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**03-3200 – DEATH PENALTY CASE**

AUG 30 2006

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**LEONARD GREEN, Clerk**

JASON GETSY,  
Petitioner-Appellant

v.

BETTY MITCHELL, Warden  
Respondent-Appellee

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**RESPONDENT-APPELLEE'S PETITION FOR REHEARING  
WITH SUGGESTION FOR REHEARING EN BANC**

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**On Appeal from the United States District Court  
for the Northern District of Ohio, Eastern Division (Cleveland)**

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## INTRODUCTION

In the opening sentence of his dissent, Judge Gilman succinctly exposes the fundamental problem with the majority's opinion: "In setting aside the death sentence imposed upon Jason Getsy for the murder of Ann Serafino, the majority today reaches beyond the arguments advanced by Getsy and announces a new rule of constitutional law." Panel Op. at 21 (Gilman, J., dissenting). That one sentence cogently demonstrates the need for en banc review. It reveals the direct conflict between the panel's holding and the Supreme Court's repeated admonition that AEDPA review is limited to "clearly established" Supreme Court precedent, see, e.g., *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003), leaving lower courts without authority to "announce[] [] new rule[s]" in such cases. See also Fed. R. App. P. 35(b)(1)(A) (conflict with Supreme Court precedent is basis for en banc review).

Moreover, a closer examination of the substance of this "new rule of constitutional law" makes the case for en banc review even more compelling. As the dissent correctly noted, the panel majority held that "the Eighth Amendment and the common law rule of consistency require [the court] to invalidate Getsy's death sentence because a different jury failed to find the murder-for-hire specification at the later trial of the man who enlisted Getsy as the hired killer." Panel Op. at 21 (Gilman, J., dissenting). But this new rule, as the dissenting judge

also noted, directly contradicts “[b]inding precedent from both the Supreme Court and this court,” *id.*, as well as precedent from other circuits.

Indeed, the majority’s new rule creates intra-circuit, inter-circuit and/or Supreme Court conflicts in three separate areas of the law. First, the majority held that the disparate sentences for Getsy and John Santine, the man who hired him, violated the common law rule of consistency. But, “this court has squarely held that the rule of consistency did not survive the Supreme Court’s decision in [*U.S. v. Powell*, 469 U.S. 57 (1984)],” Panel Op. at 23 (Gilman, J., dissenting), a conclusion shared by at least six other circuits. *Id.* (citing cases). The holding here thus conflicts with each of those cases.

Second, the majority’s holding that the Eighth Amendment requires “comparative proportionality” (i.e., proportionality between the punishments for different defendants involved in the same crime) was directly rejected, as the dissenting judge noted, by the Supreme Court in *Pulley v. Harris*, 465 U.S. 37 (1984). Panel Op. at 25 (Gilman, J., dissenting). Moreover, any such principle would inherently conflict with the Supreme Court’s demand that each capital defendant receive “individualized consideration.” See, e.g., *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992); *Enmund v. Florida*, 458 U.S. 782, 798 (1982). After all, two separate defendants who played an equal role in a crime could well have different IQs or different childhoods that would warrant different treatment, but under the

panel's one-size-fits-all approach, the Constitution would actually *require* identical sentences.

Third, the majority adopts a reading of *Furman*'s arbitrariness principle that extends *Furman* far beyond its facts, and that cannot be squared with the Supreme Court's own later treatment of that case.

In light of the myriad conflicts the panel's "new rule of constitutional law" creates—with Supreme Court precedent as well as precedent from this and other circuits—Ohio respectfully asks the original panel to reconsider its decision, or, in the alternative, respectfully urges en banc review.

#### **STATEMENT OF FACTS**

John Santine allegedly hired Getsy and two others (Richard McNulty and Ben Hudach) to kill Chuckie Serafino after a dispute over Santine's efforts to purchase Serafino's lawn-care business. Serafino lived with his mother, Ann Serafino. On the evening of July 6, 1995, Getsy, McNulty and Hudach went to the Serafino residence. Hudach sprained his ankle approaching the house, and thus remained outside. The other two entered the house, shot and killed Ann Serafino, and shot Chuckie Serafino in the face. Chuckie Serafino played dead until they left, but ultimately survived the shooting.

The Trumbull County Grand Jury indicted Getsy for, inter alia, aggravated murder. The indictment included three death specifications: (1) murder or

attempted murder of two or more people, (2) murder for hire, and (3) felony murder. The jury found Getsy guilty on all specifications and, after a separate penalty-phase hearing, recommended a capital sentence. The trial judge accepted that recommendation.

Santine was tried separately at a later time. He was convicted of aggravated murder, but the jury did not convict on the murder for hire specification, and Santine did not receive a death sentence.

