

Sup. Ct. # 89830

**IN THE
SUPREME COURT OF MISSOURI**

STATE OF MISSOURI,

Respondent,

v.

CARMAN DECK,

Appellant.

Appeal to the Missouri Supreme Court
from the Circuit Court of Jefferson County, Missouri
23rd Judicial Circuit, Division II
The Honorable Gary P. Kramer, Judge

APPELLANT'S REPLY BRIEF

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¹ Deck maintains each of the arguments presented in his Opening Brief. Only those arguments to which he finds it necessary to reply are contained herein.

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JURISDICTIONAL STATEMENT

Deck incorporates the Jurisdictional Statement from page 14 of his Opening Brief.

STATEMENT OF FACTS

Deck incorporates the Statement of Facts from pages 15-28 of his Opening Brief.

Summarizing the evidence presented at this trial, the State includes evidence that was not presented at this trial, but rather, only at the first trial. In particular, the State includes statements Deck made to a woman before the crimes (Resp. Br. 18). Because the State chose not to present that evidence to this jury, for whatever reason, this jury never heard or considered that evidence. Evidence not heard by the jury should not be contained in the Statement of Facts.

ARGUMENT I

The State insists that subsections 1 and 2 of Section 565.040, read together, demonstrate a legislative intent that a defendant only be resentenced to life without parole “in the event a court should declare the death penalty itself, or the statutory scheme under which it is imposed, unconstitutional.” But the State fails to show how the statutory language supports this interpretation. It also fails to acknowledge the plain and ordinary meaning of the terms the Legislature chose. Even if this Court holds that the statute does not apply every time a death sentence is overturned on constitutional grounds, as the statute’s broad language seems to indicate, the Court nevertheless must grant Deck relief. The United States Supreme Court expressly recognized that unjustified visible shackling of a defendant at the sentencing trial skews the weighing process and places a thumb on death’s side of the scale. This skewing renders death sentences unconstitutional.

The primary thrust of the State’s argument is that the statute – that is, both subsections acting together – “applies only in the event a court declares either capital punishment or the statutory scheme provided by Chapter 565 ... unconstitutional” (Resp. Br. 24, 29-31, 35, 49). It argues that the Legislature enacted Section 565.040 to meet two goals: (1) to clarify that the crime of first-degree murder was punishable by LWOP; and (2) to insure that defendants convicted of first-degree murder and sentenced to death would still be subject to a sentence – LWOP – for their crimes. (Resp. Br. 29).

But if the State's assertion were true, the Legislature would have had no need for subsection 2. Subsection 1 applies in the event that a court declares either capital punishment or the statutory scheme under Chapter 565 unconstitutional. Subsection 1 provides:

In the event that the death penalty provided in this chapter is held to be unconstitutional, any person convicted of murder in the first degree shall be sentenced by the court to [LWOP]..., with the exception that when a specific aggravating circumstance found in a case is held to be unconstitutional or invalid for another reason, the supreme court of Missouri is further authorized to remand the case for resentencing or retrial of the punishment pursuant to subsection 5 of section 565.036.

Section 565.040.1, RSMo. Cum. Supp. 2000. The exception to Subsection 1 shows that this subsection applies not just when the death penalty itself is deemed unconstitutional; it also applies when any specific step in Missouri's death penalty procedure is deemed unconstitutional. If the subsection related only to the unconstitutionality of the death penalty itself, the subsection would end in the middle of the third line of the block quote above. There would have been no need to add an exception regarding aggravators. The exception shows that the Legislature intended this subsection to apply when either the death penalty itself and/or some provision of the death penalty statute are deemed unconstitutional.

The Legislature must have intended Subsection 2 to have some purpose other than what is provided in Subsection 1. After all, the Legislature is presumed not to have

inserted “idle verbiage or superfluous language in a statute.” *Civil Service Com’n of City of St. Louis v. Members of Bd. of Aldermen*, 92 S.W.3d 785, 788 (Mo. banc 2003). Every word of the statute should be given meaning and effect and no words treated as surplus. *Spradlin v. City of Fulton*, 982 S.W.2d 25, 262 (Mo. banc 1998). The State fails to analyze subsections 1 and 2 as distinct subsections and instead merely lumps them together, speculating about the legislative intent without looking at the specific language the Legislature chose.

The State also refuses to give the statutory language its plain and ordinary meaning. The State urges the Court to disregard the Legislature’s choice of the term “any” as describing which death sentences, found to be unconstitutional, warrant resentencing to life without parole. Citing a 1928 case, the State stresses, “[t]he word ‘any’ is not an unyielding term, but one which readily yields to the legislative intent as reflected by the context of the act” (Resp. Br. 37, citing *State ex inf. Gentry v. Long-Bell Lumber Co.*, 12 S.W.2d 64, 80 (Mo. 1928)). But the State omits the following sentence: “And when the context so indicates, the word may be construed to mean ‘one or more,’ ‘several,’ ‘some’ or ‘an indefinite number,’ etc.” *Id.* The State furthermore fails to show how the actual context of the statute supports its conjecture as to the legislative intent.

