

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

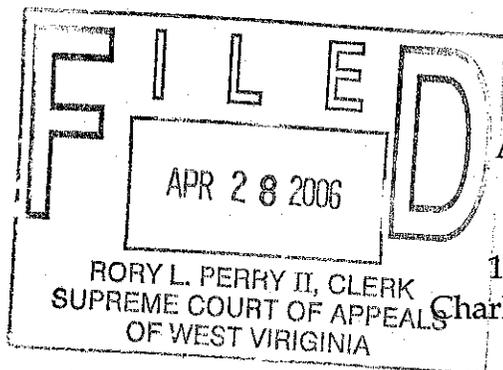
STATE OF WEST VIRGINIA,
Appellee/ Respondent,

VS.

Underlying Proceeding Below
Case No. 03-F-103
Cabell County Circuit Court

JEFFREY L. FINLEY,
Appellant/ Petitioner.

REPLY BRIEF ON BEHALF
OF APPELLANT/PETITIONER
JEFFREY L. FINLEY



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TABLE OF AUTHORITIES

Deck v. Missouri, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) 4, 5, 6

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PREFATORY STATEMENT

The State of West Virginia bases its entire argument on the premise that the presumption of innocence had fallen from the Appellant at the sentencing phase of his trial. This argument ignores the recent declaration by the United States Supreme Court that the sentencing phase of a capital trial is not conducted in a constitutional vacuum, outside the basic concepts of due process. By the State's reasoning, there could be no Due Process violation in the penalty phase of a trial, after the presumption of innocence has fallen away: any defendant could be brought before a jury bedecked in chains and straps, and there would be no violation because, according to the State, "there is no reasonable possibility that the jury would base its penalty decision on the factor of [appellant's] attire."

The State of West Virginia dedicated an inordinate amount of space within its' Brief to a vivid recounting of the terrible circumstances of Mabel Hetzer's death. The State also adopts unproven innuendo and opinion offered at trial as fact ("one can only speculate about his lack of interest and the source of funds for the beer"). These statements, as lurid, provocative and inflammatory as they might be, are nonetheless completely irrelevant to the solitary issue the Honorable Court has agreed to address in the Appeal herein.

ARGUMENT

THE PENALTY PHASE OF A HOMICIDE TRIAL, WHEREIN THE JURY RETAINS DISCRETION OVER THE SENTENCE TO BE IMPOSED ON A DEFENDANT, IS NOT CONDUCTED OUTSIDE THE PARAMETERS OF DUE PROCESS AND EQUAL PROTECTION - AS SUCH, THE APPELLANT SHOULD NOT HAVE BEEN REQUIRED TO APPEAR BEFORE HIS JURY IN RECOGNIZABLE JAIL CLOTHING.

There is no dispute between the parties herein as to an essential fact - Jeffrey Finley was forced to wear identifiable jail clothing during the penalty phase of his trial. The State asserts that because the presumption of innocence had already fallen away following the guilt phase of the trial, the non-discretionary jail attire, which was based on a "policy" of the Cabell County court system, did not constitute reversible error.

This argument ignores the controlling underlying rationale of Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007 (2005). In Deck, a decision handed down less than a year ago, the United States Supreme Court held that the use of visible shackles during the penalty phase of a homicide trial violates Due Process under the Fifth and Fourteenth Amendments to the United States Constitution.

In formulating the holding that such forced use of shackles violated Due Process, the Court cited Estelle v. Williams, 425 U.S. 501 (1976). Estelle, as the State concedes in its brief, established the rule that a defendant cannot be forced to wear prison garb during a trial. Implicit in this holding is that such actions clearly violate the presumption of innocence held by every defendant.

By acknowledging and citing Estelle, the Deck Court clearly intended to establish that the mandatory wearing of prison garb, and the forced shackling of a defendant during the penalty phase of a trial, were not mutually exclusive concepts. There is no practical difference between the use of visible shackles and the forced wearing of highly visible jail clothing.

In Deck, the Supreme Court made numerous observations regarding the practice of shackling a defendant during the penalty phase of a trial. These observations are equally applicable to the practice of requiring a defendant to wear highly visible jail clothing:

"The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases."

* * *

"[S]hackles do not undermine the jury's effort to apply [the presumption of innocence]. Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "severity" and "finality" of the sanction, is no less important than the decision about guilt."

* * *

"The appearance of the offender during the penalty phase in shackles, however, 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[.]".

* * *

"It also almost inevitably affects the jury's perception of the character of the defendant...[a]nd it thereby 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."

Deck, 544 U.S. at ___, 125 S. Ct. at 2014.

These statements reflect one clear, inescapable conclusion: that the United States Supreme Court has recognized that a defendant's rights to due process can be violated in the penalty phase of a trial, despite the departure of the presumption of innocence after the completion of the guilt phase. The Deck Court discussed the presumption, determined that it was irrelevant to errors occurring while the jury retained discretion over a criminal defendant, and concluded that Due Process violations can occur after the termination of the presumption.

An examination of the cases cited in the State's Brief indicates two clear factors: (1) none were decided after the decision in Deck, and (2) the continuing authority of these cases may be seriously questioned after this decision.

