IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-86
Case No. 22-F-130
Circuit Court of Kanawha County

GAVIN BLAINE SMITH,

Defendant below, Petitioner.

PETITIONER'S REPLY

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REPLY ARGUMENT

Petitioner's defense did not contest that, as a youth, he killed his entire family.[1] The jury only had to decide *why*, and whether his mental state satisfied the elements for first degree murder or a lesser homicide.[2] But the court instructed jurors on a factor besides mental state—an illegal one—upon which they could base a verdict.[3] It told jurors that as a youthful offender, even a serious conviction would not result in a serious penalty. The court would, at most, sentence Petitioner to life with parole eligibility.[4]

Petitioner appeals because jurors should base their verdict on the facts, not the penalty.[5] The court's illegal instruction—intended for this purpose[6]—lessened the gravity of the jury's decision in a serious case and shifted ultimate responsibility for Petitioner's fate to the parole board.[7]

The response argues I) the judge exercised his authority to clarify an earlier instruction, and II) that informing jurors of the light punishment did not impact their judgment.[8] Neither contention is correct. Courts have zero discretion to tell jurors the consequences of their decision[9] and the difficult nature of the case was an invitation for jurors to rely on illegal factors rather than rehash unpleasant facts.

But the response's legal veneer fails to disguise its extralegal goal: an outcome determinative ruling. The argument that the court acted properly is too thin. And its harmlessness argument is a category error. Neither is a sufficient apologia for what happened below, regardless of the State's opinion of Petitioner.

For what he did as a youth, Petitioner deserved a fair trial the same as anyone else. He hasn't had that yet.

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[1] A.R. 278.
[2] *Compare* A.R. 273–78, A.R. 393 *with* A.R. 278–92.
[3] A.R. 677–79.
[4] *Id.*
[5] *See* Syl. Pt. 8, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).
[6] A.R. 721–22 (State attempting to argue its instruction in closing).
[7] *See State v. Parks*, 161 W. Va. 511, 516, 243 S.E.2d 848, 852 (1978).
[8] Resp.'s Br. 7 and 12.
[9] *See Parks*, 161 W. Va. 511 at Syl. Pt. 4.

I. As a matter of law, courts may not instruct jurors on the legal consequences of their verdict if punishment is not a jury question.

"The universal rule is that punishment is the trial court's role and is not a proper matter for the jury."[10] Instructing jurors on the penalty directs them to nullify—to vote based on blameworthiness rather than the elements.[11] And telling them the parole board will have final say diminishes jurors' own sense of responsibility.[12] The court's instruction did both. And it instructed jurors to apply the facts to the law as a whole—including the penalty—without limiting their analysis to the elements.[13]

The response points to no law permitting judges to instruct jurors on the penalties when they must decide on a degree of guilt. Instead, it relies on generalizations that do not apply to this case. It argues that judges have "broad discretion" to formulate instructions.[14] But whatever deference judges enjoy when selecting lawful instructions, they have zero discretion to offer illegal ones.[15] This Court has made clear, as a matter of law not discretion, that courts may not instruct on the penalties.[16]

It also argues that first degree murder is an exception to the prohibition on penalty instructions.[17] But again, it relies on legal bromide instead of analysis. It quotes broadly from *State v. Guthrie*,[18] but the case's specific holding contradicts the response's point. There the Court ruled that the penalty is relevant to the jury's task *when they must decide mercy*.[19] Where, as here, mercy is not a jury issue,[20] it is improper for anyone to alert jurors to the penalties.[21] The most supportive case law the response claims actually refutes its position.

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[10] *Guthrie*, 194 W. Va. at 678.
[11] *See id.*
[12] *See Parks*, 161 W. Va. 516.
[13] A.R. 645.
[14] Resp.'s Br. 7.
[15] *See Parks*, 161 W. Va. 516; *cf. State v. Riffle*, No. 19-0843, 2020 WL 4355303, at *3 (W. Va. July 30, 2020) (memorandum decision) (courts also have considerable deference when sentencing, but err as a matter of law when they give an illegal sentence).
[16] *See Parks*, 161 W. Va. at 516; *cf. Guthrie*, 194 W. Va. at 678.
[17] *See* Resp.'s Br. 8.
[18] *See* Resp.'s Br. 9.
[19] *See Guthrie*, 194 W. Va. at 678.
[20] *See* W. Va. Code 61-11-23.
[21] *See Guthrie*, 194 W. Va. at 678.

