

## **Summary of SC91746, *Carman L. Deck v. State of Missouri***

Appeal from the Jefferson County circuit court, Judge Gary P. Kramer  
Argued and submitted March 27, 2012; opinion issued July 3, 2012

**Attorneys:** Deck was represented by Jeannie Willibey of the public defender's office in Kansas City, (816) 889-7699; and the state was represented by Evan J. Buchheim 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 first-degree murder and sentenced to death appeals the circuit court's denial of his request for post-conviction relief. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the circuit court's judgment. The circuit court did not clearly err in determining the man's counsel was not ineffective in not asking prospective jurors to commit to the weight they would give certain mitigating evidence before hearing all the evidence, which would have been improper had counsel asked it. Counsel was not ineffective for not calling additional mitigating witnesses whose testimony would have been repetitive, inconsequential or otherwise not helpful to the man's defense. The man was not prejudiced by his counsel's decision not to conduct neuropsychological testing as counsel's thorough investigation did not reveal the man suffered from any neuropsychological impairment or other permanent damage from any head injuries he had suffered in his life. Counsel exercised reasonable trial strategy in not objecting to certain cross-examination of an expert witness to avoid highlighting a negative issue for the jury. The man fails to prove that, but for his counsel's failure to object to certain arguments made by the prosecution, there was a reasonable probability he would have been sentenced to life instead of death. The man is not entitled to a new trial based on the circuit court's alleged destruction of certain juror questionnaires as nothing in the questionnaires of the 12 individuals who served on the jury during the man's penalty-phase retrial indicates any juror was biased against the defense.

**Facts:** A jury found Carman Deck guilty of two counts of first-degree murder, two counts of armed criminal action, one count of first-degree robbery and one count of first-degree burglary for the 1996 robbery and shooting deaths of James and Zelma Long. He was sentenced to two death sentences. This Court affirmed his convictions and sentences in *State v. Deck*, 994 S.W.2d 527 (Mo. banc 1999) (*Deck I*). The circuit court overruled his subsequent motion for post-conviction relief. On appeal, this Court affirmed the findings of guilt but reversed his death sentences, remanding (sending back) the case for a new penalty-phase trial. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002) (*Deck II*). He again was sentenced to two death sentences, which this Court affirmed in *State v. Deck*, 136 S.W.3d 481 (Mo. banc 2004) (*Deck III*). On further appeal, the United States Supreme Court reversed the sentences, finding that Deck was denied a fair trial because he appeared in shackles in the presence of the jury during the penalty phase without a showing that circumstances required shackling for the safety of those in the courtroom. *See Deck v. Missouri*, 544 U.S. 622 (2005). During the resulting second penalty-phase retrial, Deck again received two death sentences, which this Court affirmed. *See State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010). Deck subsequently sought post-conviction relief, which the circuit court denied. Deck appeals.

## **AFFIRMED.**

**Court en banc holds:** (1) The circuit court did not clearly err in denying Deck post-conviction relief as to his claim that his counsel was ineffective during jury selection by not asking prospective jurors whether they would view Deck's childhood experiences as a reason to vote against the death penalty. The United States Supreme Court has held that a juror may not refuse to consider mitigating evidence outright, and jurors who say they would vote automatically to impose the death penalty not only refuse to give such evidence any weight but also say plainly that mitigating evidence is not worth their consideration and that they will not consider it. *Morgan v. Illinois*, 504 U.S. 719, 728-29, 736 (1992). This case does not require, however, that counsel be permitted to ask prospective jurors how certain mitigating evidence would impact their deliberation. In fact, it would be improper to ask such a question because it would require prospective jurors to commit to the weight they would give certain evidence before they heard all evidence. As such, counsel cannot be ineffective for failing to make such an inquiry.

