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Wiggins v. State: Receiving a Fair Trial Under the Specter of AIDS

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WIGGINS v. STATE: RECEIVING A FAIR TRIAL UNDER THE SPECTER OF AIDS

INTRODUCTION

The fourteenth amendment protects from state infringement[1] the fundamental right to a fair and impartial trial in criminal prosecutions.[2] In order to convict a criminal defendant, the probative evidence must persuade the trier of fact beyond a reasonable doubt that the defendant committed the offense.[3] Therefore, the administration of a fair trial necessarily requires that only properly admitted evidence influence the fact-finder in the rendition of its judgment.[4] One resource designed to achieve this objective[5] is the trial judge's wide discretion over courtroom conduct.[6] Unfortunately, the occasion may occur when the trial judge incorrectly rules regarding a disputed courtroom practice during the criminal trial.[7] If the judge makes a mistake, and the incorrect ruling touches upon a "substantial right" afforded defendants, the error may plague the trial to such an extent that, upon review, the appellate court must deem the error harmful.[8]

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[1] *See* notes 34 & 35 *infra* and accompanying text. The sixth amendment to the United States Constitution provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

[2] Estelle v. Williams, 425 U.S. 501, 503 (1976).

[3] *In re* Winship, 397 U.S. 358, 364 (1970).

[4] *Id.* at 364. In order to establish a valid jury conviction, the jury must have been persuaded by *probative* evidence beyond a reasonable doubt that the defendant committed the offense.

[5] In United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970), the court stated: "The judge presiding at the trial, the jurors, courtroom personnel and spectators are entitled to security in the performance of their functions or in observing the trial. The members of the public out of the courtroom are entitled to security in the pursuit of their daily activities. The public also has an interest in the expeditious trial of persons accused of crime, and an interest in preventing the guilty from being at large and committing other offenses. Thus in appropriate circumstances, the accused's right to the indicia of innocence before the jury must bow to the competing rights of participants in the courtroom and society at large."

[6] Bartholomey v. State, 260 Md. 504, 530, 273 A.2d 164, 177-178 (1971) expounds the general rule in Maryland that "the trial judge has a wide discretion in the conduct of a trial and that the exercise of his discretion will not be disturbed unless it has been clearly abused." *See also* Plank v. Summers, 203 Md. 552, 554-55, 102 A.2d 262, 263 (1954).

[7] *See generally* Wiggins v. State, 315 Md. 232, 554 A.2d 356 (1989).

[8] In Chapman v. California 386 U.S. 18, 22-24 (1967), the Court stated that on the other hand, some constitutional errors "are so unimportant and insignificant" that they may, without violating Constitutional protections, be deemed harmless. In order for these "insignificant" errors to be deemed harmless, the appellate court must be certain that they are harmless beyond a reasonable doubt. In United States v. Nicholson, 846 F.2d 277 (5th Cir. 1988), the court suggested that a balancing test may be the proper guide for the trial judge, whereby the judge weighs the conflicting interests of providing a fair trial and of ensuring courtroom safety.

Wiggins v. State[9] presented two unique issues: (1) whether it was proper to authorize courtroom security personnel to use prophylactic apparel while escorting a defendant merely suspected of having acquired immunodeficiency syndrome (AIDS),[10] and (2) the extent to which this handling procedure impacted the jury. This Note will analyze the *Wiggins* decision, emphasizing the court's reasoning as it pertains to the following: (1) the guarantee of a fair and impartial jury trial for defendants either having or being suspected of having AIDS; (2) the permissible exercise of discretion by the trial judge in authorizing precautions during the course of the trial; and (3) harmless error and judicial review.

FACTS

In *Wiggins v. State*,[11] a Maryland jury convicted Bernard Wiggins for the murder and robbery of Bjorn Haug.[12] The evidence at trial indicated that Wiggins, his two roommates and Haug were homosexuals.[13] A postmortem medical examination revealed that Haug was AIDS infected.[14] The undisputed evidence also indicated that one of Wiggins' roommates carried the HIV virus.[15] At the trial and in the presence of the jury, sheriff's deputies prominently wore rubber gloves as they escorted Wiggins into the courtroom.[16] The judge called a bench conference and informed counsel that he had authorized the procedure as a precaution to the "possibility or probability" that Wiggins had AIDS.[17] Expressing concern for the safety of the jury, the judge further ordered that the exhibits were not to be handled by the jurors.[18]

Wiggins objected to the precautions because the court had no medical evidence to indicate that Wiggins either had, or carried, the AIDS virus.[19] The judge overruled the objection.[20] On the trial's second day deputies

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[9] 315 Md. 232, 554 A.2d 356.

