IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0554

STATE OF WEST VIRGINIA,

Respondent,

v.

SHAUNDARIUS REEDER,

Petitioner.

RESPONDENT'S BRIEF

On Order Certifying Question entered July 7, 2021
Circuit Court of Monongalia County
Case No. 20-F-122

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CERTIFIED QUESTION

Does a jury's failure to unanimously decide the recommendation of mercy allow the Circuit Court to impose the life sentence required for a conviction of First Degree Murder under West Virginia Code § 61-2-2 and either grant mercy or decline to grant mercy?

INTRODUCTION

In February 2020, Shaundarius Reeder and an accomplice shot and killed West Virginia University student Eric Smith in a calculated, late-night slaying. Roughly a year-and-a-half later, a Monongalia County jury convicted Reeder of murder in the first degree and conspiracy to commit murder. But during the mercy phase of the trial—when the jury was asked to decide whether Reeder would ever have any possibility of parole—the jury deadlocked. The circuit court then discharged the jury and proposed to decide the mercy issue itself.

In a first-degree murder case, West Virginia law provides that only the jury may decide the issue of mercy. Although circuit courts ordinarily have substantial discretion when it comes to sentencing, the Legislature has made a different choice as to first-degree murder. Thus, the only appropriate remedy is to retry the mercy phase of Reeder's trial before a new jury. That retrial, however, must be limited to the mercy phase. The hung jury at the mercy phase does *not* affect Reeder's lawful convictions. Jurors unanimously decided to convict Reeder for his serious crimes during the guilt phase, and that decision stands.

STATEMENT OF THE CASE

This case traces to Reeder's decision to turn a minor dispute into a fatal one. On a late night in February 2020, Reeder and an accomplice followed Eric Smith, a WVU sophomore, back to an apartment complex in Morgantown. A.R. vol. I 144-45. Reeder and Smith had squabbled earlier in the evening about who drove the nicest car or had more money. *Id.* at 86, 127, 144. Still angry from that argument, Reeder and his partner determined to go to the apartment where Smith

could be found and confront him. But there was no discussion—no fight. Instead, when Smith came to the door, Reeder and the accomplice started firing. *Id.* 89-90; 131-33. And after shooting Smith multiple times, Reeder and his conspirator fled. *Id.* at 90-91. Smith then succumbed to his injuries. *Id.* at 229.

As the certification order recounts, a Monongalia County grand jury indicted Reeder in June 2020 on two counts related to the shooting: Murder in the First Degree (under West Virginia Code § 61-2-1) and Conspiracy to Commit Murder (under West Virginia Code § 61-10-31). *See* Certification Order 1. Before trial, Reeder successfully moved to bifurcate the trial's guilt and mercy phases. *Id.* at 2. Thus, in 2021, a jury convened to decide Reeder's guilt or innocence. After hearing witness testimony, testimony from Reeder's conspirator, video recordings of some of the key events of the night, forensic testimony, and more, the jury unanimously convicted Reeder on both counts. A.R. vol. I 468.

The jury next convened to decide the mercy issue. After the jurors heard additional evidence, the circuit court instructed them on how the mercy phase would proceed. *See id.* at 541. The court described how the jury could "in [its] discretion, further find and add to [its] verdict a recommendation of mercy," in which case the defendant "shall" be eligible for parole after serving 15 years. *Id.* at 542. "The law requires the concurrence of 12 minds before the jury can grant or not grant mercy for the defendant," so the verdict "must be unanimous." *Id.* at 542-43. But in the end, the circuit court explained, only "[o]ne of two determinations [could] be returned by [the jury] under the mercy phase of th[e] trial. They [we]re: grant the defendant mercy or do not grant the defendant mercy." *Id.* at 543-44.

The jury then began deliberating on mercy, but the jurors sent a note to the court a bit later asking what the "process" would be if they could not "come to a decision." *Id.* at 557. The circuit

court encouraged them to keep trying. *Id.* at 556-57 (referencing *State v. Blessing*, 175 W. Va. 132, 331 S.E.2d 863 (1985)). But after deliberating for several more hours, the jurors sent another note announcing that they were "unable to come to a unanimous decision in regards to mercy versus no mercy." A.R. vol. III 2. Reeder's counsel then moved for a mistrial and asked for a "directed verdict of mercy," reasoning that Reeder should get the "benefit of the doubt." *Id.* at 3. The circuit court did not immediately rule upon the motion but discharged the jurors without any verdict. *Id.* at 8-9.

