and so on, he's giving an impression

or the State is requiring him, in effect, to give an impression to the jury that may be a -- a false impression.

MS. PERCIVAL: Yes.

JUSTICE SOUTER: Okay.

MS. PERCIVAL: Yes, it is.

JUSTICE SOUTER: But back to participation.

MS. PERCIVAL: It could also prevent him from testifying if he knows that he would need to walk from defense table up to the witness box.

JUSTICE SOUTER: But that would be true if he were in the legirons.

MS. PERCIVAL: That -- you're right, Your Honor. But there's other measures that the court could take to ensure that the defendant was in place at the witness box before the jury would come in.

JUSTICE SOUTER: True, true.

MS. PERCIVAL: But in this case the judge took no remedial measures. The judge was perfectly satisfied by the fact that the jury could see these restraints.

JUSTICE SCALIA: I gather there was some evidence or perhaps it's conceded that he was put on a suicide watch before his first trial. This was the second trial. Right?

MS. PERCIVAL: Right. When --

JUSTICE SCALIA: That he had been put on a suicide watch and that he had tried to injure himself by knocking his head against the cell wall?

MS. PERCIVAL: Yes.

JUSTICE SCALIA: What if -- what if the judge had specifically stated I'm putting him in irons because the man is -- is violent enough towards himself or others that I'm worried about the safety of the jury.

MS. PERCIVAL: Well --

JUSTICE SCALIA: What if the judge had said that?

MS. PERCIVAL: Okay. That incident --

JUSTICE SCALIA: Would that have been enough?

MS. PERCIVAL: I -- I don't think it would have been in this case because that incident had happened well prior to the first trial, and at the first trial, he was wearing the leg braces underneath his clothing and they sufficed. Deck was a perfectly calm, orderly defendant in the courtroom. There were no problems.

And so there's two issues. There's the issue of whether the shackles were warranted and then whether the -- they were excessive. And these -- handcuffing him to a belly chain and forcing him to wear legirons were excessive.

May I reserve the rest of my time, Your Honor?

JUSTICE STEVENS: Yes, you may, Ms. Percival.

Ms. Nield.

ORAL ARGUMENT OF CHERYL C. NIELD

ON BEHALF OF THE RESPONDENT

MS. NIELD: Justice Stevens, and may it please the Court:

The State of Missouri and Mr. Deck agree that the trial court needs discretion to fashion security measures such as restraints. That's particularly so in a case like this where we're talking about a penalty phase. Mr. Deck, at the time of his penalty phase retrial, had already been convicted, among other things, of two counts of murder. So by definition, he was a dangerous individual. In those circumstances --

JUSTICE SOUTER: Well, isn't -- isn't the question whether he -- he was dangerous in the courtroom?

MS. NIELD: That is part of the question. That is true.

JUSTICE SOUTER: There's no question he was dangerous when he committed the murders, but -- but I don't know that that means he's dangerous in a courtroom.

MS. NIELD: Well, I think that certainly suggests that he's dangerous right off. In terms of whether or not he's dangerous in the courtroom, there's other facts that are conspicuous upon this record.

JUSTICE O'CONNOR: Well, is there some burden on the part of the prosecutor and the court to consider at least alternative restraints or measures to make sure that there's no misbehavior?

MS. NIELD: There may be but prior to that, there -- there should be a burden on the defendant to, first of all, articulate that the restraints are visible and make a record on that. And second of all, to --

JUSTICE O'CONNOR: Well, apparently that was done. Do you say that there was no motion made by defense counsel and that alternatives were not proposed?

MS. NIELD: I think I disagree with the characterization. There was a motion filed pretrial that contained a lengthy discussion of the law, which included discussion of various cases and alternatives to restraint that had been used. But that said, the motion itself is styled motion to have accused appear at trial free of restraints. The relief requested was that Mr. Deck should appear free of restraints both --

JUSTICE KENNEDY: Do you -- do you take the position that every defendant can be restrained if the restraints are not visible to the jury?

MS. NIELD: It -- it would depend on the nature of the restraints, but if the restraints are not visible --

JUSTICE KENNEDY: Legirons strapped to the leg of the -- of the table but not visible.

MS. NIELD: Right. If not visible, then that would be fine.

JUSTICE SCALIA: Why don't you limit it to double murderers anyway?