[10] Acquired immunodeficiency syndrome is a disease that is characterized by a breakdown of the human immune system and an inability of the body to fight infections. The virus which causes AIDS is known as the human immunodeficiency virus (HIV). HIV is the same virus which has been referred to as HTLV-III (human T-lymphotropic virus, type III) and LAV (lymphadenopathy associated-virus). HIV is the virus, AIDS is the disease. *See* Stauter, *United States v. Moore: AIDS and the Criminal Law—The Witch Hunt Begins*, 22 AKRON L. REV. 503, 504 (1989); Mortimer, *The Virus and the Tests*, 294 Brit. Med. J. 1602, 1602 (1987); and note 115, *infra*.

[11] 315 Md. 232, 554 A.2d 356.

[12] *Id.* at 232, 554 A.2d at 356.

[13] *Id.* at 236, 554 A.2d at 357.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

wearing rubber gloves again escorted Wiggins into the courtroom, but the jury had not yet been seated.[21] However, the deputies, still wearing the gloves, remained seated behind Wiggins.[22] Again, Wiggins objected on grounds that the jury might draw inferences regarding his physical condition, and that these inferences, together with the jurors' beliefs and stereotypes, might adversely affect Wiggins' right to a fair trial.[23] The judge overruled the objection.[24] Subsequently, the jury returned a guilty verdict.[25] Wiggins appealed.[26]

The Maryland Court of Special Appeals stated that wearing gloves was completely inconsistent with current theories concerning the spread of AIDS.[27] Consequently, the trial judge erred in the exercise of his discretion.[28] However, there was no evidence in the record to indicate that the use of gloves prejudicially affected Wiggins' right to a fair trial.[29] During voir dire, the judge asked the jury whether this case, which had "touches of homosexuality," would prejudice the fairness of their decisions.[30] Because the jurors indicated an ability to remain impartial,[31] the Court of Special Appeals reasoned that the voir dire question sufficiently removed the possibility of jurors prejudicially associating AIDS with homosexuality.[32] The Maryland Court of Appeals, the state's court of last resort, rejected this view.[33]

BACKGROUND

Presumption of Innocence

While the sixth amendment guarantees a criminal defendant the right to an impartial trial,[34] the fourteenth amendment requires that as a

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 237, 554 A.2d at 359.

[25] *Id.* at 232, 554 A.2d at 356.

[26] *Id.* at 237-38, 554 A.2d at 358-59.

[27] Wiggins v. State, 76 Md. App. 188, 198, 544 A.2d 8, 13 (1988); a discussion as to the current medical theories regarding the transmission of AIDS is discussed in note 115, *infra*.

[28] *Wiggins*, 76 Md. App. at 199, 544 A.2d at 13-14.

[29] *Id.* at 199-200, 544 A.2d at 13-14.

[30] *Id.* at 199, 544 A.2d at 14.

[31] *Id.*

[32] *Id.*

[33] *Wiggins*, 315 Md. 232, 554 A.2d 356. The Maryland Court of Appeals stated that the voir dire questioning was insufficient to remove any potentially impermissible inferences that the jury may have drawn from the precautions. Whether a person can remain neutral regarding homosexuality is a far cry from presuming equivalent attitudes regarding AIDS. Moreover, it was unreasonable to assume that the jurors were so unsophisticated that, upon seeing the precautions taken in the courtroom, "they did not know of the existence of AIDS and the dire consequences of the disease."