Finally in defense of an "inexplicabl[e]"[22] instruction without modern precedent, the response argues the court was merely correcting an earlier instruction concerning the plea bargain Petitioner's co-defendant received.[23] The record refutes this revisionism.

First, some context. The penalty Petitioner's ex-girlfriend avoided was relevant to understanding the bargain she received for cooperating.[24] The court could have instructed jurors to disregard the penalty for Petitioner, but no one asked. At the time, the parties agreed it sufficed for jurors to understand that by flipping on Petitioner, the co-defendant would be parole eligible in months instead of facing a fifteen to life sentence.[25]

Second, the agreed instruction required no correction. The judge instructed jurors that youthful offenders convicted of first degree murder are parole eligible after fifteen years.[26] Follow-up questioning re-iterated she avoided a possible sentence of life with parole eligibility.[27] The matter was clear.

Third, the State did not seek clarification, it wanted jurors to convict with clear consciences knowing the penalty would be lax.[28] The mid-trial instruction concerned the *co-defendant*.[29] But at the close, the State did not seek clarification of her testimony. Nor did it ask that jurors disregard Petitioner's possible sentence. It did the opposite. It asked the court to instruct on what would happen to this defendant, in this case, based upon this jury's verdict.[30] And it tried to console jurors that a first degree murder conviction *for Petitioner* would not be unduly harsh.[31] The earlier ruling may have been the pretext, but the State wanted jurors to know the consequences for Petitioner, not the co-defendant.[32]

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[22] *People v. Karika*, 48 A.D.3d 980, 981, 851 N.Y.S.2d 731, 732 (2008).
[23] *See* Resp.'s Br. 8–9.
[24] A.R. 405.
[25] A.R. 426–27.
[26] A.R. 427.
[27] A.R. 427–28.
[28] *Compare* A.R. 633 (telling the judge that jurors need to know a life sentence is possible) *with* A.R. 721–22. (trying to argue to jurors that the penalty is lax).
[29] *See* A.R. 427.
[30] A.R. 630–31.
[31] A.R. 721–22.
[32] *Compare* A.R. 633 *with* A.R. 721–22.

And lastly, the court may have tried to un-ring the bell when the prosecutor argued the penalty, but jurors had already heard from the judge that sentencing would be lax.[33] This was "more substantial since it carried the authority of the court."[34] And nothing in the court's charge told jurors to disregard the penalty when applying facts to the law. On the contrary—the court instructed jurors to consider the law *as a whole*, and this included the legal consequences of their verdict.[35] "[T]the jury is presumed to follow the instructions of the court[,]" and here the court instructed jurors not to follow the law.[36]

No legal analysis can rationalize, after the fact, the ruling below. The court gave an illegal instruction,[37] requested for an illegal purpose,[38] which could have no effect other than to prejudice Petitioner.[39] Jurors were to weigh the facts and apply their findings to the elements. The court's instruction invited them to consider blameworthiness as well.

II. The error is the harm because instructing on penalty does not affect how jurors evaluate the elements, it invites them to disregard them entirely.

In *State v. Parks*, this Court reversed because the trial judge instructed jurors that the defendant would receive probation.[40] It did so without any discussion of prejudice because the error *is* the harm.[41] The response rebukes Petitioner for assuming that jurors could have ignored the elements and convicted on blameworthiness.[42] But that isn't Petitioner's presumption—it is this Court's.[43] "[P]lacing sentencing matters before the jury is 'an issue prejudicial to the fact-finding function of the jury.'"[44]

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[33] *See* A.R. 721–22.
[34] *See Parks*, 161 W. Va. at 516.
[35] A.R. 645.
[36] Syl. Pt. 2, in part, *Rice v. Henderson*, 140 W. Va. 284, 284, 83 S.E.2d 762, 763 (1954).
[37] A.R. 677–78.
[38] *Compare* A.R. 721–22 *with Guthrie*, 194 W. Va. at 677–78.
[39] *Guthrie*, 194 W. Va. at 678.
[40] *See Parks*, 161 W. Va. at 516.
[41] *See id.*
[42] Resp.'s Br. 12.
[43] *See Rice*, 140 W. Va. 284 at Syl. Pt. 2 (presumption jurors follow instructions).
[44] *Guthrie*, 194 W. Va. at 678 (quoting *Parks*, 161 W. Va. at 516).