### **REASONS FOR GRANTING THE PETITION**

Under the panel majority's opinion, the Sixth Circuit is burdened with a "new rule of constitutional law," Panel Op. at 21 (Gilman, J., dissenting), requiring reversal of a death sentence imposed on a hired killer if a co-defendant is later acquitted of a murder-for-hire specification in a separate trial. But the panel adopted this new rule in direct contravention of the Supreme Court's mandate that AEDPA review, as the statutory text expresses, "restricts the source of clearly established law to this Court's jurisprudence." *Williams v. Taylor*, 529 U.S. 362, 412 (2000), precluding circuit courts from creating "new rules" in habeas. Indeed, as the dissent notes, the majority's approach even violates the Supreme Court's pre-AEDPA prohibition in *Teague v. Lane*, 489 U.S. 288 (1989), on using "new rules" as the basis for habeas. Panel Op. at 22 (Gilman, J., dissenting).

The majority grounded this new constitutional rule on alleged requirements of consistency, proportionality and non-arbitrariness that the majority said it found in various Supreme Court case law. With regard to each of these principles, however, the panel opinion in fact creates direct conflicts—conflicts with Supreme Court precedent, precedent from this Circuit, and/or precedent from other circuits. En banc review is desperately needed to address those conflicts.

**A. The panel majority’s consistency principle conflicts with Supreme Court precedent, Sixth Circuit precedent and decisions from other circuits.**

In relying on the “common law rule of consistency,” Panel Op. at 10, to vacate Getsy’s death sentence, the panel opinion directly conflicts with Supreme Court precedent, with decisions from this Court, and with decisions in at least six other circuits. According to the majority, the Supreme Court applied the common law rule of consistency in *Morrison v. California*, 291 U.S. 82 (1934), making that rule fair game for AEDPA purposes. Panel Op. at 10. But in advancing that position, the majority fails to give proper weight to the Supreme Court’s holding in *United States v. Powell*, 469 U.S. 57 (1984), in which the Court reaffirmed the principal that a criminal defendant convicted by a jury on one count could not attack the conviction because it was inconsistent with the jury’s verdict of acquittal on another count. See also *Dunn v. United States*, 284 U.S. 390, 393 (1932).

*Powell* concluded further that the jury’s rationale in reaching a verdict is not reviewable. *Powell* explained that inconsistent verdicts are often based upon “jury

lenity” which the government is unable to appeal because of double jeopardy principles, and that appellate review of the sufficiency of the evidence provided a sufficient “safeguard[] against jury irrationality.” *Id.* at 67.

*Powell* precludes the application of the rule of consistency to undermine Getsy’s sentence. Indeed, as the dissent noted, Panel Op. at 23 (Gilman, J., dissenting), this Circuit has expressly held that, after *Powell*, the rule of consistency has no ongoing vitality. See *United States v. Newton*, 389 F.3d 631, 636 (6th Cir. 2004) (the rule of consistency has no continuing validity), *vacated in part on other grounds*, 126 S. Ct. 280 (2005); *United States v. Crayton*, 357 F.3d 560, 565–67 (6th Cir. 2004) (since the rule of consistency previously recognized by the circuit did not survive *Powell*, defendant’s conviction for conspiracy to possess cocaine upheld despite jury acquittal of coconspirator on same offense); *United States v. Sachs*, 801 F.2d 839, 845 (6th Cir. 1986) (insufficient evidence to support a guilty verdict in one case does not mean that conviction on different evidence in another case was improper). Under the established law of this Circuit, the rule of consistency could have no effect on Getsy’s sentence.

Nor is this Circuit alone in its understanding of *Powell*. Indeed, as this Circuit noted in *Crayton*, cases from the First, Fourth, Fifth, Ninth and Eleventh Circuits have all read *Powell* as “render[ing] the rule of consistency no longer good law.” 357 F.3d at 565 (citing cases). And, as the dissent here noted, since *Crayton*, the

Eighth Circuit has also joined in that same conclusion. See Panel Op. at 23 (Gilman, J., dissenting) (citing *U.S. v. Morton*, 412 F.3d 901, 904 (8th Cir. 2005)).

Moreover, even if the former rule of consistency did survive *Powell*, that rule would not apply to separate verdicts from separate jury trials. See *Newton*, 389 F.3d at 636; *Sachs*, 801 F.2d at 845. As Getsy and Santine were tried separately, then, the rule, even if in force, would not supply the “clearly established federal law” necessary to undermine Getsy’s sentence here.

The panel majority’s improper reliance on the rule of consistency directly contravenes Supreme Court precedent, Sixth Circuit precedent and precedent from other circuits. Only rehearing or rehearing en banc can correct this error.