[34] See note 1, *supra*.

matter of due process, the trial must be fair.[35] The presumption of innocence is a legal maxim used to facilitate the fairness of a trial by placing the burden of proof on the state[36] and ensuring that the defendant is granted the indicia of innocence necessary for a fair trial.[37] This presumption has existed throughout history.[38] The presumption has been referred to as "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."[39] In its basic form, the presumption requires that the accused is entitled to have his guilt or innocence determined solely on the basis of the evidence properly introduced at trial.[40] Official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial violate the presumption by frustrating its basic purpose.[41]

Prejudicial Courtroom Practices

Generally, the use of physical restraints to prevent escape, to prevent possible violence to the spectators and court officials, and to prevent disruption, have been held to lie within the sound discretion of the trial judge.[42] Therefore, when the trial judge's exercise of discretion is at issue on appeal, the reviewing court will not disturb the exercise of discretion unless the trial judge clearly abused it.[43] Judges must use reason, principle, and common sense as a guide in evaluating the probable effects of particular courtroom procedures[44] to ensure that the procedures do not threaten the fairness of the fact-finding process.[45]

Occasionally, a courtroom procedure impacts the jury to such an extent that it prejudices the accused.[46] However, the actual impact of the procedure on the judgment of jurors cannot always be discovered.[47] The

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[35] The fourteenth amendment to the United States Constitution provides in pertinent part that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law ." U.S. CONST. amend. XIV, § 1. The United States Supreme Court in *In re* Murchison, 349 U.S. 133, 136 (1955) stated that "[a] fair trial in a fair tribunal is a basic requirement of due process [guaranteed by the Fourteenth Amendment to the federal constitution]." In Pointer v. Texas, 380 U.S. 400 (1965), the Supreme Court held that the fourteenth amendment makes the guarantees of the sixth amendment obligatory upon the states.

[36] *See generally* Coffin v. United States, 156 U.S. 432, 453-60 (1895), which traces the presumption of innocence to the early Nineteenth century laws of Sparta, Athens and Rome.

[37] Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U.L.J. 351, 355 (1971).

[38] *Coffin*, 156 U.S. at 453-60.

[39] *Id.* at 453.

[40] Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

[41] *Id.*

[42] Note, *Guidelines for Controlling the Disruptive Defendant*, 56 MINN. L. REV. 699, 703 (1972).

[43] Esterline v. State, 105 Md. 629, 637, 66 A. 269, 272 (1907).

[44] *Estelle*, 425 U.S. 501, 503-04.

[45] *Id.* at 504.

[46] *Id.*

[47] *Id.*

standard of review is "close judicial scrutiny" if there is a probability of deleterious effects on the defendant's right to an impartial trial.[48] In *Holbrook v. Flynn*,[49] the Supreme Court stated that when a criminal defendant's due process is inherently denied due to a procedure that involves the probability of prejudice, "the question must not be whether jurors actually articulate a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play."[50]

In *Holbrook*,[51] The State of Rhode Island charged Charles Flynn and his five co-defendants with armed robbery.[52] The trial court, ordered the State Adult Correctional Institution to hold Flynn and his five co-defendants without bail.[53] During the trial, four uniformed, armed state troopers sat in the front row of the spectator's area of the courtroom for the purpose of supplementing the court's normal security.[54] After Flynn objected to the procedure, the judge ordered a hearing.[55] Flynn argued that while he would not object to the presence of plain clothed security officers, the presence of uniformed officers would suggest to the jury that the defendants were of "bad character."[56]

The trial judge considered the following facts: (1) the number of officers in the building was insufficient to meet the preferred ratio of two officers to every defendant; and (2) of the 54 prospective jurors who had not been struck before they were asked about the troopers, 51 stated that the troopers' presence would not create an inference of the defendant's guilt in their mind.[57] The Court held that in authorizing the presence of the troopers, the trial judge did not deny the guarantee of a fair trial.[58] The Court stated that it could not find an unacceptable risk of prejudice from the four officers quietly sitting in the courtroom when such a procedure is not inherently prejudicial and when the defendant fails to show actual prejudice.[59]

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[48] *Id. See also* Estes v. Texas, 381 U.S. 532 (1965), and *In re* Murchison, 349 U.S. 133 (1955).
[49] 475 U.S. 560 (1986).
[50] *Id.* at 570.
[51] 475 U.S. 560.
[52] *Id.* at 562.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 563-65.
[56] *Id.* at 563.
[57] *Id.* at 564-65. In Flynn v. Holbrook, 749 F.2d 961, 964 (1st Cir. 1984), *rev'd*, 475 U.S. 560 (1986), the U.S. Court of Appeals stated that the trial judge acted prematurely under the circumstances in that the defendants did not threaten the safety of courtroom officials or spectators. The court further believed that the judge "simply indicated a fear that since the defendants had not been bailed, they might flee from the courtroom."
[58] *Id.* at 567-72. The Court further stated that conspicuous deployment of security personnel in a court during the trial is not an inherently prejudicial practice comparable to shackling.
[59] *Id.* at 572.