If one takes seriously the presumption that jurors follow court instructions, Petitioner's case illustrates the qualitative prejudice inherent to instructing on penalty.[45] The only disputed issue was which degree of homicide should attach.[46] Jurors struggled with this and required an *Allen*[47] charge to reach unanimity.[48] But the court gave jurors two paths to reach a decision. They could revisit graphic testimony and exhibits to weigh the elements, or they could contemplate the penalty and assign blameworthiness.[49] The court instructed on both, and to apply the law as a whole.[50] If jurors followed the law as given, they would have considered the penalty, tainting the verdict.

Likewise, learning Petitioner's fate would eventually rest with the parole board would have detracted from the jury's sense of responsibility.[51] Based on its rebuttal, this is precisely why the State requested it.[52] Again, that this was a difficult case that jurors struggled with makes the error more prejudicial, not less.

Contrast this with run-of-the-mill errors susceptible to normal harm analysis. When an error concerns the evidence, one can evaluate the remaining evidence to decide the error's effect.[53] But nullification's prejudice is not that jurors will mis-weigh the facts. The danger is they will disregard their structural role *entirely*.[54] No amount of evidence can make up for an instruction that tells jurors the statutory penalty and to take it, along with the rest of the law, into account when selecting a verdict.[55]

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[45] *See Guthrie*, 194 W. Va. at 677 (reversing where jurors learned the penalties in a case where they had to decide which homicide degree applied).
[46] *Compare* A.R. 273–78 *with* A.R. 278–92.
[47] *Allen v. U.S.*, 164 U.S. 492 (1896); *see also State v. Waldron*, 218 W. Va. 450, 460, n. 11, 624 S.E.2d 887, 897, n. 11 (2005) ("The *Allen* charge, often called the 'dynamite charge,' is a supplemental instruction given to encourage deadlocked juries to reach agreement.").
[48] A.R. 950–51.
[49] *See Guthrie*, 194 W. Va. at 677.
[50] A.R. 645.
[51] *See Parks*, 161 W. Va. at 516.
[52] A.R. 721–22.
[53] *See* Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).
[54] *See Parks*, 161 W. Va. at 516; *see also Guthrie*, 194 W. Va. at 677.
[55] *Guthrie*, 194 W. Va. at 678 (informing jurors of the penalty is, itself, prejudicial to the jury's fact-finding).

Yet that is what the response purports to do. It argues that jurors did not credit the defense theory, but can only state this in conclusory terms.[56] It cannot analyze harm because there is no common metric between the quantum of evidence and what the defendant deserves.[57] This is why the Court historically reverses.[58] The error is the harm.

But legal analysis is not the response's aim. Below, the court erred by inviting jurors to base their verdict on extralegal considerations. Now it does the same by portraying Petitioner as irredeemable. But its argument provides insufficient paint to gloss over the outcome-determinative ruling it seeks.

CONCLUSION

Petitioner asks the Court to apply the facts to the law. Jurors should deliberate irrespective of punishment. Neither party should distract from that mission or detract from the gravity of their verdict. Petitioner therefore requests a fair trial.

Respectfully submitted,
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[56] *See* Resp.'s Br. 14.
[57] *Cf. State v. McLaughlin*, 226 W. Va. 229, 234, 700 S.E.2d 289, 294 (2010) (Whether a defendant deserves mercy is conceptually incompatible with evidentiary proofs).
[58] *See Parks*, 161 W. Va. at 516; *see also Guthrie*, 194 W. Va. at 677.