MS. NIELD: Certainly that would be fine.

JUSTICE SCALIA: Okay.

JUSTICE KENNEDY: Well, but I want to know what your position is. Traffic offenders?

MS. NIELD: Again, it -- it depends upon the circumstances, but if they're not visible to the jury, the defendant has a difficult time --

JUSTICE O'CONNOR: Well, the circumstances that you were given was a traffic offender.

MS. NIELD: A traffic offender who is restrained where it's not visible --

JUSTICE O'CONNOR: With -- with non-visible restraints. Is that perfectly okay?

MS. NIELD: Yes, it is. Yes, it is because if the jury doesn't see them, then --

JUSTICE O'CONNOR: It's kind of an extreme position, isn't it?

MS. NIELD: That's true, but it points up the importance of making a record on the visibility. If they

are not visible --

JUSTICE SOUTER: Is --

JUSTICE GINSBURG: But this -- this is given -- I mean, this is legirons. It's not leg braces. Belly chain. You don't need to make a record to -- to know that those things are visible. Is there any serious doubt that they were visible?

MS. NIELD: Well, I -- I think there was serious doubt and that's borne out by defense counsel's question to the voir dire. He said to the -- during the voir dire to the panel, you either do or will know that Mr. Deck is restrained, and I guess that's what happens when you're convicted. That's a rough paraphrase. But the either -- the part that he said, you either do or will know, that's a direct quote. So defense counsel himself was not even necessarily --

JUSTICE BREYER: What about his motion? Is Mr. Leftwich -- is that defense counsel?

MS. NIELD: One of them. That's true. And there was a gentleman --

JUSTICE BREYER: All right, fine. He says I would ask that or like to move to strike the entire jury panel for cause because of the fact that Mr. Deck is shackled in front of the jury and makes them think that he is going to -- that he is violent today and going to do

something in the courtroom. And I read that, he's saying, of course, they can see it.

MS. NIELD: Again, we --

JUSTICE BREYER: That doesn't say he can see it -- they can see it?

MS. NIELD: I think that's an allegation by counsel that that may be the case.

JUSTICE BREYER: All right. So has anybody said -- he said, Judge, I would like you to get rid of this jury which happens to be looking at the shackles. Okay. Now, at that point, you have to do -- then isn't it up to the prosecution to say, what do you mean looking at them? They can't see them. They're hidden.

MS. NIELD: Well, recall at -- at this point the sequence is critical. By this time, defense counsel in his voir dire questioning had already let the cat out of the bag. Either you do or will know that he's restrained. But by --

JUSTICE O'CONNOR: Well, are you taking the position here that this record does not disclose that the belly chains and the handcuffs and the other restraints were not visible?

MS. NIELD: Yes. I'm taking the position that we don't know from this record that they were visible.

JUSTICE O'CONNOR: That there's nothing in the

record to show that.

MS. NIELD: That's right.

JUSTICE O'CONNOR: And you don't concede it.

MS. NIELD: I do not. I do not concede it.

JUSTICE STEVENS: Yes, but your position would be precisely the same if the record made it perfectly clear that the jury could see everything, I think.

MS. NIELD: I think the test would be the same. That's --

JUSTICE STEVENS: Yes.

MS. NIELD: That's true.

JUSTICE STEVENS: So this is an alternative argument that you're making.

MS. NIELD: That's true.

JUSTICE KENNEDY: But the State of Missouri is submitting to us the proposition that every defendant in every case can be shackled so long as it's not visible. And I -- I find that an extreme position because it's an indignity on the defendant and the defendant is entitled to dignity in a courtroom.

MS. NIELD: Well, this points up the distinction in this case between guilt phase and penalty phase. And what we're talking about here and the rule that I am urging this Court to adopt relates to the penalty phase. And in the penalty phase, like Mr. Deck's, we have a

person who's been convicted of murder. Now, in a guilt phase, certainly there are issues of presumption --

JUSTICE KENNEDY: Could he be forced to wear prison clothes once he's convicted and it's the sentencing phase?

MS. NIELD: I think he possibly would be able to, yes. Yes, I do because prison clothes identify the defendant, and if a defendant is an escape risk, for example, that would identify the defendant in case he were to bolt from the courtroom, for example.