Physical Restraint Procedures

Typical courtroom practices posing threats to the fairness of the fact-finding process generally involve controlling or restraining the defendant.[60] Shackling defendants in the jury's presence is greatly prejudicial to a fair trial because it introduces "extraneous indicia of guilt into the minds of presumably impartial jurors."[61] In *Bowers v. State*,[62] a jury convicted the defendant of first degree murder.[63] During the sentencing phase of the trial, the judge polled the jury to determine whether they would draw any adverse inferences about the defendant from seeing him in leg irons.[64] On appeal, the court believed that the procedure did not prejudice the defendant.[65] Relevant factors justifying the trial judge's action include the fact that the defendant's conviction survived appellate review, that the defendant had previous institutional difficulties, and that the defendant had personality problems.[66]

In *Illinois v. Allen*,[67] a jury convicted the defendant of armed robbery.[68] The defendant conducted his defense pro se.[69] Throughout the trial, the defendant was upset and argued with the judge in a very abusive and disrespectful manner.[70] The judge ordered the defendant removed from the court, and proceeded with appointed counsel.[71] The Supreme Court approved the trial judge's actions and stated that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."[72] However, gagging and shackling should be used as a last resort.[73] It was not only possible that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."[74]

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[60] Note, *Dealing with Unruly Persons in the Courtroom*, 48 N.C.L. REV. 878, 879 (1970).

[61] *Id.*

[62] 306 Md. 120, 507 A.2d 1072 (1986).

[63] *Id.* at 122, 507 A.2d at 1073.

[64] *Id.* at 126, 507 A.2d at 1075.

[65] *Id.* at 138-39, 507 A.2d at 1081.

[66] *Id.*

[67] 397 U.S. 337 (1970).

[68] *Id.* at 338-39.

[69] *Id.* The defendant conducted his defense in his own behalf.

[70] *Id.* at 339-40. During voir dire, the defendant threatened the judge, stating "[w]hen I go out for lunchtime, you're [the judge] going to be a corpse here." Also, the defendant threatened to disrupt the trial stating that "[t]here's not going to be no trial, either" regardless of whether the judge ordered gagging, shackles or any other type of restraint.

[71] *Id.*

[72] *Id.* at 343.

[73] *Id.* at 344.

[74] *Id.*

In *Dixon v. State*,[75] the defendant was led into and removed from the courtroom wearing handcuffs while the jury was present.[76] The jury convicted the defendant.[77] On appeal, the defendant argued that the handcuff procedure denied him a fair trial.[78] The appeals court upheld the trial judge's actions, stating that the circumstances surrounding the case justified the physical restraint in order to protect those present in the courtroom.[79] Important factors in the judge's decision were that the defendant threatened to harm the deputies, and that the city jail personnel were on strike.[80] Other justifications for physical restraints may be founded upon the defendant's tendency toward violence; the seriousness of the charge; the defendant's physical/mental temperament; the defendant's prior record; and past or present escapes.[81]

While physical restraints may be necessary to ensure safety and order, the Supreme Court has unequivocally stated that requiring a defendant to wear prison garb clearly furthers no "essential state policy."[82] Moreover, the prison garb is a constant reminder of the defendant's condition, and such a distinctive outfit may affect a juror's judgment.[83] It has been suggested that defendants who wear prison garb or who are accompanied by guards are more likely to be found guilty than unsupervised defendants wearing their own clothes.[84]

The Harmless Error Rule

Although the conduct of a criminal trial is committed to the trial judge's sound discretion,[85] the defendant's right to a fair trial is paramount and is protected by the Constitution.[86] In *Chapman v. California*,[87] the Supreme Court laid down the test to be applied in cases involving an alleged constitutional error.[88] The Court stated that "before a federal

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[75] 27 Md. App. 443, 340 A.2d 396 (1975).

[76] *Id.* at 451, 340 A.2d at 401.

[77] *Id.* at 443, 340 A.2d at 396.

[78] *Id.* at 451, 340 A.2d at 401.