After the deadlock, the circuit court stayed the case and certified to this Court the question of how to proceed. It believed that a "gap" existed in "West Virginia law about how a Circuit Court must proceed when a jury is unable to reach a verdict in the mercy phase of the trial." Certification Order 3. It noted, however, that circuit courts have substantial discretion in sentencing, while juries have little. *Id.* at 3-4. It further noted that circuit courts may determine whether to "attach[]" mercy in a case where a defendant enters a guilty plea. *Id.* at 4. And the court "presided over the mercy phase of the trial" and therefore "knows the facts and circumstances and, arguments thereto, that counsel presented to the jury." *Id.* Given all that, the circuit court proposed that it should determine whether to grant mercy absent a unanimous verdict from the jury. *Id.*

SUMMARY OF THE ARGUMENT

West Virginia law provides that a jury *must* decide the mercy issue in a first-degree murder trial. And a jury *must* decide that issue unanimously. So, lacking a unanimous jury verdict, the mercy phase must be retried. Although no prior case directly addresses the issue, prior cases—along with the language of the relevant statute—do foreclose the circuit court from sentencing the

defendant on mercy after a deadlock. The retrial would be limited to the issue of mercy, and it would be tried under the relaxed standards applicable to that phase.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. Further, the parties now appear to agree on the appropriate disposition. Before this Court, Reeder has abandoned his previous argument that he should receive a "directed verdict" of life with mercy. *See* Pet.'s Br. 11.

STANDARD OF REVIEW

In a certified-questions case like this one, the Court considers the relevant question de novo. Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

ARGUMENT

I. The mercy phase must be retried before a jury.

West Virginia's first-degree murder statute provides for a presumptive sentence of life imprisonment without the possibility of parole—with an important limitation. W. Va. Code § 62-3-15. In particular, "the jury may, in their discretion, recommend mercy." *Id.* If they do, then the defendant "shall be eligible for parole in accordance with the provisions of [W. Va. Code § 62-12-1, *et seq.*], except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years." *Id.* In contrast, in a case in which the defendant pleads guilty, "the court"—rather than the jury—decides whether the defendant should be granted mercy. *Id.*

Based on this language, this Court has often held that "the recommendation of mercy in a first degree murder case lies solely in the discretion of the jury." Syl. Pt. 7, *State v. Triplett*, 187

W. Va. 760, 421 S.E.2d 511 (1992); *see also, e.g.*, *State v. Miller*, 178 W. Va. 618, 622, 363 S.E.2d 504, 508 (1987) ("[T]he decision to recommend mercy is left entirely within the discretion of the jury."); *State v. Williams*, 172 W. Va. 295, 307, 305 S.E.2d 251, 263 (1983) ("This statute clearly places in the jury the discretion to fix the punishment to be imposed upon a finding that an accused is guilty of murder in the first degree."); *Walker v. Ballard*, No. 12-0138, 2013 WL 1632113, at *23 (W. Va. Apr. 16, 2013) (memorandum decision) ("Whether to grant mercy, or the eligibility for parole, to a convicted first degree murderer is the sole province of the jury."). The jury's decision on mercy "is made binding on the trial court," *Miller*, 178 W. Va. at 622, 363 S.E.2d at 508, and "the circuit court has no authority to modify" that decision, Syl. Pt. 4, *Schofield v. W. Va. Dep't of Corr.*, 185 W. Va. 199 406 S.E.2d 425 (1991).

When a trial court exercises its discretion to bifurcate the guilty and mercy phases of trial, Syl. Pt. 4, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), then the "jury verdict in the [bifurcated] mercy phase ... must be unanimous," Syl. Pt. 4, *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010). This requirement follows from West Virginia Rule of Criminal Procedure 31, which applies to both the guilt and mercy phases of the trial. *Id.* at 235; *see also, e.g.*, *State v. Dunn*, 237 W. Va. 155, 168, 786 S.E.2d 174, 187 (2016) (describing how a circuit court appropriately sent jurors back for further deliberations on mercy when a juror reported that the verdict was not unanimous when polled). Thus, the trial court here correctly told the jury that they needed to reach their decision on mercy unanimously.