JUSTICE GINSBURG: But there's no for example here because the court said, in answer to the lawyer's objection -- the -- the lawyer says, it prejudiced him -- prejudices him toward the jury and it makes him look dangerous. The court's answer: the objection you're making will be overruled. He has been convicted and will remain in legirons and belly chain. The only thing that was relevant, according to the trial judge was he has been convicted.

MS. NIELD: That is the only stated reason, that he has been convicted. I think what that means is he's a twice convicted murderer. Of course, he's dangerous.

Further, there are reasons spread upon this record. And keep in mind the same judge from the penalty phase retrial has been with this case from the beginning.

There are reasons spread upon this record that justify additionally the use of restraints against Mr. Deck.

JUSTICE GINSBURG: Why? He went through the entire guilt phase with the more moderate restraints, just the leg brace, and there was no incident. There was no disturbance in that trial. He didn't try to lash out at anyone. Why wasn't that the best example of what one could anticipate in the penalty phase?

MS. NIELD: What you state is true, but by the time of the penalty phase retrial, Mr. Deck's position, to paraphrase from Martinez v. Court of Appeal, had changed dramatically. He had already been convicted. Add to that he had already pursued his direct appeal through the Missouri Supreme Court.

JUSTICE STEVENS: Is the fact of conviction critical for your point of view because it doesn't really matter if there's prejudice or that because there's no -- no danger of prejudice?

MS. NIELD: I'm not sure I understand your question.

JUSTICE STEVENS: Well, do you concede that even though he had been convicted, it would, nevertheless, be prejudicial in the eyes of the jury to see a man shackled when one of the issues they'll have to decide is whether his future dangerousness might -- might justify his

execution? Do you think there is prejudice there, or do you share Justice Scalia's view that it would be a good thing for the defendant?

MS. NIELD: I think it would depend. Some jurors might take away that the person --

JUSTICE STEVENS: And if it depends, why would it not be appropriate to have a rule that the trial judge should be required to explain the basis for his decision?

MS. NIELD: Certainly here it would have been simpler had the trial court been a little wordier, and that's not the case. That said, I think the test should be, looking back, has the trial court done something that's reasonable.

And then to get into the prejudice issue, I think you have to look at the facts of this case. In terms of whether or not the restraint could prejudice Mr. Deck, one thing to look at is the defense that he offered in mitigation. His defense in mitigation was not that he was not a dangerous individual. It was not that these murders were an aberration --

JUSTICE STEVENS: Yes, but would you not agree that it's always of relevance to a jury in deciding whether the -- the man should be executed, is how dangerous is this guy?

MS. NIELD: Yes, certainly juries can consider

that, and jury case law is in accord. But on the facts of this case, Mr. Deck's defense in mitigation was not that he was a safe individual or, again, that the murder of these two people was an aberration in an otherwise saintly life. That's not the case.

The mitigation defense was that he did these horrible things. He is some -- a nefarious individual, but that he should not be sentenced to death because that wasn't his fault. It was his parents' fault. They had done a poor job in raising him. He had suffered difficult circumstances growing up. So there's simply no intersection between the mitigation defense offered here and whatever the jury might take away that might be negative from the fact that he was restrained.

JUSTICE SOUTER: But the fact --

JUSTICE KENNEDY: Could they put him in a cage?

MS. NIELD: Could they put Mr. Deck in a cage? I don't think so. Could they put --

JUSTICE KENNEDY: He's -- he's been convicted. We know he's dangerous.

MS. NIELD: Right.

JUSTICE STEVENS: It seems to me your argument is much like arguing on the merits of the -- at the original trial that his defense was alibi or something like that, therefore you don't have to worry about the

prejudice that arises from the restraints.

MS. NIELD: Well, I think in the penalty phase, we're looking at reliability. And -- and the bottom line is restraining somebody who's twice been convicted of murder is not in any way unreliable or misleading.

JUSTICE STEVENS: Yes, but the bottom line from the other point of view is that shackles are always prejudicial, and you try to have the scales evenly balanced when you're deciding whether the man should die or not.