[79] *Id.*

[80] *Id.*

[81] *See* People v. Whitson, 127 Ill. App.3d 999, 470 N.E.2d 1054 (1984).

[82] *Estelle*, 425 U.S. at 505. The Court also stated that forcing the defendant to wear jail garb may violate fourteenth amendment equal protection guarantees because the requirement usually operated against those who could not post bail prior to trial, while those who could secure release were not subjected to the requirement. *Id.* at 505-06.

[83] *Id.* at 505.

[84] Fontaine & Kigler, *The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 LAW AND HUMAN BEHAVIOR 63, 69-70 (1978). However, the social science study further explains that favored treatment was accorded defendants who had both supervision and prison clothing.

[85] Smith v. State, 299 Md. 158, 179, 472 A.2d 988 (1984).

[86] *Estelle*, 425 U.S. at 503.

[87] 386 U.S. 18 (1967).

[88] *Id.*

constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[89] The harmless error rule is an "outcome-oriented" rule.[90] For instance, errors having no impact on the outcome of the judicial proceedings may not be harmful.[91] If the appellate court determines there was a reasonable probability that, absent the alleged error, a different result would have been reached, then the error is harmful.[92]

ANALYSIS

Wiggins v. State

The trial court's interest in protecting the safety and security of the trial judge, the jurors, courtroom personnel and spectators during trial[93] did not justify the precautions taken in *Wiggins*.[94] Because the judge never really knew whether Wiggins was AIDS infected,[95] the precautions were, at minimum, premature.[96] The *Wiggins* court held that the trial court abused its discretion by permitting the guards to wear gloves before the court determined that the procedure was necessary to promote legitimate state concerns.[97]

Initially, the court of appeals stated that while a trial judge has substantial discretion over the proceedings in a criminal case,[98] it is certainly not unlimited.[99] If the judge's exercise of discretion denies a defendant the right to a fair trial, the judge has abused his discretion.[100] Consquently, the judgment may be set aside.[101] When the trial judge's exercise of discretion is at issue on appeal, the trial record should state

[89] *Id.* at 24. In Dorsey v. State, the Maryland Court of Appeals stated that "there is no sound reason for drawing a distinction between the treatment of those errors which are of constitutional dimension and those other evidentiary, or procedural, errors which may have been committed during a trial . . . . Invariably, a number of constitutional rights, be they of federal or state origin, are inexorably intertwined with state rules of evidence and procedure." 276 Md. 638, 657-58, 350 A.2d 665, 677 (1976). In a concurring opinion, Chief Justice Murphy stated that the *Chapman* harmless-error rule only applies to violations of constitutional rights and that a less exacting rule should apply for non-constitutional rights.

[90] Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82-85 (1988).

[91] *Id.* at 85.

[92] *Id.*

[93] Note, *supra* note 42, at 703.

[94] *Wiggins*, 315 Md. 232, 554 A.2d 356.

[95] *Id.* at 236, 554 A.2d at 358.

[96] *Id.* at 240, 554 A.2d at 360.

[97] *Id.* at 232, 554 A.2d at 366.

[98] *Id.* at 239, 554 A.2d at 359.

[99] *Id.*

[100] *Id.* at 239-40, 554 A.2d at 359.

[101] *Id.*

the judge's justifications for the action.[102] In *Bowers v. State*,[103] the court stated that it preferred that the basis for the judge's action be explicitly stated.[104] The general rule is to affirm the exercise of discretion when it is clear from the record that there were good and sufficient reasons to support the judge's action.[105]

Rather than attempting to ascertain Wiggins' true physical condition, the trial judge made a factual conclusion based on the evidence.[106] The evidence showed that both Haug and Wiggins' roommate either had AIDS or carried the HIV virus.[107] Haug allegedly met Wiggins for purposes of homosexual relations.[108] Therefore, the trial judge concluded that Wiggins had the disease.[109] When the judge authorized deputies to use the rubber gloves, he did not inform the jury of the reason for the use.[110] In effect, the judge introduced an "unexplained factor irrelevant and extraneous to the issue of Wiggins' guilt or innocence."[111]

The court of appeals emphasized that "[i]t is not a big step in logical inference, considering the contemporary climate, from seeing the guards protected in their contact with the defendant to the thought that he might have AIDS," and it was "not far fetched that the jury, observing the gloves, thought it better, in any event, that Wiggins be withdrawn from public circulation and confined in an institution with others of his ilk."[112] According to the court of appeals, the trial judge should have requested a medical determination on whether Wiggins was infected with the disease.[113] The court then should have placed on record the prevailing medical opinion regarding the propriety of the guards using gloves as a precautionary measure.[114]

The current medical theories regarding the spread of AIDS[115]

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[102] Bowers v. State, 306 Md. 120, 507 A.2d 1072.

