No. 04-5293

In The Supreme Court of the United States

CARMAN L. DECK,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

AMICUS CURIAE BRIEF OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES; *AMICUS*; and the NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;"

The Eighth Amendment to the U.S. Constitution provides in relevant part: "[N]or cruel and unusual punishments inflicted."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1.

INTEREST OF *AMICI CURIAE*

The Bar Human Rights Committee, *Amicus*, and the National Association of Criminal Defense Lawyers (NACDL), hereby request that this Court consider the present brief pursuant to Rule 37.2(a) in support of Petitioner Carman L. Deck.[1]

The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. The Committee regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* before the United States Supreme Court.

Amicus is a U.K. charity, which aims to train U.K. lawyers to provide assistance for U.S. death penalty attorneys by undertaking internships, in the provision of briefs of *amicus curiae*, preparing clemency petitions, undertaking research and making applications to the Inter-American Commission of Human Rights. *Amicus* runs an educational program which has included senior judges, academics and practitioners from the U.S. and around the world. "Amicus" has also previously appeared as *amicus curiae* before the U.S. Supreme Court.

National Association of Criminal Defense Lawyers (NACDL) works domestically and internationally to ensure justice and due process for persons accused of

[1] Letters from both counsel consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for neither party authored this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of the brief.

crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL has appeared as *amicus curiae* numerous times before this Court.

SUMMARY OF ARGUMENT

The practices of other common law countries, civilized nations and the provisions of international treaties to which the United States is a signatory may inform this court's interpretation of what processes should be applied to a defendant during the penalty phase of a capital trial. Common law, international law and convention require that all defendants be treated with a dignity that is commensurate to the overriding and abiding presumption of innocence during their trials and axiomatically to their trials in a penalty phase before a jury. The courtroom is the legal and social center in which due process and procedure abide, and the absence of procedural conduct maintaining dignity and respect for all of the parties and participants denigrates that legal and social foundation.

Absent threatening or improper behavior by the defendant, due process requires that a defendant normally be free of restraints at *all* stages of his trial. Improper restraints on a defendant during penalty phase denies him the due process required by the Fifth Amendment, compels him to, in essence, give testimony against himself contrary to the Fifth Amendment, effectively denies him the opportunity to confront himself as witness against himself in contravention of the Sixth Amendment and constitutes degrading treatment of the defendant.

A number of states count "future dangerousness" among their capital sentencing statute's aggravating circumstances. The sight of a defendant in ostentatious restraints cannot but unduly influence the jury's assessment to the defendant's detriment. Additionally, research shows that "future dangerousness" is always on the minds of jurors and is, thus, at issue in most trials. Improper restraint of a defendant during penalty phase proceedings fatally taints this process.

Absent a compelling State reason to restrain a defendant, restraint at any stage of a trial is a serious constitutional violation and cannot be condoned.

ARGUMENT

I. The common law, the practice of other nations, and international law are proper considerations with which to assess evolving standards of decency and the requirements of due process.

To ascertain the requirements of due process and the meaning of the constitutional bar on cruel and unusual punishment, it is permissible to look to other jurisdictions. "'*There is no doubt' that Section 10 of the English Bill of Rights of 1689 'is the antecedent' of the cruel and unusual punishment clause of our Eighth Amendment*."[2] The historical evolution of common law can assist the Court: *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). The influence

[2] *McKenzie v. Day*, 57 F.3d 1461, 1487 n.18 (9th Cir. 1995) (William A. Norris, dissenting) citing *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia J., concurring).

of the international custom of Western European countries, countries with an Anglo-American culture and human rights treaties have all been recognized as of significance, *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Supreme Court has held that the practice in other "*civilized nations of the world*" is a relevant consideration, *Trop v. Dulles*, 356 U.S. 86, 102 (1958), as are standards in other jurisdictions, *Enmund v. Florida*, 458 U.S. 782, 796 (1982), in deciding what amounts to cruel and unusual punishment.

