

IN THE COURT OF APPEALS OF MARYLAND

NO. 112

SEPTEMBER TERM, 1994

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JOHN MICHAEL MITCHELL

V.

STATE OF MARYLAND

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Eldridge  
Rodowsky  
Chasanow  
Karwacki  
Bell  
Raker

JJ.

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DISSENTING OPINION BY Bell, J., in  
which Eldridge, J. joins.

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FILED: June 20, 1995

When, after four hours of deliberations, during the course of which it asked two questions pertaining to the petitioner's criminal responsibility, the jury inquires as to the effect of a hung jury, in context, it is obvious that the jury's focus was on an issue within its province to resolve. While the question, on its face, was concerned with an issue outside the jury's area of responsibility, the resolution of that issue had a direct and significant impact on the very issue that jury was required to decide, i.e., whether the petitioner was criminally responsible when the charged offenses were committed. In this case, it is precisely because the jury wished to avoid speculating about the "extraneous" issue that it asked the subject question; the jury was attempting to discharge its responsibility, rather than abdicate it, for want of what it perceived to be necessary information. Where the very real possibility exists that the failure to answer a question from the jury will, due to jury speculation as to the matter about which inquiry was made, unfairly impact one of the parties,<sup>1</sup> it is not enough for the court to inform the jury that the issue about which inquiry has been made is not a matter for its resolution; in that circumstance, the court must, in addition, answer the question. When it is the defendant who is placed at a disadvantage, to do otherwise creates an unacceptable risk that the

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<sup>1</sup>It is conceivable that a jury question could be phrased in such a way as to telegraph a bias against the State. Insuring the integrity of the trial process requires that, in that case, as in the case when the adverse impact is on the defendant, the jury not be allowed to proceed uninformed to the fullest extent of the true state of affairs.

jury will resolve the doubt in favor of the State, rather than in favor of the defendant as it is required to do.

There can be no serious question, as the petitioner points out, that the jury was struggling with the question of the petitioner's criminal responsibility. The petitioner having all but conceded that he committed the offenses, criminal responsibility was, in reality, the only issue before the court, as the two notes that the jury sent the trial judge reflect. Thus, the jury's inquiry whether the petitioner would "walk" in the event of a hung jury must be considered and interpreted in that light. The court having instructed the jury as to the effect of a finding of a lack of criminal responsibility, the jury was not concerned about what would happen if it found the petitioner not criminally responsible; rather, it was concerned about what would happen if there could be no agreement on that issue: would, in effect, the petitioner be acquitted if the jury disagreed as to the petitioner's criminal responsibility? Given the unmistakable impression, conveyed by its question, that the jury did not want the petitioner to "walk," a verdict was simply not possible until the jury was satisfied that that would not occur. In other words, a prerequisite to a fair consideration of the only issue in the case was the jury's understanding of the ramifications of being unable to resolve that issue.

While, as I have indicated, the effect of a hung jury ordinarily is not a matter of concern for the jury, under these

circumstances, an honest answer to the question was necessary if the jury were to be able to answer fairly the very question which was within its province - the criminal responsibility of the petitioner. I repeat, it is not enough to tell the jury that it is not within its province to consider the effect of a hung jury; the court must also have informed it that it was the State's decision whether to allow the defendant to "walk." By refusing to answer the jury's question and, instead, repeating the modified Allen charge, the court ensured the conviction of the petitioner, the very result forecast in the question itself.

The majority asserts that the exception applied in capital cases to permit information concerning a defendant's eligibility for parole in the event of a life sentence to be submitted to the jury is inapposite since, in this case, the jury was not involved in sentencing and, in any event, even a capital jury is not told the consequences of its being "hung." In no case involving the capital sentencing exception has the effect of a hung jury been raised by the jury itself.<sup>2</sup> See Oken v. State, 327 Md. 628, 642-

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<sup>2</sup>The issue was raised by the juries in Leupen v. Lackey, 248 Md. 19, 234 A.2d 573 (1967), and Dove v. State, 47 Md. App. 452, 423 A.2d 597 (1980); however, neither case satisfactorily answered the merits of the issue, if the issue was analyzed at all. In Leupen, the court focused simply upon the adequacy or propriety of the Allen charge given. In Dove, the defendant failed to object to the court's response to the jury's question. Moreover, Chambers v. State, 337 Md. 44, 48, 650 A.2d 727, 729 (1994), is also inapposite. In that case, the issue was whether to instruct the jury in accordance with a defense request for an instruction informing the jury that it could recommend mercy, pursuant to a Maryland Rule.

43, 612 A.2d 258, 265 (1992), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1312, 122 L.E.2d 700 (1993), and Booth v. State, 327 Md. 142, 153-54, 608 A.2d 162, 167, cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 500, 121 L.Ed.2d 437 (1992). In those cases, on the contrary, the issue was raised by the defendant, who argued that such an instruction was proper since a hung jury is an acceptable outcome of a capital sentencing proceeding. That this Court rejected that argument does not, however, answer the question this case presents.

Furthermore, I believe the rationale of Doering v. State, 313 Md. 384, 407-412, 545 A.2d 1281, 1292-95 (1988), though not directly applicable, is instructive. Just as "a jury seeking to determine the appropriateness of a life sentence will be aided by information correctly describing the legal and practical effects of such a sentence," so too is a jury concerned about the effects of a hung jury entitled to information, accurately describing the consequences of that judgment, in order properly to perform its duty.

For the foregoing reasons, I reject the majority's suggestion that a truthful, i.e., an accurate, answer, albeit one that does not tell the jury definitively and precisely what will happen would have the same effect as not answering the question. While telling the jury that it is the State's responsibility to determine whether to retry the defendant is not the same as telling it that the defendant will not walk in the event of a hung jury, it does give the jury the meaningful information it seeks. I dissent.

Judge Eldridge joins in the views herein expressed.