For example, the State cites to the decision of Duckett v. Godinez, 67 F. 3d 734 (9th Cir. 1995) as support for its position. However, the State's Brief does not refer to any other federal court which has adopted the Duckett rationale, and to only a single decision of a state appeals court which has adopted the Duckett holding.¹ A closer examination of this case is required.

¹ In French v. State, 778 N.E. 2d 816 (Ind. 2002), the Supreme Court of Indiana also referenced Duckett, noting that the wearing of jail clothes by a defendant in a habitual offender trial did not amount to fundamental constitutional error, due chiefly to the defendant's failure to object to the attire.

People v. Bradford, 939 P. 2d 259 (Cal. 1997), dedicated approximately one (1) page out of a 95-page opinion to the facts and law regarding the issue presented herein, and one solitary paragraph to the holding cited by the State. There are, however, profound distinctions between Bradford and the Appellant's case.

The primary distinction, which is characterized by the State as "of no matter", is the element of *judicial compulsion*. The defendant in Bradford rejected the trial court's offer to permit him to wear civilian clothing. In this case, the Appellant's request to wear civilian clothing was emphatically refused, and the Appellant accepted the trial court's invitation to object to the issue.²

Unlike the Appellant, the defendant in Bradford was offered two opportunities to procure and wear civilian clothing for the penalty phase of his trial. He declined to do so. Mr. Finley, by contrast, was *ordered* to wear jail clothing because, according to the judge, it was the "policy" in Cabell County.

The trial judge in Bradford discussed the implications of the defendant's decision to wear jail clothing, inquiring of the defendant "whether he realized that the jury might draw adverse inference from his appearance in jail attire" (Bradford, at 338) (emphasis added). The trial court herein did not advise the Appellant of any such inferences, opting instead to *invite* such "adverse inference" by requiring the Appellant to wear such clothing.

² "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." Syllabus Point 1, State Road Commission v. Ferguson, 148 W.Va. 742, 137 S.E.2d 206 (1964); Syl. Pt. 4, State v. Flanders, 218 W. Va. 208, 624 S.E. 2d 555 (2005).

The distinctions between these cases were best summarized by the

Bradford court:

"As an initial matter, it is clear from the record that the defendant was not compelled to wear county jail attire, but expressed his desire to do so, **even after having been advised of his right not to be compelled to wear such clothing.** Having been expressly informed that the jury might draw adverse inferences from his wearing of his attire, the defendant nonetheless waived that right." *Id.* [emphasis added].

As stressed in the Appellant's Brief, there is no practical legal difference between shackles and jail clothing. The visibility of shackles or manacles may be minimized to some degree; bright orange jail clothing cannot be ignored.

The State asserts that the Appellant is attempting to "muddle the issue with irrelevant information by insinuating... that the Appellant was wearing leg restraints." (Reply Brief, Pg. 7.) While the record is silent as to this issue, the Appellant has asserted that he was required to wear leg manacles during the penalty phase. The State counters this assertion by citing unknown and unrecorded statements of the Cabell County prosecutor and a trial bailiff that it is "standard procedure" that all restraints be removed before a jury.³

The State's assertion is somewhat questionable in light of two undisputed facts. First, the trial judge directed the removal of the Appellant's handcuffs just prior to the beginning of the penalty phase to permit the Appellant "to testify or write notes." This statement unquestionably indicates that the Appellant was wearing restraints when brought to the court.

³ It is notable that these sources refer to a "standard procedure" utilized by the court system, and do not specifically refer to the Appellant's trial.

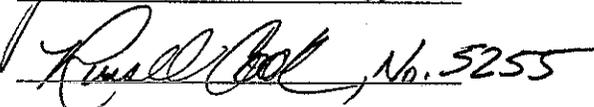
Second, the trial court required the Appellant to appear in jail garb at the remainder of the proceedings, stating "this jury already knows that he is a convict, they're the ones that convicted him." Since the Appellant was required to *dress* in the manner of a "convict", it defies common sense and basic logic that the circuit court would mandate the removal of the Appellant's leg manacles for the purpose of avoiding undue prejudice presented by his appearance in shackles.

**CONCLUSION AND
PRAYER FOR RELIEF**

For no legally justifiable or practical reason, the Appellant was forced by the Cabell County Circuit Court to appear before the jury in the penalty phase of his trial in highly visible jail clothing. It is impossible to state that there was no "reasonable possibility" that his appearance may not have had some effect on the jury.

The Appellant would pray that the Honorable Court overturn the Appellant's first degree murder conviction and remand the matter to the circuit court for a new trial.

JEFFREY L. FINLEY
By Counsel


 No. 5255

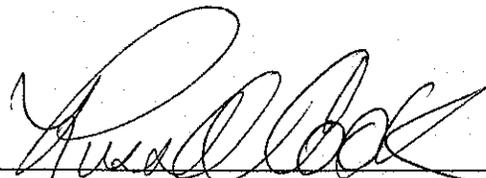
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CERTIFICATE OF SERVICE

I, Russell S. Cook, do hereby certify that I have served this REPLY BRIEF
ON BEHALF OF APPELLANT/PETITIONER, JEFFREY L. FINLEY, on the 28TH
day of APRIL, 2006, by first-class United States mail, postage prepaid, to
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