MS. NIELD: In terms of making that decision, it's important to remember that Missouri has procedures in place to channel, at the front end, the jury's decision whether or not to impose death. Among those are aggravating circumstances. And in this case the aggravating circumstances did not relate at all to dangerousness or future dangerousness. In fact, in Missouri --

JUSTICE SOUTER: Well, the -- the stated aggravating circumstances didn't, but the point of -- one point of the argument is that by shackling the man in -- in this complete and visible way, you are creating the impression that no one could fail to -- to perceive that this guy is so dangerous that they can't even depend upon courtroom security either to protect him from the --

protect the jurors or courtroom personnel or to prevent escape. That -- excuse me. That may not be a verbal argument about dangerousness, but it seems to me that it is an unmistakably visible one. What is your response to that?

MS. NIELD: Two responses to that. In terms of the dangerousness, again, this jury in particular knew that Mr. Deck had been convicted of murder. They knew that the choice they faced was both stark and very serious: life without probation or parole or death. And so to present Mr. Deck in restraints could hardly come as a shock. To the contrary, it might be confusing and cause consternation to have a twice-convicted murderer sitting at counsel table no more restrained than counsel or the people in the courtroom.

JUSTICE GINSBURG: Do we know why the judge apparently changed his mind? Because if I remember correctly, at the pretrial hearing, the court said that the defendant would be allowed to, A, wear his own clothes and, B, to have leg braces underneath for security. And then sometime after that pretrial hearing, the judge apparently changed his mind. Do we know what triggered that?

MS. NIELD: We -- we do not. There is no record of any such pretrial hearing. The only way we know about

that is from allegations in the motion for new trial. So there is -- there is no record on that at all.

If possible, I'd like to get back to the cage question, Justice Kennedy, that you posed. That's a -- that's an extreme form of restraint. Could that ever be used in a case? It's possible.

But then I think we get into questions of whether or not the trial court's action was reasonable. And in looking at reasonableness, we can consider are there other perhaps less visible, less dramatic forms of restraint that might do the job equally well. That's not to say, however, that a --

JUSTICE O'CONNOR: Well, how about the ones that were used on Mr. Deck during the trial? Was that an alternative that was reasonable?

MS. NIELD: I think it was an alternative in this case, and the defense didn't proffer, at the time of the objection, anything that they thought that might be less. And I think the trouble comes in here -- again, I don't believe a least restrictive alternatives approach is appropriate, but when you talk about least restrictive, I think it's sometimes difficult to tell what is less restrictive than something else because not all restraints --

JUSTICE O'CONNOR: Well, in part it depends on

whose burden it is. Is it the burden of the State, if they're going to use shackles, to somehow establish that it's needed?

MS. NIELD: I think --

JUSTICE O'CONNOR: Or do you take the position that they're free to impose shackles in every case, even a traffic offense, if the prosecutor wishes to do it, without any justification? That's your position apparently.

MS. NIELD: Well, I think if it's non-visible restraints --

JUSTICE O'CONNOR: Is that right?

MS. NIELD: I -- I don't think that's --

JUSTICE O'CONNOR: Is that your position?

MS. NIELD: No. I don't think that's precisely right.

JUSTICE O'CONNOR: No?

MS. NIELD: I think if it's non-visible restraints, we have a non-issue. If the jury doesn't see it, it doesn't really matter. That's -- that's --

JUSTICE O'CONNOR: That's not my question, and -- and it relates to what is the burden of the State in these situations to use the visible restraints?

MS. NIELD: The burden is for the State to show that the restraints were reasonable, were not completely

out of proportion --

JUSTICE O'CONNOR: And where in this record do I find that the State carried that burden --

MS. NIELD: The record --

JUSTICE O'CONNOR: -- and that there was a finding by the trial judge on it?

MS. NIELD: There was not a finding per se, but the facts of this case, spread upon the record, support the use of restraints in this case.

JUSTICE O'CONNOR: Could you point me to places in the record where it supports your position on the use of the visible restraint?

MS. NIELD: Yes. Mr. Deck had an aiding escape conviction that was presented to the jury. There was the attempted escape that Justice Scalia referred to. Or excuse me. He referred to the -- the suicide --

JUSTICE O'CONNOR: Had that not occurred before he was even tried?

MS. NIELD: That had, yes. Yes, that's true.

JUSTICE STEVENS: And what were the facts of the aiding escape? Was he trying to get away or was he helping somebody?

MS. NIELD: He was assisting somebody.

JUSTICE KENNEDY: I mean, what did he do? Draw a map or what?