**B. The panel majority’s proportionality analysis is contrary to Supreme Court and Sixth Circuit precedent.**

Along with its misapplication of the rule of consistency, the panel majority concluded that Getsy’s death sentence constituted an Eighth Amendment violation because it was disproportionate to the life sentence imposed upon John Santine, the mastermind of the conspiracy to murder the Serafinos. The panel majority’s conclusion ignores both the proportionality case law of the Supreme Court and well established Sixth Circuit precedent.<sup>1</sup>

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<sup>1</sup> The panel majority also ignores the fact that Getsy was convicted of two additional aggravating circumstances, purposeful killing or attempt to kill two or more persons and felony murder during the commission of an aggravated burglary.

In *Pulley v. Harris*, 465 U.S. 37, 42–43 (1984), the Supreme Court defined proportionality as “an abstract evaluation of the appropriateness of a sentence for a particular crime.” *Pulley* noted further that in evaluating the nature of the offense and the penalty imposed the “Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime.” *Id.* at 43. As examples of such punishments, *Pulley* included (1) imposition of a death sentence for the rape of an adult woman that does not result in death, and (2) a death sentence for a defendant who aids and abets the commission of a felony but does not take a life, attempt to take a life, or intend to take a life. *Id.* at 43 (citing *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)).

However, as the dissent noted, Panel Op. at 25 (Gilman, J., dissenting), *Pulley* expressly *rejected* the argument relied upon by the panel majority—that the Constitution requires comparative proportionality review. See 465 U.S. at 43–51. According to the Supreme Court, a punishment that is proportionate *to the crime* (e.g., a capital sentence for purposefully killing another) does not become unacceptable merely “because [it is] disproportionate to the punishment imposed on others convicted of the same crime.” *Id.* at 43.

Despite the fact that comparative proportionality review is not constitutionally required, the Ohio Supreme Court does conduct a proportionality review between

capital defendants convicted of similar offenses. This Circuit has consistently upheld the Ohio courts' review procedures as included "within the wide latitude allowed" States in defining the parameters of comparison cases. See *Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003) (rejecting habeas claim that Ohio failed to provide meaningful proportionality review of death sentence); *Buell v. Mitchell*, 274 F.3d 337, 368–69 (6th Cir. 2001) (rejecting habeas challenge to Ohio's review of proportionality of death sentence because proportionality review is not constitutionally required); *Williams v. Bagley*, 380 F.3d 932, 963 (6th Cir. 2004) (no liberty interest in Ohio's system of proportionality review, eight different panels of the Sixth Circuit have concluded that Ohio's system comports with due process); and *Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003) (proportionality review not constitutionally required). But if anything, these cases confirm that such review is a voluntary decision by the State, *not* a constitutional requirement.

In an effort to distinguish this case from *Pulley*, *Wickline*, *Buell*, *Williams* and *Smith*, the panel majority relies upon *Enmund* as support for its flawed proportionality analysis. A review of *Enmund*, however, does not support the panel majority's conclusion. *Enmund* does not require comparative proportionality, but rather requires only that in deciding whether a given defendant receives a capital sentence, "the focus must be on *his* culpability, not on that of [others who acted with him], for we insist on individualized consideration as a constitutional

requirement in imposing the death sentence.” 458 U.S. at 798 (citation and punctuation omitted).

Getsy, unlike Enmund, clearly falls within the class of defendants for whom death is an appropriate punishment: Getsy in fact killed Ann Serafino, attempted to kill Charles Serafino and intended to kill everyone in the residence prior to his entry into their home. Thus, *Enmund* provides no support to the majority in striking Getsy sentence.

Indeed, if anything the majority’s rule conflicts with the “individualized consideration” *Enmund* demands. According to the majority, each defendant must get the same penalty if it is to be valid for any. It is not surprising, then, that the dissent concluded that “[t]he majority’s reading of *Enmund* turns the case on its head.” Panel Op. at 26.

*McCleskey v. Kemp*, 481 U.S. 279 (1987), further undercuts the panel majority’s comparative proportionality rule. In *McCleskey*, an African American defendant used statistical evidence to argue that the sentence he received for killing a Caucasian was disproportionate to sentences imposed in other murder cases. *Id.* at 306. The Supreme Court, relying upon *Pulley*, however, concluded that a defendant could not prove a constitutional violation merely by demonstrating “that other defendants who may be similarly situated did not receive the death penalty.” *Id.* at 306–07. According to the *McCleskey* Court, the possibility that a jury may

have acted out of what it termed “discretionary leniency” and decided not to impose the death penalty in one case could not serve to invalidate the death sentence imposed in another. *Id.* at 307.

