No. 03-3200

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JASON GETSY,

Petitioner-Appellant,

vs.

BETTY MITCHELL, Warden,

Respondent-Appellee.

On Appeal from the United States District Court
Northern District of Ohio, Eastern Division (Cleveland) No. 01-1-00380

BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The panel decision in this case exceeds the scope of the limited role of federal habeas corpus. It strikes down a death sentence by creating a new

rule of constitutional law not contained in the Supreme Court's precedents. In doing so, the decision is contrary to the limitations placed on federal habeas courts by the Supreme Court and Congress. A state court applied the rules in effect at the time of the appeal faithfully and correctly, yet its decision was overturned in a collateral attack, contrary to both statute and precedent. This result is contrary to the interests CJLF was formed to protect.

CJLF's Motion for Leave to File Brief Amicus Curiae in Support of Respondent's Petition for Rehearing was received by the court on September 11, 2006.

STATEMENT OF FACTS AND CASE

John Santine hired Getsy and two others (Richard McNulty and Ben Hudach) to kill Charles ("Chuckie") Serafino after a dispute over Santine's efforts to purchase Serafino's lawn-care business. Charles lived with his mother, Ann Serafino. *See Getsy v. Mitchell*, 456 F.3d 575, 577-579 (6th Cir. 2006).

On the evening of July 6, 1995, Getsy, McNulty, and Hudach went to the Serafino residence. Hudach remained outside because he sprained his ankle while approaching the house. Getsy and McNulty

> "fired simultaneously through the sliding glass door on the back of the Serafino house. They entered the house through the shattered door and shot at Chuckie as he was running down the hall. When they saw Ann Serafino, Getsy stated, they 'just kept shooting.' " 456 F.3d at 579.

Ann Serafino was killed. Charles played dead until Getsy and McNulty left.

On July 17, 1995, the Trumball County Grand Jury indicted Getsy for, inter alia, the aggravated murder of Ann Serafino. 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 counts and specifications and, after a separate penalty-phase hearing, recommended the death penalty. The prosecution dismissed the conspiracy count. The trial court imposed a death sentence. 456 F.3d at 579-580.

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.

Getsy appealed to the Ohio Supreme Court, which affirmed his conviction and sentence. *State v. Getsy*, 702 N.E.2d 866, 893 (Ohio 1998). The United States Supreme Court denied Getsy's petition for certiorari on June 24, 1999. *Getsy v. Ohio*, 527 U.S. 1042 (1999). Getsy filed a state postconviction petition, which was denied. *See State v. Getsy*, 1999 Ohio App. LEXIS 4975 (1999). The Ohio Supreme Court denied review. *See State v. Getsy*, 723 N.E.2d 1113 (Ohio 2000). Getsy filed a petition pursuant to 28 U.S.C. § 2254 in February 2001.

On appeal, the panel majority reversed and vacated the judgment, requiring the state to "reconsider" in light of this opinion Getsy's sentence under Ohio law. 456 F.3d at 598. Judge Gilman dissented, noting that the majority's holding was "bypassing the limitations that both Congress and the

Supreme Court have placed upon this court's power to grant relief under the circumstances of this case." *Id*. at 615.

SUMMARY OF ARGUMENT

The panel majority reversed Getsy's death sentence after finding that it violates *Furman*, *Enmund*, and *Morrison* because, the panel majority claims, like crimes are not being punished alike in the very same case and because of the inconsistent jury verdicts in this case. *Teague* precludes the new rule that the panel created when it combined the broad *Furman* arbitrariness principle and the rule against disproportionate sentences. *Teague* also precludes the broad rule created by the panel when it combined the *Furman* arbitrariness principle and the very specific rule against inconsistent verdicts. Proportionality review is not required by the Constitution or Supreme Court precedent, and a number of the federal circuits have so held. *Morrison* and *Hartzel* do not prohibit, and do not even directly discuss, inconsistent verdicts. Inconsistent verdicts are completely acceptable in a majority of the federal circuits.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) precludes collateral attack on the Ohio Supreme Court's reasonable and correct affirmance of Getsy's conviction and sentence. The Ohio Supreme Court's decision on the merits was not "contrary to" and did not "involve an unreasonable application of" the United States Supreme Court's precedents.

ARGUMENT

I. The panel majority's holding constitutes a new rule.

The panel's holding qualifies as a "new rule" under the nonretroactivity jurisprudence of *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny. The panel majority held that Getsy's death sentence violates the Eighth Amendment "arbitrariness" standard outlined in *Furman v. Georgia*, 408 U.S. 238 (1972), which prohibits random, disproportionate capital sentences, as well as the proportionality requirement it claimed to find in *Enmund v. Florida*, 458 U.S. 782 (1982), and the due process, inconsistent verdict prohibition it claimed to find in *Morrison v. California*, 291 U.S. 82 (1934). *Getsy v. Mitchell*, 456 F.3d 575, 581-592 (6th Cir. 2006).