[103] *Id.*

[104] *Id.* at 138, 507 A.2d at 1081. *See also* Dixon v. State, 27 Md. App. 443, 450-52, 340 A.2d 396, 401-02 (1975).

[105] *Id.*

[106] *Wiggins*, 315 Md. at 240, 554 A.2d at 359-60.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 245, 554 A.2d at 362.

[111] *Id.* at 244, 554 A.2d at 362.

[112] *Id.* at 244-45, 554 A.2d at 362.

[113] *Id.* at 245 n.5, 554 A.2d at 362 n.5.

[114] *Id.*

[115] U.S. DEPT. OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 5 (1986) states that:

> Aids is *not* spread by common everyday contact but by sexual contact (penis-vagina, penis-rectum, mouth-rectum, mouth-vagina, mouth-penis). Yet there is great misunderstanding resulting in unfounded fear that AIDS can be spread by casual, non-sexual contact. The first cases of AIDS were reported in this country in 1981. We would

support the conclusion that the use of gloves was an improper action.[116] Moreover, because the glove precaution may have contributed to the rendition of the guilty verdict, the court of appeals could not declare beyond a reasonable doubt[117] that Wiggins received a fair and impartial trial.[118]

Extension of the Physical Restraint Cases

The Wiggins decision evidences an extension of the physical restraint cases. The recurring theme in *Bowers*,[119] *Allen*,[120] *Dixon*[121] and *Holbrook*[122] involved the concern that the fact-finder would either consciously or unconsciously attribute guilt to the defendant by virtue of seeing the defendant physically restrained or removed from the courtroom.[123] Because the trial courts had determined that shackling, gagging or physical removal were necessary to further legitimate state concerns, the courts were justified in imposing the more extreme courtroom procedures.[124]

The fact-finder's purpose is to weigh the probative evidence offered throughout the trial and render a judgment thereon.[125] In criminal trials, the jury should infer a defendant's guilt based solely on the properly admitted evidence.[126] In the physical restraint cases, the defendants were concerned that, in observing the shackles or handcuffs, the jury would invariably infer guilt upon seeing the defendant physically bound.[127] In

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know by now if AIDS were passed by casual, non-sexual contact.

In *In Re* Peacock, 59 Bankr. 568 (Bankr. S.D. Fla. 1986), the court was presented with a bankrupt afflicted with "pre-AIDS syndrome," and in determining whether any special precautions should be implemented, the Court deferred to the judgment of a medical epidemiologist with the Center for Disease Control. The substance of the advisement stated that:

> The cause of the acquired immunodeficiency syndrome (AIDS) has been found to be a virus known as human T-lymphotropic virus, type III or lymphadenopathy associated virus (HTLV-III/LAV). HTLV-III/LAV can be transmitted through sexual contact or through blood products or blood. We have no evidence that it can be transmitted through air, food, water, inanimate objects, or casual contact.
>
> We have not recommended special precautions for courtroom proceedings where one or more of the participants has AIDS. I know of no usual courtroom procedure that would result in transmission of HTLV-III/LAV. *Peacock*, 59 Bankr. at 571.

[116] *Wiggins*, 315 Md. at 244, 554 A.2d at 361-62.

[117] *Id.*, 554 A.2d at 362.

[118] *Id.* at 253, 554 A.2d at 366.

[119] Bowers v. State, 306 Md. 120, 507 A.2d 1072 (1986).

[120] Illinois v. Allen, 397 U.S. 337 (1970).

[121] Dixon v. State, 27 Md. App. 443, 340 A.2d 396 (1975).

[122] Holbrook v. Flynn, 475 U.S. 560 (1986).

[123] *See generally, Bowers*, 306 Md. 120, 507 A.2d 1072; *Allen*, 397 U.S. 337; *Dixon*, 27 Md. App. 443, 340 A.2d 396 (1975); and *Holbrook*, 475 U.S. 560.