Case law from other circuit courts interpreting *Pulley* and *McCleskey* also rejects the panel majority’s comparative proportionality analysis. For example, in *Hatch v. Oklahoma*, 58 F.3d 1447, 1466 (10th Cir. 1995), the Tenth Circuit faced a similar situation: a sentence of death was imposed upon one co-defendant (Hatch) while the second co-defendant received a life sentence. Hatch argued in habeas that he was entitled to a proportionality review that compared his death sentence with his co-defendant’s sentence. The Tenth Circuit rejected Hatch’s argument on the basis of *Pulley*, finding that since Hatch received the appropriate review of his individual culpability, a review of his “comparative responsibility” was simply not constitutionally required. *Id.* See also *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996) (per curiam) (habeas petitioner failed to raise federal constitutional claim by arguing death sentence disproportionate to codefendant whose death sentence had been vacated on appeal); *Russell v. Collins*, 998 F.2d 1287, 1294 (5th Cir. 1993) (rejecting habeas challenge that death sentence was disproportionate to 60 year sentence of codefendant); *Palmer v. Clarke*, 408 F.3d 423, 438–39 (8th Cir. 2005) (rejecting challenge to proportionality review of death sentences to cases where life sentence imposed); and *Allen v. Woodford*, 366 F.3d 823, 862–63

(9th Cir. 2004) (neither the Eighth Amendment nor due process requires comparative proportionality review in imposing the death penalty).

In short, the majority's decision implementing a comparative proportionality rule conflicts with Supreme Court precedent, as well as case law from across the country, and thus warrants review by the full court.

**C. The verdicts in Getsy's and Santine's separate trials do not implicate *Furman v. Georgia* concerns.**

The panel majority incorrectly maintains that the verdicts in Getsy's and Santine's separate trials resulted in an unconstitutionally arbitrary death sentence for Getsy under *Furman v. Georgia*, 408 U.S. 238 (1972), which found the death penalty, as administered in 1972, to be cruel and unusual punishment under the Eighth Amendment. Despite the panel majority's contention, *Furman* does not invalidate Getsy's death sentence.

Subsequent Supreme Court decisions reveal that *Furman* was primarily concerned with avoiding the arbitrary imposition of the death penalty. To that end, the Court concluded that the decision as to whether a death sentence should be imposed had to be guided by established standards "so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg v. Georgia*, 428 U.S. 153, 199 (1976). See also *Blystone v. Pennsylvania*, 494 U.S. 299, 314 (1990) (vesting the sentencer with unbridled

discretion to determine whether death sentence should be imposed is arbitrary under *Furman*).

Contrary to the conclusion of the panel majority, Getsy's jury did in fact focus on the particularized circumstances of the Serafino murder as well as Getsy's individual culpability as required under *Furman*. It is also beyond dispute that Ohio's system of capital punishment does not allow the sentencer to exercise unbridled discretion in deciding whether a death sentence should be imposed. Rather, Ohio's capital sentencing structure requires the jury/three judge panel to find statutory aggravating factors and then weigh those factors against the mitigating circumstances before a death sentence may be imposed. There is no question that Getsy's jury performed this statutory function in deciding to impose the death sentence.

Moreover, *Furman* is inapplicable to Getsy's sentence in two other ways. First, *Furman* was concerned not with the unfairness of individual death sentences, but rather with the arbitrary nature of a State's capital punishment scheme in its entirety. See *Gregg*, 428 U.S. at 200. Therefore it is difficult to see how *Furman* can supply the "clearly established federal law" necessary to invalidate Getsy's individual sentence. 28 U.S.C. § 2254(d)(1). Second, by attempting to combine the outdated rule of consistency along with *Morrison v. California*, 291 U.S. 82 (1934) and *Hartzel v. United States*, 322 U.S. 680 (1944), with the Eighth Amendment

concerns addressed in *Furman*, the panel majority has in essence expanded upon *Furman* to create a new rule of constitutional law based upon cases decided 28 and 38 years prior to *Furman*. See Panel Op. at 30 (Gilman, J., dissenting).

In short, Judge Gilman was undeniably correct in observing that the panel majority here “announce[d] a new rule of constitutional law.” Even if AEDPA permitted the Court to do so in a habeas case, and of course it does not, the rule the majority adopted conflicts with Supreme Court precedent, previous opinions of this Circuit, and case law from at least six other circuits. Before the panel’s “new rule” becomes the law of the Circuit, Ohio respectfully urges that further review is warranted, whether by the original panel or the Court as a whole.

### CONCLUSION

For the above reasons, this Court should grant rehearing or rehearing en banc.

Respectfully submitted,

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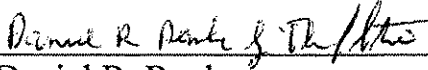
## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Petition for Rehearing with Suggestion for Rehearing En Banc has been sent by regular U.S. mail this 30th day of August, 2006, to the following counsel:

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