“[T]he primary rule of statutory construction is to ascertain the intent of the legislature by giving the language used its plain and ordinary meaning.” *Fast v. Marston*, 282 S.W.3d 346, 349 (Mo. banc 2009); *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 848 (Mo. banc 2009); *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 198 (Mo. banc 2009); *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208

S.W.3d 907, 909 (Mo. banc 2006). Yet the State asks this Court to disregard the plain and ordinary meaning of the statutory language. “The term ‘any’ ensures that the definition has a wide reach.” *Boyle v. United States*, 129 S.Ct. 2237, 2243 (2009), citing *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831 (2008) (phrase “any other law enforcement officer” suggests a broad meaning). “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’ ” *Ali*, 128 S.Ct at 835-36, quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (use of expansive word “any” and absence of restrictive language left “no basis in the text for limiting” the phrase “any other term of imprisonment” to federal sentences). See also *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130 (2002) (“the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 589-90 (1980) (“any” is expansive term).

Next, while acknowledging that Deck suffered a due process violation at his sentencing re-trial, the State argues that the error related to procedure in all criminal jury trials and did not directly relate to Deck’s death sentences (Resp. Br. 32, 35). The problem with the State’s argument is that it draws distinctions that the Legislature did not. The Legislature chose not to limit Section 565.040.2 as the State suggests, but rather used broad, expansive terms: “In the event that any death sentence is held to be unconstitutional....” Other than one delineated exception regarding aggravators, the Legislature did not limit the type of constitutional error that would warrant resentencing. As this Court recognized in *State v. Whitfield*, 107 S.W.3d 253, 271 (Mo. banc 2003):

[Section 565.040.2] expressly states that a defendant whose sentence is vacated on constitutional grounds shall be resentenced to life in prison. It does not ... state that ... defendants whose sentences are overturned on procedural grounds shall receive new trials.

Apparently, the Court considered the constitutional error in *Whitfield* a “procedural” error, yet granted relief under Section 565.040.2 all the same.

Even if this Court holds that the statute does not apply every time a death sentence is overturned on constitutional grounds, as the statute’s broad language seems to indicate, the Court nevertheless must grant Deck relief. Despite the State’s assertions to the contrary (Resp. Br. 32-36), the United States Supreme Court held that Deck’s sentences were unconstitutional and that the shackling error influenced the sentencing determination. *Deck v. Missouri*, 544 U.S. 622, 633 (2005). Deck’s sentences were rendered “unconstitutional” because they resulted from a weighing process that had been skewed in favor of death.

The Supreme Court has recognized that errors at trial, whether they relate to invalidated sentencing factors or the unjustified use of visible shackles, can so skew the weighing process as to result in unconstitutional death sentences. In *Brown v. Sanders*, 546 U.S. 212, 220-21 (2006), the Supreme Court held that a sentence can be rendered “unconstitutional” by an invalidated sentencing factor “by reason of its adding an improper element to the aggravation scale in the weighing process...” The problem is “the skewing that could result from the jury’s considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty.” *Id.* at 220

(emphasis in original). “[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death’s side of the scale.” *Id.*, quoting *Stringer v. Black*, 503 U.S. 222, 232 (1992).

The same kind of skewing occurred in Deck’s case, rendering his sentence unconstitutional. The Supreme Court specifically recognized that the use of visible shackles in the sentencing trial can be a “thumb [on] death’s side of the scale.” *Deck*, 544 U.S. at 633. The shackling “almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community – often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point.” *Id.* Shackling “also almost inevitably affects adversely the jury’s perception of the character of the defendant.” *Id.* As a result, shackling in the sentencing trial, “inevitably undermines the jury’s ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive – when it determines whether a defendant deserves death.” *Id.*

Deck’s sentences were rendered “unconstitutional” within the plain and ordinary meaning of that term. Under the plain and ordinary terms of Section 565.040.2, he must be resentenced to life without parole.

ARGUMENT II

The State mischaracterizes the record when it states that Venirepersons Coleman and Ladyman stated they could not follow the court’s instructions and that they refused to answer questions. Each venireperson unambiguously responded that they could consider both punishments but just would not want to be the person to sign the verdict form for death. These responses did not disqualify the venirepersons; they merely showed that Ms. Coleman and Mr. Ladyman appreciated the gravity of sending another person to his death. The State is not entitled to stack the jury with pro-death jurors.