[124] *Id.*

[125] *See* Taylor v. Kentucky, 436 U.S. 478 (defendant has the right to have the jury consider only evidence adduced at trial).

[126] *See* Estelle v. Williams, 425 U.S. 501 (the court must secure the concept that guilt is to be found only on the basis of probative evidence).

[127] *See generally* Note, *supra* note 60, at 879.

effect, the jury would not be basing its conviction on probative evidence, but upon reliance of a distortive physical restraint procedure.[128] *Wiggins* is distinguishable from these cases.

Wiggins argued that the prejudicial inference in his case was based upon the glove precaution.[129] Specifically, because the jury observed Wiggins being escorted by guards wearing gloves, it was reasonable to infer that he was infected with a disease.[130] Moreover, because the case involved homosexual behavior, it was also reasonable for the jury to infer that Wiggins had AIDS.[131] This inference chain is similar to the ones challenged when gags and shackles were used.

The use of gloves, like the use of gags or shackles, introduced a potentially prejudicial element before the jury.[132] These dramatic and distortive elements were clearly irrelevant to the issue of the defendant's guilt or innocence.[133] From a presumably impartial jury's view, the introduction of these elements is not only certain to impact the defendant's presumption of innocence,[134] but in *Wiggins*, it was also possible that the jury would infer that Wiggins had AIDS.[135] This inference chain is impermissible because it effectually counteracts the principle that only probative evidence is to influence the jury.[136]

Additionally, medical authorities have unequivocally stated that transmission of the AIDS virus is extremely limited,[137] and unlikely to occur in the courtroom setting.[138] Therefore, the trial court's precaution was not reasonably tailored to fulfilling the alleged state concern.[139] In *In re Peacock*,[140] the court was faced with a debtor diagnosed as a victim of pre-AIDS syndrome.[141] The court inquired into the propriety of using face masks as a special procedure for protecting the litigants, witnesses and court personnel from possible infection by the debtor.[142] The court

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[128] *Id.*

[129] Wiggins v. State, 315 Md. at 236-37, 554 A.2d at 358.

[130] *Id.* at 244-45, 554 A.2d at 361.

[131] *Id.*, 554 A.2d at 361-62.

[132] *Id.* at 240 n.4, 554 A.2d at 360 n.4.

[133] *Id.* at 244-45, 554 A.2d at 362.

[134] *See* Holbrook v. Flynn, 475 U.S. at 570.

[135] *Wiggins*, 315 Md. at 244-45, 554 A.2d at 362.

[136] *In re* Winship, 397 U.S. at 364.

[137] *See* note 115, *supra*.

[138] *Id. See also In re* Peacock, 59 Bankr. 568.

[139] Wiggins v. State, 315 Md. at 236, 554 A.2d at 358. The concern of the Maryland trial court was the safety of the sheriff's deputies.

[140] 59 Bankr. 568.

[141] *Id.* at 569. Although the court uses the phrase "pre-AIDS syndrome," for purposes of addressing the prophylactic issue, the court equated pre-AIDS syndrome to full-blown AIDS.

[142] *Id.*

determined that the procedure was unnecessary.[143] The bankruptcy judge was primarily convinced by a letter from an epidemiologist with the Center for Disease Control which stated that no evidence existed to suggest that AIDS may be transmitted "through air, food, water, inanimate objects, or casual contact."[144]

Just as the *Peacock* court declined to impose special precautions as a means of promoting health and safety, at minimum, the *Wiggins* trial court should have conducted an investigative hearing on the matter.[145] Also, the Maryland court of appeals would have had an adequate record to evaluate the judge's exercise of discretion.[146] This is important, because if the prevailing medical testimony suggested that the precautions were necessary, the court of appeals may not have found an abuse of discretion.[147]

The Chapman "Harmless Error" Rule

Wiggins challenged the use of gloves as a procedure likely to cause the jury to form prejudicial inferences.[148] Thus, the appeals court had to determine whether the trial judge abused his discretion in using the procedure. According to *Chapman v. California*[149] and *Dorsey v. State*,[150] the applicable test is whether the appellate court can "declare a belief that [the error] was harmless beyond a reasonable doubt."[151] In other words, the reviewing court must be satisfied that there is no reasonable possibility that the evidence or procedure complained of may have contributed to the rendition of the guilty verdict.[152]