Recently, this Court has recognized the value of common law decisions from the international community in determining the contours of the Eighth Amendment's "cruel and unusual punishment" clause. *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (considering international community's rejection of the death penalty for persons with mental retardation). Likewise, this Court has recognized the relevance of international norms when considering the permissibility of practices in this country. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 2483 (2003) (noting that "the right [of adults to engage in intimate, consensual conduct] has been accepted as an integral part of human freedom in many other countries"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J. concurring) (noting support for affirmative action policies in international law).

International norms play a part in the ongoing growth of common law. The Judicial Committee of the Privy Council has commented that:

> "*In considering what natural justice requires, it is relevant to have regard to international human rights norms set out in treaties to which the state*

> *is a party whether or not those are independently enforceable in domestic law.*"

Lewis v. Attorney General of Jamaica, [2001] 2 A.C. 50, 80.

These concepts should therefore be used in order to assist the Court in deciding whether exhibiting a defendant in restraints during the sentencing phase of his trial amounts to a denial of due process, a cruel and unusual punishment and a fundamental breach of his civil liberties.

In *Trop v. Dulles*, 356 U.S. at 100-01, the Supreme Court proposed a standard for interpreting the phrase "*cruel and unusual*" and thus whether a punishment was proscribed by the Eighth Amendment.

> "*The basic concept underlying the Eighth Amendment prohibition is nothing less than the dignity of man. While the state has power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards*."

Id. at 100.

The Court opined that the Eighth Amendment "*must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.*" *Id*. at 101.

The importance of the continuing development of fundamental standards is emphasized in other common law jurisdictions. In the case of *Fisher v. Minister of Public Safety and Immigration (No. 1)*, [1998] A.C. 673, at 686, Lord Steyn commented that:

> "*The innate capacity of different areas of law to develop varies. Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced*

> *to die by hanging is at the other extreme. The law governing such cases is in transition.*"

The European Court of Human Rights refers to the European Convention on Human Rights as being a "*living instrument*" when considering the prohibition on inhuman or degrading treatment or punishment in Article 3, *see Soering v. United Kingdom* (*A/161*), 11 E.H.R.R. 439.

II. Due Process requires that trials be conducted so as to respect the dignity of the court and of the parties.

Missouri's stated reasons for restraining Petitioner during his capital trial resentencing phase were *quia timet* precautions. It argued that Petitioner's case "*presented security concerns not present in other penalty phase proceedings.*" Mo. Sup. Ct. Br. of Resp. at 9. The U.S. Supreme Court has upheld the right of judges, when "*confronted with disruptive, contumacious, stubbornly defiant defendants*," to take necessary steps to meet the circumstances of each case, *Illinois v. Allen*, 397 U.S. 337, 343 (1970). Missouri implies that Petitioner's conviction for capital murder is prima facie evidence that satisfies *Allen* and thus entitles the State to restrain Petitioner during penalty phase proceedings although insufficient to restrain him during guilt phase proceedings. This is misconceived and replete with irony.

Misleadingly, Missouri characterizes Petitioner's argument as "*grounded on the presumption of innocence.*" Mo. Sup. Ct. Br. of Resp. at 11. Petitioner makes no such claim but rather points out that this court's reasoning in *Allen* made no mention of the presumption of innocence as a basis for its decision. Mo. Sup. Ct. Br. of Pet. at 6. Petitioner's

arguments are primarily founded in Missouri's alleged violations of the Fifth Amendment's prohibition against compelled self-incrimination, the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Equal Protection Clause. Mo. Sup. Ct. Br. of Pet. *passim*.

Amici propose an alternative analysis supporting Petitioner. Missouri failed to accord Petitioner, during the resentencing phase of his trial, the dignity and respect that, absent contumacious or violent behavior, common law due process affords all defendants throughout their trials. In *Allen*, Justice Black stated that "*to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort*" and that "*use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.*" *Id.* at 344. While the restraints employed in the present case were less incapacitating than those described in *Allen*, nevertheless the sight of an orderly defendant wearing shackles and a belly chain in a trial is unnecessarily demeaning, degrading and immeasurably prejudicial to the defendant.

