OFFICIAL ARKANSAS
SUPREME COURT OPINION

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SUPREME COURT OF ARKANSAS

No. CR 11-116

KENNETH RAY OSBURN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered December 1, 2011

DISSENT ON DENIAL OF REHEARING.

PAUL E. DANIELSON, Associate Justice

After further reflection on the issues presented in the instant case, I would grant Osburn's petition for rehearing. In our opinion of October 6, 2011, this court equated the jury's actions in this case to a deadlock. However, it is now clear to me that an Arkansas jury cannot deadlock or be "hung" in a bifurcated sentencing proceeding in which the State seeks the death penalty.

Arkansas Code Annotated § 5-4-603 (Supp. 2007) clearly provides that where the jury does not *unanimously* find that death is appropriate, the defendant shall be sentenced to life imprisonment without parole. *See, e.g.*, *Fretwell v. State*, 289 Ark. 91, 95–96, 708 S.W.2d 630, 632 (1986) (holding that the Allen charge was "obviously erroneously given since, if the jury did not unanimously agree on the death sentence, their verdict would automatically stand at life without parole and there would not be a retrial"). The sentence of life is by default; unlike the Pennsylvania statute at issue in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), the

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decision on which our original opinion relies, there is absolutely no provision in our statute that permits a discharge of the jury "if [the court] is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence." 42 Pa. Stat. Ann. § 9711(c)(v).

It is more than well settled that our statute permits mercy. *See, e.g.*, *Camargo v. State*, 337 Ark. 105, 987 S.W.2d 680 (1999); *Greene v. State*, 335 Ark. 1, 977 S.W.2d 192 (1998); *Jackson v. State*, 330 Ark. 126, 954 S.W.2d 894 (1997). Moreover, our statute, unlike that of Pennsylvania, does not require a unanimous decision by the jury to sentence a defendant to life; to the contrary, if even one juror finds a life sentence more appropriate, for whatever reason, the defendant receives a sentence of life in the State of Arkansas. *Cf. Commonwealth v. Sattazahn*, 563 Pa. 533, 763 A.2d 359 (2000). In other words, any vote by the jury other than 12-0 in favor of the death penalty demonstrates and equates to a rejection of death.

The Supreme Court has reaffirmed that

> the relevant inquiry for double-jeopardy purposes was not whether the defendant received a life sentence the first time around, but rather whether a first life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence-*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt.

Sattazahn, 537 U.S. at 108 (2003) (quoting *Arizona v. Rumsey*, 467 U.S. 203 (1984)). By enacting a capital-sentencing procedure "that resembles a trial on the issue of guilt or innocence," a state, such as Arkansas, "*explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Bullington v. Missouri*, 451 U.S. 430, 444 (1981) (emphasis in original). In the instant case, the record demonstrates that all of the requisite findings were made by the jury pertaining to a sentence of death; however, one juror refused to sign the

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verdict of death. By her doing so, there was no longer a unanimous vote for the death penalty; the State had clearly failed in its efforts to prove that a sentence of death was warranted. Once she did so, the jury's verdict automatically became one of life imprisonment without parole.

In sum, the jury necessarily "acquitted" Osburn of death because it could not unanimously agree that the death penalty was warranted.[1] The jury did not fail to render a decision; instead, its failure to unanimously sentence Osburn to death was a decision on the merits of the State's case.[2] Our use of the "reasonable-doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant that should bear 'almost the entire risk of error.'" *Id.* at 446 (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)). Here, the State had its "one fair opportunity to offer whatever proof it could assemble;" it failed to prove its case, and it is not entitled to another chance at doing so. *Id.* at 446 (quoting

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[1]Whether the circuit court treated the jury as deadlocked should have no bearing on our decision. As already noted, the Arkansas statute does not allow a jury to deadlock. The State, therefore, must prove its case for a sentence of death such that the jury unanimously finds the death sentence warranted. Here, once the State failed to do so, the jury was required to sentence Osburn to life imprisonment without parole. *See* AMI Crim. 2d 1008.

While I am cognizant of the fact that AMI Crim. 2d 9110 references a deadlocked jury, as the comment to the instruction makes clear, the statutory procedure for the death-penalty phase in no way provides for a deadlocked jury. To the contrary, the statute forecloses such a possibility.

[2]In our original opinion, we also addressed Osburn's arguments under our state constitution, stating that our decision in *Sneed v. State*, 143 Ark. 178, 219 S.W. 1019 (1920), established the rule that "where a jury has decided guilt in a capital case and then imposed a life sentence, there is an implied rejection of the death penalty, and upon retrial, the death penalty is unavailable to the state." 2011 Ark. 406, at 5. Here, the jury decided guilt and rejected death, by virtue of the sole juror refusing to sign the verdict of death. Accordingly, *Sneed* is directly on point.

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Burks v. United States, 437 U.S. 1, 16 (1978)).

While I do not take great pleasure in admitting that my initial decision in this case was in error, I must. There is simply too much at stake in the instant case. Accordingly, I respectfully dissent from the denial of rehearing, as I would grant the petition.