(2) Deck's counsel was not ineffective for not calling certain additional mitigation witnesses. Counsel's decision not to call a witness is presumed to be a matter of trial strategy and will not support a claim of ineffective assistance of counsel unless the defendant clearly establishes otherwise. *See, e.g., State v. Harris*, 870 S.W.2d 798, 817 (Mo. banc 1994). During the penalty phase, a viable defense under *Harris* is one in which there is a reasonable probability that the additional mitigating evidence from the witnesses counsel did not call would have outweighed the aggravating evidence, resulting in the jury voting against the death penalty. Here, Deck's counsel presented mitigating evidence from a child development expert and a psychiatrist as well as deposition testimony from some of Deck's family members. The family witnesses testified about Deck's difficult childhood and poor upbringing, including recounting instances of physical abuse by Deck's mother and her boyfriend and Deck's lack of emotional stability as he was moved among various family members and foster homes. The expert witnesses testified that Deck's childhood experiences gave him "no way to develop into a responsible, caring citizen." As such, any testimony from the additional witnesses Deck now claims his counsel should have presented would have been cumulative (repetitive) or inconsequential. Other witnesses Deck claims his counsel should have presented were uncooperative. As such, counsel was not ineffective for the strategic decision to tell the story of Deck's childhood without using these uncooperative witnesses. Additionally, Deck did not carry his burden to prove that, had his former fiancée been located and testified, there was a reasonable probability the jury would have voted to impose life imprisonment instead of the death penalty. Further, it was reasonable trial strategy for Deck's counsel not to call Deck's sister – who was a codefendant in the crimes – because counsel did not want the prosecution to cross-examine her about the murders. The circuit court did not err in finding that counsel was not ineffective for not calling these additional witnesses.

(3) Deck was not prejudiced by his counsel's decision not to conduct neuropsychological testing. Although he presented a list of injuries to his head, he does not present any evidence that his counsel was aware that any of these injuries caused brain damage or, independent of his own post-conviction expert's testimony, that any of these injuries caused any type of permanent damage. Deck's counsel conducted a thorough investigation into Deck's childhood and found no

evidence of brain damage or impaired psychological testing. Because counsel had no reason to believe that Deck suffered from any neuropsychological impairment, Deck was not prejudiced by the fact his counsel did not explore how to present such evidence in mitigation of punishment. Even the expert who testified during the post-conviction proceeding admitted he did not find significant or even moderate impairment on any intelligence tests he conducted of Deck.

(4) Counsel was not ineffective for not objecting to the prosecutor's cross-examination of an expert witness. Although the prosecutor's hypothetical posed to the witness, in which Deck called himself a "no-good s.o.b." was improper, the testimony of Deck's attorneys at the post-conviction hearing only bolsters the conclusion that their decision not to object was the exercise of reasonable trial strategy. One did not remember why they did not object, other than assuming they had a good reason for not doing so, while the other testified that they did not object because they did not want to highlight a negative issue for the jury. Counsel also testified that they objected quickly to shut down this line of questioning by the prosecutor.

(5) Counsel was not ineffective for failing to object to the prosecutor's arguments relating to Deck's conviction for aiding an escape from prison in 1985. On direct appeal, this Court reviewed these same statements for plain error and, after reviewing the entire record, determined that Deck was not prejudiced by these statements. *Deck IV*, 303 S.W.3d at 542-43. The standard for prejudice for ineffective assistance of counsel, however, is less exacting. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), prejudice requires a reasonable probability that the result would have been different. Looking at the prosecutor's statement here in the context of the whole record, defense counsel's failure to object did not result in prejudice to Deck under *Strickland*. Deck fails to prove that, but for counsel's failure to object to the prosecutorial misstatements, there was reasonable probability that Deck would have been sentenced differently.

(6) Deck is not entitled to a new trial based on the circuit court's alleged destruction of juror questionnaires. In October 2010, the circuit court denied Deck's motion to review juror questionnaires because "the questionnaires have been destroyed." Regardless of whether they were destroyed, copies of the questionnaires of the 12 jurors who served on Deck's jury during the penalty-phase trial have been filed with this Court and stipulated to by both parties. Nothing in the jurors' responses indicates they would be biased against the defense. Deck fails to prove prejudice because the questionnaires provide no evidence that any juror was biased.