The harmless error rule is based on the underlying policy of shielding jurors from matters upon which no evidence is offered and which are likely to influence the jury.[153] Behavior which violates the rules regulating prosecutorial and judicial conduct at trial often gives rise to the creation of unfavorable inferences regarding the defendant's guilt.[154]

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[143] *Id.* at 569.
[144] *Id.* at 571. *See also* note 115, *supra.*
[145] Wiggins v. State, 315 Md. at 245 n.5, 554 A.2d at 362 n.5.
[146] *Id.*
[147] *Id.* at 240 n.4, 554 A.2d at 360 n.4.
[148] *Id.* at 240-45, 554 A.2d at 360-62.
[149] 386 U.S. 18 (1967).
[150] 276 Md. 638, 350 A.2d 665 (1976).
[151] *Chapman*, 386 U.S. at 24.
[152] Dorsey v. State, 276 Md. at 659, 350 A.2d at 678.
[153] Note, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. CRIM. L. & CRIMINOLOGY 457, 463 (1983).
[154] *Id.* at 463.

The *Wiggins* court considered the climate surrounding the AIDS issue and the popular beliefs regarding its transmission.[155] The court then held that it was probable that seeing Wiggins escorted by deputies wearing gloves would lead the jury to infer he was infected with AIDS.[156] Because the jury was not instructed as to the medically recognized methods of AIDS transmission, it is very probable that they may have used their own information and experience to conclude it was better to remove the defendant from society.[157] For this reason, the *Wiggins* court believed that it could not declare beyond a reasonable doubt that the gloves did not prejudice the defendant.[158] *Wiggins* appears to have applied the harmless error test consistently with the rule enunciated in *Chapman* and *Dorsey.*

If counsel had asked the jurors during voir dire whether the use of gloves would prejudice their ability to render an impartial verdict, the question of fairness may have been rendered moot. Where the jurors have demonstrated an ability to remain impartial regarding the shackling of a contumacious defendant, the court has permitted a conviction to stand.[159] Yet, because the trial judge's purpose of using gloves was entirely inconsistent with theories regarding AIDS transmission, and was completely ineffective as a safety precaution, the conviction could not stand in view of the prejudicial impact to the jury.

CONCLUSION

Public concern and fear of AIDS have certainly contributed to the current level of heightened awareness among the American population concerning AIDS. Moreover, because of the rapid spread and currently uncurable nature of the disease, the influx of AIDS-infected individuals

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[155] Wiggins v. State, 315 Md. at 240-45, 554 A.2d 360-62.

[156] *Id.* The court reviewed various current periodicals that tended to demonstrate widespread public concern and fear of AIDS. Because of the precautions, "it is not improbable that the jury would assume, in light of the widespread and continuous publicity devoted to AIDS, that Wiggins was infected with the disease." *Id.* at 244, 554 A.2d at 361. Because of this, there was a reasonable possibility that the precautions "may have contributed to the rendition of the guilty verdicts." *Id.* at 244, 554 A.2d at 362.

[157] *Id.* at 244-45, 554 A.2d at 362.

[158] *Id.* at 244, 554 A.2d at 362.

[159] *See* Bowers v. State, 306 Md. 120, 507 A.2d 1072; Illinois v. Allen, 397 U.S. 337. In Holbrook v. Flynn, 475 U.S. 560, the Court stated that while the jurors may be questioned at the beginning of a trial as to their attitudes regarding a procedure, "at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial." *Id.* at 570. Thus, attitudes may change to the defendant's detriment.

into the American criminal justice system will present continuing issues for the legal community. *Wiggins* provided an answer to the narrow issue of a trial's fairness when it held that the constitutional guarantee of a fair and impartial trial should not be frustrated by incorrect assumptions regarding the transmission of AIDS. In the courtroom, a criminal defendant having the disease must be treated the same as an uninfected defendant. In conclusion, because *Wiggins* considered usage of the glove precaution an unnecessary and prejudicial procedure, *Wiggins* evidences an extension and preservation of basic and fundamental rights afforded defendants in criminal trials, irrespective of whether such individuals are infected with the dreaded disease AIDS.

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