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1 P R O C E E D I N G S

2 (1:00 p.m.)

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

5 Ms. Percival.

6 ORAL ARGUMENT OF ROSEMARY E. PERCIVAL

7 ON BEHALF OF THE PETITIONER

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

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

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

25 If the court is to impose an inherently

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MS. PERCIVAL: Yes.

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

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

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

15 MS. PERCIVAL: Yes, Your Honor.

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

21 MS. PERCIVAL: Yes, Your Honor.

22 JUSTICE SCALIA: He was -- he was convicted.

23 MS. PERCIVAL: Yes, and --

24 JUSTICE SCALIA: Should that make no difference?

25 MS. PERCIVAL: The reason that this presumption

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

6 JUSTICE SCALIA: Guilty.

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

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

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

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

24 JUSTICE SCALIA: Okay.

25 MS. PERCIVAL: -- both interests successfully.

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

3 MS. PERCIVAL: Yes, yes.

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

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

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

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

1 parole.

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

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

1 fact-finding process is what the problem is.

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

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

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

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

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

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

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

3 MS. PERCIVAL: Well --

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

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

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

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

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

5 JUSTICE SCALIA: It's --

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

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

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

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

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

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

21 (Laughter.)

22 MS. PERCIVAL: No.

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

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

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

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

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

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

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

4 Holbrook --

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

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

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

25 Shackling opens the door to prejudice and

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

4 JUSTICE BREYER: Is --

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

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

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

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

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

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

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

19 MS. PERCIVAL: Yes, it is.

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

1 jury was unaware of that situation?

2 MS. PERCIVAL: Yes.

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

4 MS. PERCIVAL: No. I --

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

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

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

17 MS. PERCIVAL: No, it was not.

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

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

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

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

9 MS. PERCIVAL: No, Your Honor. No.

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

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

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

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

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

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

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

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

17 MS. PERCIVAL: Yes, when the --

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

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

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

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

4 MS. PERCIVAL: Yes.

5 JUSTICE SOUTER: Okay.

6 MS. PERCIVAL: Yes, it is.

7 JUSTICE SOUTER: But back to participation.

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

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

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

17 JUSTICE SOUTER: True, true.

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

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

25 MS. PERCIVAL: Right. When --

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

4 MS. PERCIVAL: Yes.

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

9 MS. PERCIVAL: Well --

10 JUSTICE SCALIA: What if the judge had said
11 that?

12 MS. PERCIVAL: Okay. That incident --

13 JUSTICE SCALIA: Would that have been enough?

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

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

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

1 JUSTICE STEVENS: Yes, you may, Ms. Percival.
2 Ms. Nield.

3 ORAL ARGUMENT OF CHERYL C. NIELD

4 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MS. NIELD: Certainly that would be fine.

8 JUSTICE SCALIA: Okay.

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

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

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

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

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

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

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

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

1 are not visible --

2 JUSTICE SOUTER: Is --

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

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

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

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

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

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

3 MS. NIELD: Again, we --

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

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

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

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

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

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

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

1 record to show that.

2 MS. NIELD: That's right.

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

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

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

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

10 JUSTICE STEVENS: Yes.

11 MS. NIELD: That's true.

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

14 MS. NIELD: That's true.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. NIELD: Yes, certainly juries can consider

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

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

15 JUSTICE SOUTER: But the fact --

16 JUSTICE KENNEDY: Could they put him in a cage?

17 MS. NIELD: Could they put Mr. Deck in a cage?

18 I don't think so. Could they put --

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

21 MS. NIELD: Right.

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

1 prejudice that arises from the restraints.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MS. NIELD: I think --

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

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

12 JUSTICE O'CONNOR: Is that right?

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

14 JUSTICE O'CONNOR: Is that your position?

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

17 JUSTICE O'CONNOR: No?

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

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

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

1 out of proportion --

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

4 MS. NIELD: The record --

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

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

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

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

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

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

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

23 MS. NIELD: He was assisting somebody.

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

1 (Laughter.)

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

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

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

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

19 MS. NIELD: That's true.

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

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

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

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

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

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

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

6 MS. NIELD: We don't --

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

9 MS. NIELD: We don't --

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

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

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

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

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

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

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

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

15 JUSTICE SCALIA: Why is that?

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

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

25 MS. NIELD: That's correct.

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

3 MS. NIELD: There were --

4 JUSTICE SCALIA: And the jury found all five.

5 MS. NIELD: Actually there were six --

6 JUSTICE SCALIA: Six.

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

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

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

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

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

11 MS. NIELD: I think --

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

15 MS. NIELD: I think --

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

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

22 JUSTICE KENNEDY: I understand that.

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

25 JUSTICE SCALIA: But answer his question. Give

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

3 MS. NIELD: Where it wouldn't?

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

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

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

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

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

1 not be harmless.

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

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

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

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

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

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

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

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

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

25 The Missouri Supreme Court was correct in its

1 analysis and it should be affirmed.

2 JUSTICE STEVENS: Thank you, Ms. Nield.

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

5 REBUTTAL ARGUMENT OF ROSEMARY E. PERCIVAL

6 ON BEHALF OF THE PETITIONER

7 MS. PERCIVAL: Thank you, Your Honor.

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

10 MS. PERCIVAL: Yes, Your Honor.

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

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

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

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

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

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

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

16 These restraints were --

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

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

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

25 The shackles dehumanized Deck and it degraded

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

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

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

9 JUSTICE STEVENS: May I ask one quick question?

10 MS. PERCIVAL: Sure.

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

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

15 JUSTICE STEVENS: Okay.

16 The case is submitted.

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

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