(Laughter.)

MS. NIELD: He -- he had a saw blade and he assisted these other individuals in sawing their way out. So there's that, both a conviction --

JUSTICE STEVENS: Which really has very little probative value on this issue. I mean, the fact that he tried to saw his way out of a cell hardly speaks to the risk of fleeing from the courtroom while the proceedings are going on.

MS. NIELD: I -- I must disagree. I think if he's aiding other people in escape, he himself tried to remove the glass from the window when he was held in jail prior to trial by removing the caulking. If he is willing to escape in those circumstances, what's to say he's not willing to escape in the Jefferson County courtroom?

JUSTICE GINSBURG: So we already know that -- that that effort was made before he was tried in the guilt phase.

MS. NIELD: That's true.

JUSTICE GINSBURG: And whatever inference you might draw, it didn't prove out. So it seems to me the -- the closest in time is the -- and -- and in fact is the episode he's just been through, the trial episode. So why wouldn't that be -- the -- the judge would start with that in mind. Well, I tried this man and he didn't give me any

problems, so I have no reason to anticipate problems now.

MS. NIELD: That's true. But again, we also have the fact that he had -- between the initial penalty phase and the penalty phase retrial, Mr. Deck had pursued his direct and post-conviction appeals. They had not been successful on the issue of guilt. The issue of guilt is done. He's a twice-convicted murderer. And he knew that at that time.

Furthermore, we have the fact that the first jury in the penalty phase found one of the six aggravating circumstances -- actually they found all, but one of them was that Mr. Deck killed in order to avoid lawful arrest. He has 12 convictions on his record, and at the time that he killed the Longs, he knew that if I leave witnesses and they can identify me and I go to prison for breaking into their house and stealing money, I will not be leaving prison. So that was a factor as well. That was a factor as well.

JUSTICE BREYER: If -- if there are some factors that favor putting him in shackles and I guess others might not, what's the argument that the judge shouldn't at least have to make a finding?

MS. NIELD: Again, the question is reasonableness. We don't have a finding here, and it would certainly have been helpful. But --

JUSTICE BREYER: I mean, you know, I realize you want to save the conviction and the penalty, but if you look at the mine run of cases, it's pretty hard for me to see how the State could show special circumstances and they not get a finding from the judge that they're right.

MS. NIELD: We don't --

JUSTICE BREYER: It's pretty hard to see an argument against it.

MS. NIELD: We don't --

JUSTICE BREYER: I know that hurts your case, but I -- I still need to think of some argument or reason why the judge shouldn't have to at least make a finding.

MS. NIELD: Right. Findings would certainly be helpful, but again, the question is whether or not what the trial court did is reasonable, not if what he did was perfect. If conspicuous on this record, we have factors like an attempted escape, aiding others in escaping, the fact that he killed to avoid lawful arrest, the fact that between his initial penalty phase and the retrial he had pursued his remedies. With all these facts, can we really say that the trial court was on the side of unreasonableness versus reasonableness? Do we have to wait for Mr. Deck to actually have an outburst? Or it could be something where it's an -- an issue of the spectators in the courtroom. There could be many things.

It could be an issue of what the particular confines of the Jefferson County courthouse are and whether or not it's set up in such a way as to avoid escape and things of that nature.

JUSTICE GINSBURG: With a -- with a blank record -- the -- the State is going to restrain someone and it may be necessary, it may be not, and if the State has the burden, then why shouldn't a reviewing court speculate on what might have been when the only thing that was -- appears of record is he's been convicted and will remain in legirons? The only reason the court gave is that now things have changed. He's no longer in the guilt phase where he enjoys the presumption of innocence. He has been convicted and, therefore, we can keep him in chains. There's nothing situation-specific about it. The judge seems to be saying once a person is convicted, at least of murder, it's fair game. It's -- it's permissible to keep him in legirons and shackles.

MS. NIELD: I think that's what the court said here. However, it's important to remember that the defendant has a burden to establish a constitutional violation. And further, the colloquy of the court and counsel was such that counsel said, look, these restraints make him look dangerous. And the court, by saying he's been convicted, said, well, he is dangerous.