When a jury is the required decision-maker and it fails to render a unanimous decision, then a mistrial results. *See* W. Va. Code Ann. § 62-3-7 (explaining that the circuit court "may discharge the jury[] when it appears that they cannot agree in a verdict"); *Arizona v. Washington,* 434 U.S. 497, 509 (1978) ("[T]he trial judge's belief that the jury is unable to reach a verdict [has]

long [been] considered the classic basis for a proper mistrial."). Such a mistrial, of course, does not bar a retrial. *See State ex rel. Taylor v. Janes,* 225 W. Va. 329, 336, 693 S.E.2d 82, 89 (2010); *see also Adkins v. Leverette,* 164 W. Va. 377, 380, 264 S.E.2d 154, 156 (1980) ("When a jury cannot reach a verdict ..., it is well settled in the law that the defendant can again be tried for the offense charged."). Quite simply, when a mistrial happens, it is as if the slate is wiped clean on the mistried issue, and "jeopardy is set at naught." Syl. Pt. 1, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938).

The mistrial here follows the ordinary rule; it does not allow the judge to assume control over deciding the mercy issue.[1] A hung jury is effectively a "non-result." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109 (2003). Put differently, because "a jury speaks only through a unanimous verdict," *Taylor*, 225 W. Va. at 337, 693 S.E.2d at 90, it makes "no decision at all" when it deadlocks, *Sattazahn*, 537 U.S. at 109 (O'Connor, J., concurring in part and concurring in the judgment). *Cf. Tibbs v. Florida,* 457 U.S. 31, 42 (1982) (explaining that a deadlocked jury does not result in acquittal). Courts generally do not draw any meaning from a jury's "silence"—on this or any other issue. *See State v. Loveless,* 139 W. Va. 454, 469-70, 80 S.E.2d 442, 451 (1954) (refusing to infer that the jury intended to decline mercy in a first-degree murder case where the jury was silent on that issue); *see also State v. Kent*, 223 W. Va. 520, 527, 678 S.E.2d 26, 33 (2009) (refusing to construe a jury's silence on alternative theories of murder as an "acquittal" on those alternative theories).

[1] The State knows of one case, described in *Warren H. v. Ballard*, No. 12-0324, 2013 WL 1707675, at *1 (W. Va. Apr. 19, 2013) (memorandum decision), in which the circuit court sentenced a criminal defendant to life without the possibility of parole after the jury deadlocked during the mercy phase of a kidnapping trial. But the defendant there did not question that procedure, and this Court did not address in any available opinion whether it was proper for the circuit court to sentence defendant itself.

Relatedly, when this Court has vacated a jury's mercy-phase verdict in the past, it has ordered a retrial—not a new sentencing proceeding by the circuit judge. *See, e.g., State v. Finley*, 219 W. Va. 747, 753, 639 S.E.2d 839, 845 (2006) (ordering the circuit court to "empanel a jury for trial of the sole issue of whether mercy is to be recommended for the sentencing of Appellant"); *State v. Doman*, 204 W. Va. 289, 292, 512 S.E.2d 211, 214 (1998) (remanding for "retrial by a jury [concerning] whether the appellant should receive a recommendation of mercy"). If a jury must reconvene after a successful appeal on this issue, then it should likewise reconvene after a mistrial.

Thus, this Court should hold that, when a jury deadlocks during the mercy phase of a bifurcated trial for first-degree murder, the defendant should be retried on the mercy issue before a different jury. The trial court should not decide the mercy issue itself.[2]

II. The trial court does not have discretion to sentence Reeder—though it can exercise substantial discretion in conducting the mercy-phase-only retrial.

The trial court's reasons for potentially holding that it could sentence Reeder in the absence of a unanimous verdict on mercy are unconvincing. The circuit court is right that trial courts *generally* enjoy "broad" discretion over sentencing issues. *State ex rel. Massey v. Hun*, 197 W.

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[2] Because the statute and related authorities resolve this issue, this Court need not and should not address Reeder's argument that the U.S. Constitution *requires* a retrial. *See* Pet.'s Br. 10-11. The mercy phase operates like a discretionary sentence reduction rather than a sentence enhancement. *See State ex rel. Leach v. Hamilton*, 280 S.E.2d 62, 64 (W. Va. 1980) ("A finding of guilt automatically results in a life sentence and a jury's only discretion is whether to grant parole eligibility by recommending mercy."). So it may very well be constitutionally permissible for the Legislature to take the mercy question away from the jury if it wishes.

