

## **Summary of SC93882, *State of Missouri v. Jesse Driskill***

Appeal from the Laclede County circuit court, Judge Kenneth M. Hayden  
Argued and submitted October 15, 2014; opinion issued March 31, 2015

**Attorneys:** Driskill was represented by Rosemary E. Percival of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Shaun J. Mackelprang of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man convicted of murder and sentenced to death appeals, arguing in part he had an anxiety disorder that rendered him incompetent to stand trial. In a 5-2 decision written by Judge George W. Draper III, the Supreme Court of Missouri affirms the trial court's judgment. The man failed to demonstrate he was not competent to stand trial, and there was no evidence the man was incompetent to stand trial without being medicated. The trial court did not err in granting the man's requests to leave the courtroom and in finding he voluntarily waived his right to testify. The trial court also did not err in admitting the testimony of three relatives of the victims or photographs of the victims. In its independent review, the Court finds the imposition of the death penalty meets the statutory requirements and is not disproportionate to similar cases.

Judge Patricia Breckenridge dissents. She would send the case back for a new penalty phase trial, finding that the trial court committed reversible error in not ordering a competency examination, as required by state law, after the man's condition deteriorated to the extent he could not be present in the courtroom or participate in the proceedings by closed-circuit television and communicate with his counsel by telephone.

**Facts:** Concerned family members found an elderly husband and wife dead in July 2010 in the couple's Highlandville, Missouri, home. Autopsies revealed that the wife had been killed by a near-contact gunshot wound above her left eye and that the husband had died from asphyxiation from a plastic bag wadded up in his throat. The husband also had been shot through his face and neck. The wife also had sustained blunt trauma along her right eyebrow, resulting in a laceration and a skull fracture; had injuries consistent with sexual assault; and had extensive burns on her face, head, back and legs, with burned paper in her groin area. Vaginal swabs taken from the wife confirmed DNA present from Jesse Driskill, who in the meantime had told friends that he had invaded a couple's home, robbed them of money, raped the wife and killed them, then tried to clean up the evidence by pouring bleach on the wife and burning her. Law enforcement officers arrested Driskill, and the state charged him with two counts of first-degree murder, one count of first-degree robbery, one count of forcible rape, one count of forcible sodomy and five counts of armed criminal action and indicated it would seek the death penalty. Twice before Driskill's trial began in August 2013, his counsel asked the trial court to permit Driskill to leave the courtroom and participate in proceedings via a closed-circuit television in the event he had a panic attack, explaining to the court that Driskill suffered from anxiety disorder and intermittent explosive disorder. During jury selection – after Driskill was permitted to leave the courtroom upon his request – the trial court asked Driskill's counsel for the reports of two experts who had

evaluated Driskill's competency to stand trial, one in May 2013 determining he was incompetent to stand trial without being medicated and the other in July 2013 determining he was competent to stand trial without being medicated. The court determined that Driskill was competent to proceed. Several times during the trial, the court permitted Driskill to leave the courtroom, and it allowed him to participate in the proceedings by watching on a closed-circuit television and using a telephone to communicate with his counsel, although several times Driskill declined to participate. The trial court several times inquired of Driskill about how he was feeling, whether he understood the proceedings and whether anyone was coercing him. Ultimately the jury found Driskill guilty as charged, and after the penalty phase of the trial, the jury recommended the death penalty. The trial court sentenced Driskill to death for the murder convictions, a consecutive 15-year prison term for the burglary conviction and consecutive life sentences for the remaining convictions. Driskill appeals.

### **AFFIRMED.**

**Court en banc holds:** (1) The trial court did not err in accepting the guilty verdicts and in sentencing him; Driskill failed to demonstrate he was not competent to stand trial. A trial court's determination regarding a defendant's competency is a factual determination that will be upheld unless there is no substantial evidence to support it, and the defendant bears the burden of proving he is incompetent. Although Driskill points to various occurrences at trial that he believes called into question his competency, none are persuasive. The trial court reviewed the two experts' examinations of Driskill made in the months prior to his trial, observed him in the courtroom and questioned him as to his state of mind, seeking to determine whether he was able to assist in his defense. After receiving all this information, the court determined an additional competency evaluation was not necessary. Any time Driskill believed he was unable to remain in the courtroom, he was accommodated. Throughout both phases of the trial, the court took adequate precautions to ensure that, when Driskill believed he would suffer a panic attack, he was able to leave the courtroom, and when Driskill actually suffered one panic attack during jury selection, the trial court recessed until it ensured Driskill had calmed down and was able to resume assisting in his defense. The trial court continually asked Driskill how he felt and whether he was able to assist his counsel, and Driskill presented no additional evidence that he was unable to understand the proceedings against him or was unable to participate in his own defense at any point during the guilt or penalty phases of his trial. Substantial evidence supports the trial court's finding that Driskill was competent to stand trial.