“[A] criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.” *Uttecht v. Brown*, 551 U.S. 1, 9 (2007). The State may remove venirepersons for cause only when the venirepersons’ views on the death penalty “would prevent or substantially impair the performance of their duties as jurors in accordance with the instructions and their oath.” *Wainwright v. Witt*, 469 U.S. 412 (1985); *Adams v. Texas*, 448 U.S. 38 (1980). The State may not otherwise strike venirepersons, even if they are firmly opposed to the death penalty; would hesitate to impose a death sentence; would “invest their [death penalty] deliberations with greater seriousness and gravity;” or if the prospect of the death penalty would “involve them emotionally.” *Witherspoon v. Illinois*, 391 U.S. 510, 521 (1968); *Morgan v. Illinois*, 504 U.S. 719, 732 (1992)(*Witherspoon* limits the State’s ability to remove for cause jurors who “might hesitate” to return a death

sentence”); *Lockhart v. McCree*, 476 U.S. 162, 176 (1986) (“those who firmly believe that the death penalty is unjust”); *Adams*, 448 U.S. at 49-51 (cannot exclude jurors “whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected”); *Boulden v. Holman*, 394 U.S. 478, 483-84 (1969) (“fixed opinion” against the death penalty); *State v. Roberts*, 948 S.W.2d 577, 597 (Mo. banc 1997).

Excluding jurors on any broader basis creates a jury “uncommonly willing to condemn a man to die.” *Witherspoon*, 391 U.S. at 521. It “unnecessarily narrows the cross section of venire members” and stacks the deck against the defendant. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987), quoting *Witherspoon*, 391 U.S. at 523. Any death sentence imposed by a “jury organized to return a verdict of death” is constitutionally impermissible. *Morgan*, 504 U.S. at 732, quoting *Witherspoon*, 391 U.S. at 520-23; *Lockhart*, 476 U.S. at 179-80. “Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.” *Witherspoon*, 391 U.S. at 523.

By culling the jury of venirepersons whose only fault was to understand the gravity of sentencing another person to die, the State denied Deck his right to an impartial jury and tipped the scales toward death. Venirepersons Coleman and Ladyman were fully qualified to serve. Both unambiguously stated that they could consider both punishments. Neither expressed an inability to follow the court’s instructions or obey their oath.

Contrary to the State's assertions on appeal, these venirepersons never expressed an unwillingness to follow the court's instructions or obey their oath (Resp. Br. 66-67); nor did Ms. Coleman "refuse[] to directly answer the question" or "ultimately [say] that she could not promise that she would be able to follow the court's instructions on this matter" (Resp. Br. 53, 55). Ms. Coleman stated that she could "give meaningful, realistic, honest consideration to a sentence of death" and equal consideration to a sentence of life without parole (Tr. 278). She stated that she did not know if she could sign the death verdict and would not promise that she would be able to sign it (Tr. 278-80). Although she could not give a yes or no answer, she answered the prosecutor's questions directly (Tr. 279-80). And the prosecutor himself acknowledged that Mr. Ladyman could consider both punishments (Tr. 450). At trial, the State did not assert that either Mr. Ladyman or Ms. Coleman could not follow the court's instructions or obey their oath, but rather just cited their reluctance or inability to sign the death verdict as foreperson (Tr. 447, 450-51).

The State argues that each of the jurors must be "equally qualified" (Resp. Br. 67). It argues that because Ms. Coleman and Mr. Ladyman were reluctant to be the sole juror to sign the death verdict, they were not as qualified to serve and could be excused for cause (Resp. Br. 67). But jurors are either qualified or they are not; there are no varying levels of qualification. As long as they can follow the court's instructions and obey their oath, they are as equally qualified as any other member of the jury. The State is not entitled to a jury stacked with people who are gung ho to impose a death sentence.

Neither the instructions nor the oath require any particular juror to serve as foreperson. Although these venirepersons did not want to be the one juror to sign the verdict form, their feelings merely demonstrated that they understood the gravity of sending another human being to his death. They cannot be struck for cause on this basis. *Adams v. Texas*, 448 U.S. 38, 49-51 (1980) (cannot exclude jurors “whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected”). In fact, jurors should “treat their power to determine the appropriateness of death as an ‘awesome responsibility.’” *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985). The Supreme Court has acknowledged that it is “a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State.” *Id.* at 329.

The State posits that these venirepersons, if allowed to serve, might convince other jurors not to sign the verdict form (Resp. Br. 67). Logically, these two jurors would have no motivation to do so; they stated they could impose death, but just would not want to be the one to sign the verdict. If other jurors were willing to sign, these two jurors would have no motivation to convince them otherwise. The State’s real concern was that these two venirepersons recognized the gravity of sentencing a man to die, and that this understanding, this greater seriousness, would rub off on the other jurors and make it harder to obtain a death verdict.