Although Reeder also mentions other states' law, the West Virginia statute's language does not lend itself to guidance from other states. Those states' statutes often have different, more specific language describing the steps following a deadlock at the penalty phase of a bifurcated criminal trial. *See, e.g.*, Cal. Penal Code § 190.4(a) (describing steps that may be taken when "the jury has been unable to reach a unanimous verdict" on a special circumstance justifying the death penalty).

Va. 729, 478 S.E.2d 579, 583 (1996). But in this narrow context—and on the narrow question of parole eligibility following a murder conviction—the Legislature has made a different choice. *See* W. Va. Code § 62-3-15. "[T]he punishment of life imprisonment upon conviction for first degree murder is fixed unless *the jury*, in its discretion, recommends mercy." *McLaughlin*, 226 W. Va. at 241, 700 S.E.2d at 301 (emphasis added).

For much the same reason, the trial court's ability to determine mercy in a guilty-plea case does not matter here. The Legislature expressly provided "the court" could decide the mercy issue in guilty-plea cases, but it prescribed that "the jury" must decide the mercy issue in jury-tried cases. W. Va. Code § 62-3-15. And although the circuit court would be well-equipped to decide the mercy issue given its deep knowledge of the relevant facts and law of this case, permitting it to do so would require this Court to amend the terms of the statute. This Court is "obliged not to add to statutes something the Legislature purposely omitted," no matter how practically advantageous it might be. *Banker v. Banker*, 196 W. Va. 535, 547, 474 S.E.2d 465, 477 (1996).

The trial court was right, though, about one thing: The jury's failure to decide the mercy issue "does not affect the conviction of guilt." Certification Order 3 (citing *Doman*, 204 W.Va. at 292, 512 S.E.2d at 214). "[I]t would be a waste of judicial resources to require an entirely new trial." *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 586, 655 S.E.2d 794, 802 (2007); *see also McLaughlin,* 226 W. Va. at 238, 700 S.E.2d at 298. Thus, Reeder's two convictions still stand, and the circuit court need only retry the mercy phase.

Further, because "the [second] jury would not have information regarding the guilt phase of the trial, the lower court should exercise reasonable discretion in determining how the circumstances of the commission of the crime are to be conveyed to the jury in addition to other evidentiary matters appropriate to the mercy phase that the parties may adduce." *Finley*, 219 W.

Va. at 753, 639 S.E.2d at 845. In other words, this Court should encourage the circuit court to employ reasonable means to streamline the proceedings below and place the relevant facts before the second jury in the most efficient way possible. *See* Syl. Pt. 7, *McLaughlin*, 226 W. Va. at 230, 700 S.E.2d at 290 (stressing the relaxed evidentiary standards in a mercy phase trial); *see also State v. Trail*, 236 W. Va. 167, 180 n.17, 778 S.E.2d 616, 629 n.17 (2015) ("[I]t is clear that only Rules 401 and 403 apply to evidentiary rulings made during the mercy phase of a bifurcated trial."). Of course, the "prosecution is entitled to prove its case by evidence of its own choice," *Old Chief v. United States*, 519 U.S. 172, 186 (1997), and any trial proceedings at the mercy phase must respect that. But if, for example, the parties and the Court can agree together on a more efficient means of presenting that proof during the mercy stage, then this Court should likewise respect that flexibility. That way, justice can be expeditiously served.

CONCLUSION

For all the above reasons, the Court should answer the certified question in the negative, holding that Reeder should be retried before a jury *on the mercy issue alone* rather than receive a sentence from the circuit court.

Respectfully submitted,

STATE OF WEST VIRGINIA

Respondent.

By counsel,

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DATED: April 25, 2022

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CERTIFICATE OF SERVICE

I, Michael R. Williams, counsel for the Respondent, hereby certify that I have served true and accurate copies of the **Respondent's Brief** upon the Petitioner depositing said copy in the United States mail, postage prepaid, on this day, April 25, 2022, and addressed as follows:

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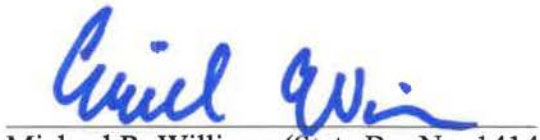

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