Now, if there were other objections to the restraints, for example, that he was unable to communicate with counsel because his hand was not free and he couldn't write notes or if the restraints were causing him pain or if the restraints, the way they were set up, were causing him to have difficulty facing the jury perhaps --

JUSTICE SCALIA: Ms. Nield, is -- is the State making a harmless error argument here? I really couldn't tell from your brief whether you're doing it or not. Are -- are -- is the State asserting that assuming it -- assuming it was wrong, assuming it was a violation, this jury would have -- would have come out the same way anyway?

MS. NIELD: That's right. That's true.

JUSTICE SCALIA: Why is that?

MS. NIELD: First of all, again, the defense in mitigation was essentially that Mr. Deck is dangerous, but we ought to spare him the penalty of death because of his poor upbringing. And that defense in mitigation does not intersect or have any sort of nexus with any sort of presumptions that jurors might draw.

JUSTICE SCALIA: What -- what specific aggravating circumstances did they jury find? You say there are statutory aggravating circumstances in Missouri.

MS. NIELD: That's correct.

JUSTICE SCALIA: And the jury found -- there are five.

MS. NIELD: There were --

JUSTICE SCALIA: And the jury found all five.

MS. NIELD: Actually there were six --

JUSTICE SCALIA: Six.

MS. NIELD: -- that were pled in this case and the jury found all six. And they are as follows. The murders were each committed while he was engaged in another homicide. He murdered each victim for the purpose of receiving money. Both murders involved depravity of mind. Each murder was committed for the purpose of avoiding lawful arrest. Each murder was committed while Mr. Deck was engaged in the perpetration of a burglary, and each murder was committed while Mr. Dèck was engaged in the perpetration of robbery.

So, again, none of these factors -- there's no nexus between these factors, which are really implicit in the guilt finding -- no nexus between these aggravating circumstances that render Mr. Deck death-eligible and any sort of dangerousness that the jurors might take away from the fact that he was restrained.

Once you get past the death-eligibility hurdle with the aggravating circumstances, then comes the Eighth Amendment concerns about reliable and accurate sentencing

in the selection decision, the decision that's one of a moral nature of whether this person should be put to death. And on that front, again, restraining somebody who's twice been convicted of murder is not inaccurate, it is not unreliable, it's not misleading in any way.

JUSTICE KENNEDY: So -- so it's never ground for reversal? I'm -- I'm wondering, in line with Justice Scalia's question, is -- is -- would the calculus be, well, this is not a close case and some other cases are closer? I mean, is that what we do?

MS. NIELD: I think --

JUSTICE KENNEDY: Your -- your -- I -- I think first position at least would be that it's never prejudicial. But assume we don't agree with that.

MS. NIELD: I think --

JUSTICE KENNEDY: How does harmless error work to -- to pursue Justice Scalia's line of questioning?

MS. NIELD: I think in terms of harmless error, that would be our second position, but the first position here is that a constitutional violation has not been established.

JUSTICE KENNEDY: I understand that.

MS. NIELD: And where that's the case, you look at the totality.

JUSTICE SCALIA: But answer his question. Give

him an example of where it -- it wouldn't be harmless error.

MS. NIELD: Where it wouldn't?

JUSTICE SCALIA: Assuming that it is a violation, what's an example of where it wouldn't be harmless error?

MS. NIELD: An example of where it might not be harmless error is where the defendant's defense in mitigation is focused specifically on dangerousness or future dangerousness. For example, if the defense in mitigation is I committed these murders, but I'm very sick now, I'm feeble, I'm not going to pose any sort of threat to anybody inside or outside the prison walls, if the defense in mitigation relates to danger. Or, for example, if the defense in mitigation was that while incarcerated, the person had found religion and realized the error of his or her ways and was no longer inclined to do these things and felt remorse, that again might relate.

JUSTICE SCALIA: Or I suppose if future dangerousness was a specific aggravating factor under State law, as it is in Texas, for example --

MS. NIELD: Correct. That would make a difference.

JUSTICE SCALIA: -- then -- then you would concede that if this was unlawful, the error clearly would

not be harmless.

MS. NIELD: That could certainly make a difference there. That's correct.

Or another example of where the defense in mitigation might intersect more with the dangerousness issue. In the Simmons line of cases, in one of the cases the defense was that the particular defendant had a proclivity for attacking elderly women and that was the nature of his crime. But in prison there were no elderly women, and so he would not pose a danger to anyone outside the prison walls if incarcerated for life, nor would he pose a danger to other prisoners because they were not elderly women.