The position at common law in England and Wales is broadly similar to that described in *Allen*:

> "*As to whether or how a defendant is to be restrained during his trial is a matter which falls within the judge's discretion but the principle in general must be that unless there is danger of escape or violence the defendant ought not to be handcuffed or otherwise restrained in the dock or, it goes without saying, in the witness box. (See R -v-Vratsides (1998) CLR 251) Usually there are other means of protecting the public and preventing*

> *escape which involve less risk of prejudice to a defendant*."

R. v. Mullen (Thomas); R. v. Mustapha, No. 9800906X5 & 9801555X5 (C.A. (C.D.) May 5, 2000) (available on Westlaw as 2000 WL 571186) at para 26.

The disquiet felt by Justice Black in *Allen* is of the kind that would lead an English court to apply the 'safety test' propounded by Widgery LJ:

> "*It has been said over and over again throughout the years that this court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this court should not lightly interfere.*
>
> *[W]e are [. . .] charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.*"

R. v. Cooper (Sean), [1969] 1 Q.B. 267, 271.

Absent disorderly or violent behaviour, Petitioner is entitled to be treated in the courtroom with the inherent dignity and respect to which all persons are entitled. The United States has recognized such entitlement in the

declarations of human rights and conventions whose proclamations and agreements it has joined. See, for example, the preamble to the Universal Declaration of Human Rights:

> "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*"

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt.1, U.N. Doc. A/810 at 71 (1948). See also article 2(1) of the International Covenant on Civil and Political Rights requiring that:

> "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ".*

And article 7 agreeing that

> "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . . ".*

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). Finally the United States has also ratified the Convention Against Torture. Article 16(1) provides:

> "*Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or*

> *acquiescence of a public official or other person acting in an official capacity. . . . ".*

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, [Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)].

The meaning of the phrase "*degrading treatment*" in article 3 of the European Convention on Human Rights has been considered by the European Court of Human Rights in a number of cases. In *Mouisel v. France (67263/01)*, (2004) 38 E.H.R.R. 34, the court had to consider whether the use of restraints applied to a convicted armed robber during medical treatment in hospital amounted to degrading treatment. In holding unanimously that such treatment breached article 3, the Court reiterated that:

> "*According to its case law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art.3 of the Convention. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. . . . Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Art.3. . . . "*

Id. at para. 37.

In *Raninen v. Finland (20972/92)*, (1998) 26 E.H.R.R. 563 the court had to consider whether handcuffing in

public a Finnish national, arrested for avoiding military service, amounted to degrading treatment in breach of article 3:

> "*. . . Article 3 of the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. In order to fall within the scope of Article 3, the ill treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case . . . Furthermore, in considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. . . . In this connection, the public nature of the punishment or treatment may be a relevant factor. At the same time, it should be recalled, the absence of publicity will not necessarily prevent a given treatment from falling into that category: it may well suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others.*"

Id. at 587-8.

A reading of *Mouisel* and *Raninen* shows that the European Court of Human Rights will find degrading treatment in breach of the Convention in cases where the degrading treatment has fallen well short of physical maltreatment but where the degradation has been compounded by its public exhibition.

In *Namunjepo & Ors v. The Commanding Officer, Windhoek Prison & Anor*, 2000 (6) BCLR 671 (NmS)

available as 1999 SACLR LEXIS 96, the court had to consider whether the placing of five prisoners in chains was an infringement of their constitutional rights to dignity and whether their rights to be free from torture, cruel, inhuman or degrading treatment or punishment had been violated.

> *"Whatever the circumstances the practice of using chains and leg irons on human beings is a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited so that it cannot stray*
>
> * * *
>
> *I am therefore of the opinion that the placing of a prisoner in leg irons or chains is an impermissible invasion of article 8(1) and contrary to article 8(2)(b) of the Constitution as it at least constitutes degrading treatment.*"

Namunjepo & Ors v. The Commanding Officer, Windhoek Prison & Anor 2000 (6) BCLR 671 (NmS) available as 1999 SACLR LEXIS 96 at 37-8.