(2) The trial court did not plainly err in granting Driskill's requests not to remain in the courtroom. The record demonstrates Driskill never objected that he was denied his right to be present when he appeared by closed-circuit television. A defendant may absent himself from the courtroom purposely and, thereby, waive his right to be present, even without a statement on the record. A defendant may not be inclined to remain in the courtroom during certain penalty phase testimony given that such testimony would concern topics the defendant may find sensitive, including childhood abuse, educational levels and mental abilities. The trial court repeatedly questioned Driskill on the record regarding whether he wished to remain in the courtroom and whether his choice not to be present was his voluntary choice. Any time Driskill decided he did not want to remain in the courtroom, he executed a valid waiver on the record of his right to be present. Any unintended consequences as to conclusions the jury may have drawn from

Driskill's requests to remove himself from the courtroom do not affect the validity of his waiver. Driskill fails to present any argument or reason why he was prevented from appearing or that his absence was anything other than intentional.

(3) The trial court did not err in finding Driskill voluntarily waived his right to testify during both the guilt and penalty phases of his trial. Driskill understood that he had the right to remain silent and that there would be no inference drawn from his silence. He told the trial court "I want to testify, but I just know I can't. I mean I'm not good with people." The court questioned him multiple times, seeking to verify that no one had threatened him or coerced him into choosing to waive his right to testify, but he never altered his decision not to testify or his response that he was not being threatened or coerced into not testifying. His responses to the court's examination were unequivocal, clear and straightforward. The record is devoid of any mental anguish that could lead one to believe Driskill did not voluntarily relinquish his right to testify or that he was being coerced. There is no evidence, and Driskill makes no argument, that there was any coercion forcing him to waive his right to testify. He also fails to present any evidence that he was disabled pursuant to any provision of the Americans with Disabilities Act or that he was denied equal access to the witness stand, and the trial court accommodated Driskill so he did not appear in the courtroom when he suffered from a panic attack. While Driskill expressed some interest in testifying, he consulted with counsel and voluntarily chose to waive his right to testify.

(4) The trial court did not err in not continuing the trial so that Driskill be medicated during his trial. Driskill failed to show the trial court abused its discretion in failing to grant a continuance. Whenever Driskill felt he needed to leave the courtroom, the trial court permitted him to do so and granted a recess. The court made multiple inquiries of Driskill and his counsel as to whether he was able to proceed with trial and assist in his defense throughout the trial. There is no showing Driskill was incompetent to stand trial without being medicated.

(5) The trial court did not err in denying the jury's request to view all the exhibits admitted into evidence during the penalty phase of the trial. The court previously had informed both the state and Driskill that, if the jury requested exhibits, either all or none of the exhibits would be provided. Driskill wanted to provide the jury all the records – containing more than 1,100 pages – supporting the testimony of two doctors who testified on his behalf, but he objected to giving the jury the state's exhibits of his prior convictions, even if they were redacted. Ultimately, the state and Driskill were unable to reach an agreement regarding the exhibits, and the court did not send any exhibits to the jury, telling it that it must be guided by the instructions given and the evidence as the jurors remembered it. The court did not err in not providing the jury with a voluminous, one-sided record.

(6) The trial court did not err in overruling Driskill's objections as to the testimony of three relatives and the admission of photographs of the victims and in admitting this evidence. Victim impact evidence is admissible under the state and federal constitutions, and the trial court has broad discretion to admit whatever evidence it determines may be helpful to the jury in assessing punishment. Driskill presents no argument as to how the relatives' brief statements of loss were so excessive and emotionally charged that his sentencing was rendered unfair.

(7) In its independent proportionality review, this Court: finds the death sentence was not imposed under the influence of passion, prejudice or other factor; finds there was sufficient evidence supporting the jury's findings, beyond a reasonable doubt, of at least one statutory aggravating circumstance for each victim; and has not identified any similar case that would support a finding that Driskill's sentence is disproportionate. The evidence of Driskill's guilt is overwhelming, and the imposition of the death penalty meets the statutory requirements.

**Dissenting opinion by Judge Breckenridge:** The author would hold that the trial court's failure, based on information before it in the record, to order an independent psychiatric examination to determine Driskill's competency was reversible error. In requesting the examination, Driskill asserted he had a mental condition that precluded him from being present in the courtroom so that he could consult with his counsel and assist in his defense. Rather than initiating the proceedings required by section 552.020.2, RSMo and order an examination of Driskill to determine his competency, the trial court attempted to address the obvious issues raised by Driskill's behavior during trial by repeatedly questioning him and his counsel and recessing the trial to give him time to recover from his anxiety or panic attacks. A defendant's demeanor at trial is relevant to the ultimate determination of competence, but it cannot replace the required proceedings to determine competency fully. While the trial court's accommodations may have been sufficient for Driskill to participate meaningfully in the guilt phase of his trial, his condition had deteriorated significantly by the penalty phase of trial, and he no longer was able to be present in the courtroom or participate in the proceedings by closed-circuit television and communicate with counsel by telephone. As such, the author would find the accommodations were not sufficient to protect Driskill's rights during the penalty phase and, therefore, would reverse the judgment and remand (send back) the case for a new penalty phase trial.