JUSTICE GINSBURG: I thought the question here was, was he dangerous in the courtroom? Was he going to lash out at a witness or try to --

MS. NIELD: I think that's the question when the trial court looks at the restraints issue, but Mr. Deck is saying that this impaired the reliability of his sentencing under the Eighth Amendment. And there, we do look at these other kinds of issues. It's not whether he would be dangerous in the courtroom. That's the trial court decision at the front end under the Eighth Amendment, and when we look at reliability, is this something that is going to impel the jury to impose a

death sentence based upon whim or caprice or arbitrariness. And we would submit that it is not.

Again, to restrain somebody who's convicted of killing not one, but two people, to do that does not send the jury irrevocably down the path of giving death. And that points up the prosecutor's argument in this case.

JUSTICE GINSBURG: If he -- if he were kept under these restraints, legirons and the -- what do they call it -- belly chain, day in and day out in prison, would that constitute cruel or unusual punishment?

MS. NIELD: It could. It could. And it would depend upon the prison security. The difference being, in prison, he's already confined versus outside the prison walls. It -- it could present a problem. In one of the Spain cases, the -- the neck restraint was deemed to be cruel and unusual, and particularly if it's ongoing, if it's -- if it occurs for a lengthy period of time.

But, of course, we don't have that here and we have not a prison context but a context of a local, rural courtroom where the trial judge has to make sure that the people in that courtroom, the personnel, the spectators, the jurors, that they are safe. And we would submit that under the facts of this case, that that trial court's decision was not unreasonable.

The Missouri Supreme Court was correct in its

analysis and it should be affirmed.

JUSTICE STEVENS: Thank you, Ms. Nield.

Ms. Percival, you have about 4 and a half minutes left.

REBUTTAL ARGUMENT OF ROSEMARY E. PERCIVAL

ON BEHALF OF THE PETITIONER

MS. PERCIVAL: Thank you, Your Honor.

JUSTICE KENNEDY: Could -- could you comment on whether or not there's harmful error here?

MS. PERCIVAL: Yes, Your Honor.

This constitutional violation was not harmless for a number of reasons.

For one, character was the key consideration in the jury's analysis of whether this person should live or die. The court is saying that even 7 years after this crime occurred, that Carman Deck is so dangerous that he needs to be in both belly chain and legirons to keep the courtroom safe, to keep him there. The court is saying that he's dangerous in the courtroom, that he remains dangerous and therefore he --

JUSTICE KENNEDY: Are you asking us to say that in light of six aggravating factors on which he was convicted, the result likely would have been different?

MS. PERCIVAL: Yes, I am, Your Honor. And that's because there's -- that is the -- just the first

step of the Missouri procedure. The jury then goes to step two, by which they look at both statutory aggravators and nonstatutory aggravators to decide whether death is warranted. At step three, they then weigh the mitigation against the aggravation.

The Missouri Supreme Court itself in the first appeal stated that Deck had presented substantial mitigation about his horribly abusive childhood.

And it's not accurate that the defense was only related to his -- his childhood. In closing arguments, defense counsel repeatedly argued that Deck deserved to be in prison because of what he had done, but that he would be safe in prison. There would be no risk that he would hurt anybody else. So that was part of the defense strategy.

These restraints were --

JUSTICE SCALIA: That was at this trial or at the first trial, that --

MS. PERCIVAL: This trial. He made that argument at this trial.

These restraints were visible throughout the trial. There were 15 recesses, at which time Deck would have had to stand up when both the jurors leave the court and come back in.

The shackles dehumanized Deck and it degraded

the dignity of the courtroom. Prison clothing does not relate to character, and shackles directly relate to character, which is so key in the death analysis.

It was not reasonable to impose these excessive restraints after Deck had behaved appropriately at -- at numerous proceedings prior to this.

And for these reasons, we would ask the Court to find that there was a constitutional violation --

JUSTICE STEVENS: May I ask one quick question?

MS. PERCIVAL: Sure.

JUSTICE STEVENS: Does the record tell us how big he was?

MS. PERCIVAL: No, it does not, Your Honor. Sorry.

JUSTICE STEVENS: Okay.

The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)