In *Blanchard & Ors v. Minister of Justice, Legal and Parliamentary Affairs & Anor,* [1999] ICHRL 108 URL: http://www.worldlii.org/int/cases/ICHRL/1999/108.html, a Zimbabwean court in considering the International Covenant on Civil and Political Rights (ICCPR), 1966 and Art 7 United Nations Standard Minimum Rules for the Treatment of Prisoners, rls 87, 88(1), ruled that the use by prison authorities of leg-irons and handcuffs, except for the prevention of escape during transportation or to restrain violent behavior in the absence of other effective methods, was condemned. Although persons in custody do not possess the full range of freedoms as unincarcerated

individuals, any restraints imposed upon them must be circumscribed and absolutely necessary.

Missouri's treatment of Petitioner was public, degrading and served no compelling State purpose in the circumstances of this case. *Amici* urge the Court to find that Missouri failed to afford Petitioner that due process required by the international interpretation of the common law and Fifth and Fourteenth Amendments of the Bill of Rights.

III. Unwarranted restraint of a capital defendant during the penalty phase of trial constitutes compelled self-incrimination and inability to confront a witness against him.

Article 6 of the European Convention on Human Rights and the Human Rights Act 1998 guarantee the right to a fair trial. According to *Moreira de Azevedo v. Portugal (A/189)*, (1991) 13 E.H.R.R. 721 at paragraph 65, this is to be given a broad and purposive interpretation. The right to a fair trial includes "*the right of anyone charged with a criminal offence . . . to remain silent and not to contribute to incriminating himself.*" In *Saunders v. United Kingdom (19187/91)*, (1997) 23 E.H.R.R. 313 at 334, the European Court of Human Rights described the right to silence and the right not to incriminate oneself as a generally recognized international standard that lay at the heart of a notion of fair procedure under Article 6. The latter right presupposed that the prosecution in a criminal case must prove its case without resort to evidence obtained through methods of coercion and oppression in defiance of the will of the accused. In this sense, the privilege against self-incrimination was "*closely linked*" to the presumption of innocence. See *I J L v. United Kingdom (29522/95)*, (2001) 33 E.H.R.R. 11, and *Serves v. France*

(20225/92), (1999) 28 E.H.R.R. 265, *Condron v. United Kingdom (35718/97)*, (2001) 31 E.H.R.R. 1.

Article 6(2) guarantees the presumption of innocence in criminal proceedings. Pre-trial publicity involving statements by police officers or other public officials to the effect that an accused person is guilty of an offense with which he is charged may amount to a violation of Article 6(2) (*Allenet de Ribemont v. France (A/308)*, (1995) 20 E.H.R.R. 557). The appearance of Petitioner in chains speaks as loudly to the minds of a jury as the words of police officials, witnesses and media reports.

American authorities are in accord with these international norms. The Fifth Amendment as applied to the States by the Fourteenth Amendment requires that no person shall be compelled in any criminal case to be a witness against himself. Although during the sentencing phase the defendant no longer enjoys the presumption of innocence, there are still other issues to be tried between him and the State. During that phase the defendant should retain all other common law due protections as long as there are issues to be tried.

This court has said that "*[u]nder the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. . . . By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition.*" Rehnquist CJ in *Lowenfield v. Phelps,* 484 U.S. 231, 244 (1988). The sentencing phase of a capital trial is accordingly a fact-finding process where evidence is weighed by the jury and presumptions in favor of the defendant must be overcome by jury determination.

This Court has recognized the independent importance of the jury in the sentencing phase and their necessity to determine the factual issues during penalty that can result in a death verdict. The penalty process is afforded Constitutional protections. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court stated that "*[I]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.*" *Id.* at 602. The jury's role and right to determine that death is the appropriate punishment, beyond a reasonable doubt, cannot be diminished by the State's use of shackling to create an image of dangerousness as a tactic to inflame their passions.

> "*The same dictates of text and policy that ensure that a criminal defendant may be deprived of his or her liberty only after the prosecution has overcome the presumption of innocence at trial apply with equal, if not greater, force to require that the prosecution overcome the presumption of life in a capital sentencing proceeding before a defendant can be put to death.*"

Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing,* 94 Yale L.J. 351 at 360 (1984) (Beth S. Brinkmann)

Six States have capital sentencing schemes where the jury must or may find the defendant to be a future danger to the public if he is to be placed in the narrower class of defendants eligible for the death penalty. In Texas one of the statutory questions for the jury is "*whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society*" (Vernon's Ann.Texas C.C.P. Art. 37.071).

