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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Benjamin, Justice, concurring:

Why in the world would the Supreme Court of Appeals of West Virginia ever accept this case for review? After all, Jeffrey Lee Finley is a convicted murderer. What he did to Mabel Hetzer on March 22, 1999, is almost beyond imagination. Not only did he kill Ms. Hetzer, he brutalized her and sexually assaulted her. He broke her back. He strangled her.

“Jeffrey Lee Finley does not deserve the rights which our society bestows on its citizens. Indeed, Jeffrey Lee Finley is such a bad person, there would be no harm if the State ignored the law and quietly tipped the scales of justice against Jeffrey Lee Finley and ‘helped’ the jury to ‘do the right thing.’” These sentiments, no doubt held by many, may also be stated as: “Bad people don’t deserve the rights which law-abiding citizens have.” Primary to such a statement is the belief that the rights to which a person is entitled may be determined by considerations of popular sentiment or political convenience. In other words, rights are conditional and dependent on what the State or some other arbiter believes they should be. It is an unfortunate truism that many people today believe the statements above

to be accurate. Whether that means advocating for censorship of the press when someone doesn't like what is written, arbitrary restrictions on gun ownership by law-abiding citizens, or feeling that bad people like Jeffrey Lee Finley don't deserve any constitutional rights, the slippery slope of limiting individual and constitutional rights based on current notions of popularity and emotion is a tempting siren. We forget too easily that constitutional rights were preserved for the popular as well as the unpopular, the wealthy as well as the poor, and the good as well as the bad.

The establishment of Jeffrey Lee Finley's rights during the sentencing phase of his trial were set forth by the United States Supreme Court in *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). I must disagree with my dissenting colleagues that *Deck* is not applicable herein. It is. As the majority decision explains, limitations on the State's presentation before a jury of a criminal defendant were considered by the United States Supreme Court in *Deck* both at the guilt and the penalty phases of the defendant's trial. Such limitations are subject to exceptions as "justified by an essential state interest." *Id.*, at 624. What possibly the state's interest here was in the use of prison garb in the sentencing phase of Jeffrey Lee Finley's trial is uncertain – though its affect is certainly palpable.

Here, the jury needed no "help" from the State in doing what it needed to do. Our system of criminal jurisprudence is unique in putting the determination of whether an individual will be incarcerated in the penitentiary in the hands of a jury of peers, not in the

hands of the State. Furthermore, it is the jury which decides between mercy or no mercy. The dissenters argue that prison garb conveys to the jury nothing more than what the jury already knows – that the defendant is a “convicted” defendant. The dissenters attempt to distinguish the rationale of *Deck* by claiming that shackles would have a different effect on the jury because such restraints would convey to the jury that the defendant was dangerous. That argument simply is not credible. The dissenters go to considerable lengths to identify the many bad acts of Jeffrey Lee Finley. The jury which convicted Jeffrey Lee Finley was acutely and personally aware of each such act – much more graphically than can any reader of the record herein. How the dissenters believe that the same jury which convicted Jeffrey Lee Finley of such horrendous acts could not appreciate him as dangerous absent shackles is beyond credulity.

The difference here is the mandate of a dignified judicial process required by *Deck*. The sad fact is that the jury needed no subtle help from the State to do the job entrusted by our system to it and specifically kept from the State.<sup>1</sup> By improperly involving itself in the province left exclusively to the jury, the State committed error. Jeffrey Lee Finley is entitled to a new sentencing phase, but not a new trial on guilt.

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<sup>1</sup> Although the dissenters also reference certain cases in an attempt to bolster their arguments, I note that all such cases predate the United States Supreme Court’s pronouncement in *Deck* and none are cases decided by the United Supreme Court.

Why should the Supreme Court of Appeals of West Virginia take a case like this? Because we must. The public must be able to take the Court's impartiality and dedication to the rule of law and the protection of the People's rights as a certainty, even when it might be easier or more popular for the Court to simply ignore the error. We ought to be judges, not politicians. As judges, we must choose the path which safeguards all of our protections and breathes vitality into our rights. When we uphold the law on an issue such as that before us, despite public sentiment to go with a more palatable result, we are not siding with the criminal, we are protecting the system from the excesses of the State. Justice is not a rush to judgment. We do justice when we support, protect, defend and enforce the federal and state constitutions and the rule of law – as difficult as that sometimes may be. I concur in the majority decision.