This Court must reverse.

ARGUMENT V

The State argues that there was no significant change in Officer Wood's testimony between the prior trials and this one (Resp. Br. 102). The record refutes this argument. Wood testified at the suppression hearing that Deck drove through the parking lot with no lights on (1st Tr.101-102). He drove 30 feet past Wood and pulled into a parking spot (1st Tr.102). At the first trial, he again testified that Deck drove past him without his lights on (1st Tr.566). At this penalty phase retrial, however, Wood testified that Deck initially was driving through the parking lot with his lights on (Tr. 550). He passed Wood with the lights on but turned off his lights before he pulled into a parking spot (Tr. 550). Wood clarified:

Q: But as it passes your car, and as it's pulling into the parking spot, that's when it turns off the headlights?

A: Before coming to a complete stop, yes.

(Tr. 569). This testimony was a dramatic change from Wood's earlier testimony and it centered on an essential fact. There is nothing inherently suspicious about Deck turning his lights off as he was pulling into a parking spot. An early 80's-model car, as Deck was driving (Tr. 508), would not have had headlights that shut off automatically when the car's ignition was turned off, as most current models do. Thus, he would need to remember to shut off the lights and might be more likely to do that as the car was rolling to a stop lest he forget and end up with a dead battery. Many people still shut off their lights before coming to a complete stop, to prepare for shutting the car off. The law of

the case rule should not apply. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-30 (Mo. banc 2007).

The State also incorrectly argues that even if Deck had been seized illegally, the evidence obtained from the car and his statements to the police would still have been admissible (Resp. Br. 105). “Generally, evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as fruit of the poisonous tree.” *State v. Miller*, 894 S.W.2d 649, 654 (Mo. banc 1995), citing *Nardone v. United States*, 308 U.S. 338, 341 (1939). The question is whether the evidence was obtained “by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Miller*, 894 S.W.2d at 654. While Deck eventually agreed to speak with the police and gave a confession, the State must show that his consent to speak was voluntary and sufficiently independent from the prior illegality to purge the taint of that illegality. *Id.* at 655. Three factors must be considered in determining whether a confession was obtained by exploitation of an illegal arrest: (1) the temporal proximity of the illegal arrest and the confession; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *Id.* at 656, citing *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

While a time period of forty-five minutes was deemed sufficient to purge the taint of illegality in *Rawlings v. Kentucky*, 448 U.S. 98, 107 (1980), the Court stressed the conditions of that detention. The Court recognized that, “under the strictest of custodial conditions such a short lapse of time might not suffice to purge the initial taint.” *Id.* The Rawlings defendants were allowed to move freely throughout the first floor of their

house, get themselves coffee from the kitchen, and even play an album on the stereo. *Id.* at 108. Deck, in contrast, was placed in police custody immediately, transported from St. Louis County to Jefferson County, and agreed to waive his *Miranda*² rights about two hours after his arrest (2d Tr. 431). This was not enough time, given the circumstances, to purge the initial taint. In addition, no circumstances intervened. The police exploited Deck's illegal seizure to obtain evidence and his confession. That evidence and the confession should have been excluded.

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

ARGUMENT VII

The State criticizes Deck for raising this issue after it has been decided adversely in the past (Resp. Br. 116-17). But the Court should re-assess this issue in light of *Smith v. Spisak*, a case currently pending at the United States Supreme Court (SC#08-724, argued Oct. 13, 2009). The Court is reviewing the Sixth Circuit's opinion in *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), which held that Ohio's jury instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988). The Sixth Circuit held that there was a reasonable probability that a juror would have been foreclosed from considering and giving effect to mitigating evidence. *Spisak v. Mitchell*, 465 F.3d at 709-10. One juror voting for a death sentence could have prevented the other eleven jurors from voting for a life sentence, since the jury could consider a life sentence only after unanimously rejecting death. *Id.*

So, too, under MAI-CR3d 313.44, the jury would be compelled to proceed to Step 4 even if eleven jurors found that the evidence in mitigation outweighed the evidence in aggravation. Since, under the instruction, Step 3 requires unanimity, one juror could prevent the imposition of a sentence of life without parole. A single juror would prevent the remaining eleven from giving effect to the mitigating evidence, in violation of *Mills*.

CONCLUSION

Deck incorporates the Conclusion from Page 136 of his opening Brief.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid, along with a disk containing the brief, to Evan Buchheim, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 24th day of October, 2009.

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 4,159 words, which does not exceed the 7,750 words allowed for a Reply Brief.

The disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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