In other States statutory aggravators include: whether "*[t]he defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society*" (Idaho Statute § 19-2515); in Oklahoma, whether "*[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society*" (21 Okl.St.Ann. § 701.12); in Oregon, one of the issues to be submitted to the jury is "*Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society*" (O.R.S. § 163.150); in Virginia, "*[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability . . . [that the accused] would commit criminal acts of violence that would constitute a continuing serious threat to society*" (Va. Code Ann. § 19.2-264.4); and in Wyoming aggravators include an assessment whether "*[t]he defendant poses a substantial and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence*" (W.S.1977 § 6-2-102).

When a jury is charged upon oath with making a determination such as those above, it cannot help but notice if the state finds it necessary to restrain the defendant in the courtroom. Jurors might well conclude, consciously or subconsciously, that the explanation or one of the explanations for such restraint is that the defendant is presently dangerous. In such circumstances the defendant can be said to have been compelled to provide mute testimony against himself.

Such a practice is manifestly unjust and unconstitutional in the jurisdictions mentioned. However, even in

those jurisdictions where there is no explicit requirement for jurors to find future dangerousness, empirical research conducted by the Capital Jury Project has shown that dangerousness is always on the minds of capital jurors and is, thus, at issue in virtually all capital trials – see John H. Blume, et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 402 *et seq*.

Washington State has just recently addressed this issue, squarely on point, and decided that even a jury's glimpses of a defendant's ankle shackles was prejudicial. *In re Personal Restraint Petition of Cecil Emile Davis*, ___ P.3d. ___, 2004 WL 2473459 (Wash.) (Nov. 4, 2004) (en banc). In *Davis*, the court found that the image of Davis' shackled ankles may have given jurors a negative inference as to his character:

> "*Although there is no evidence that any juror saw Petitioner in shackles during the penalty phase, we cannot be assured that any negative inference as to Petitioner's character was cured. In the penalty phase, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.*"

Id., at headnote *id.* 22

The glimpses of the shackles were more important during the sentencing phase than the trial, where the evidence against him was overwhelming, wrote Justice Faith Ireland for the majority:

> "*Although the opportunity to observe Davis in shackles was partial and fleeting . . . the balance must tip in Davis' favor in the penalty phase.*"

Id.

In an earlier case, the Washington Supreme Court addressed obvious shackling in a capital case, facts more closely to Deck's case, and reversed the case for a new penalty phase:

> *"Here, the issue is the possible impact which shackling the Defendant may have had on the sentencing decision, particularly in connection with the question of future dangerousness. It is undisputed that placing the [D]efendant in restraints indicates to the jury that the Defendant is viewed as a 'dangerous' and 'unmanageable' person, in the opinion of the court, who cannot be controlled, even in the presence of courtroom security."*

State v. Finch, 137 Wash.2d 792 at 795, 975 P.2d 967 (1999) (cited with approval in *Davis*).

Finally, the Sixth Amendment as applied to the States by the Fourteenth Amendment requires that a defendant be confronted with the witnesses against him. A restrained defendant who is compelled to mutely testify against himself has no effective means of confronting himself as a witness. Defendants who are confronted with forensic analysis of samples of body fluids or DNA compulsorily taken from them can challenge the accuracy of such evidence. Defendants presented to the jury as a standing exhibit as to their dangerousness during the penalty phase, not only have no effective means of challenging the State's characterisation of them but effectively testify

against themselves both during presentation of the State's case and their own.

CONCLUSION

If there exists so much as a caraway seed of doubt as to the prejudicial effect of a defendant's personal confinement in chains, then the courts of the United States cannot be seen to falter in their obligations to a fair jury trial. This court should declare that a defendant may not, absent contemporaneously dangerous behavior or threats, be restrained during the penalty phase of a capital trial. Such a ruling by this court would reinforce the fundamental values of the Bill of Rights and give effect to the United States' international human rights treaty obligations.

Amici Curiae urge the Court to grant the relief sought by the Petitioner.

Respectfully submitted.[3]

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