The *Teague* analysis is well established.

> " '[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.' *Teague v. Lane*, [498 U.S. 288] at 301 [(1989)]. In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must '[s]urve[y] the legal landscape as it then existed,' [citation] and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.' [Citation.] Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle. [Citation.]" *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

Getsy's conviction and sentence became final when the Supreme Court denied his petition for writ of certiorari on June 24, 1999. *Getsy v. Ohio*, 527 U.S. 1042 (1999). The legal landscape will be surveyed below. This will show that the panel majority's decision created a new rule. This new rule does not fall within either of the two narrow exceptions to the nonretroactivity principle.

A. Furman/Generality.

If the allowed generality is too high, then a rule could always be "dictated" by some precedent, turning *Teague* into a useless formality. *See Sawyer v. Smith*, 497 U.S. 227, 236 (1990) ("But the test would be meaningless if applied at this level of generality"). The panel opinion says,

> "At one end of the spectrum lie legal principles with such a high level of generality that their application does not necessarily lead to a 'predictable development' in the relevant law and therefore cannot be considered clearly established. [Citing *Sawyer*]. On the other end are narrowly drawn bright-line rules with little application beyond factually indistinguishable cases." 456 F.3d at 581.

The panel misunderstood *Sawyer*.

The panel majority found that the *Furman* arbitrariness principle, as supplemented by the rules against disproportionate sentences and irreconcilable jury verdicts in the same case, "falls well within the middle of *Teague*'s spectrum of abstraction." *Ibid*. It said that these principles provide sufficient content for predictable legal development and apply to a range of factual situations. *Ibid*.

In combining the *Furman* arbitrariness principle and the rule against disproportionate sentences, the panel majority took a broad principle and made a specific rule, thereby creating a new rule. *Furman* is a one-paragraph opinion that held that the imposition and carrying out of the death penalty under the statutes in force at the time was cruel and unusual punishment. 408 U.S. at 239-240. This is a general, sweeping mandate. The panel majority's holding is contrary to *Sawyer*, where the court held that the rule adopted in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), was a new rule for *Teague* purposes. *Sawyer*, 497 U.S. at 234. *Caldwell* relied on Eighth Amendment authorities that were much more specific than *Furman*. *Id*. at 235. Yet these more specific precedents did not dictate the result in *Caldwell*. *Ibid*. Moreover, Sawyer's contention that state courts would have found *Caldwell* to be a "predictable development" did *not* suffice to show that *Caldwell* was not a new rule. *Id*. at 236.

The panel majority apparently believes that a precedent is sufficiently specific that applications of it are not new rules if these applications are predictable legal developments from the precedent. That is exactly the opposite of what *Sawyer* held.

The Supreme Court's most recent case on new rules, *Beard v. Banks*, 542 U.S. 406 (2004), rejected a similar argument that the principle of *Lockett v. Ohio*, *supra*, compelled the rule of *Mills v. Maryland*, 486 U.S. 367 (1988). Substituting *Furman* and the panel's rule, respectively, the Court's answer is a perfect fit to the present case.

> "*Thus*, *although the* [*Furman*] principle—conceived of at a high level of generality—could be thought to support the [panel's] rule, reasonable jurists differed even as to this point. It follows *a fortiori* that reasonable jurists could have concluded that the [*Furman*] line of cases did not compel [that rule]." *Banks*, 542 U.S. at 416 (emphasis in original).

B. Disproportionality.

The panel majority found that,

> "sentencing Getsy to death, while the arguably more culpable Santine received a life sentence for the *very same* crime, violates the Eighth Amendment, as construed by the Supreme Court in *Furman* and *Enmund*, and its prohibition of arbitrary and disproportionate death sentences." 456 F.3d at 587 (emphasis in original).

However, proportionality review is not required by the Constitution or Supreme Court precedent. The Supreme Court has said that there is no basis in its cases for holding that comparative proportionality review of sentences imposed in similar cases is required. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). Likewise, proportionality review of sentences imposed on codefendants is not mandated by the Constitution or Supreme Court precedent. *Enmund v. Florida*, 458 U.S. 782, 798, 801 (1982) instructs courts to consider the defendant's culpability and the role he or she played in the perpetration of the crime when deciding whether a death sentence is proper. It does not require courts to ensure that sentences imposed on codefendants are proportionate to their respective levels of culpability. Two of Enmund's codefendants robbed and fatally shot an elderly couple at their home. *Id*. at 784. Based on the evidence presented at trial, the jury could

have inferred that Enmund was in a car near the scene of the crime waiting to help his codefendants escape. *Id*. at 786. Enmund was tried with one of the codefendants who directly took part in the robbery and murders. *Id*. at 785. The jury recommended the death penalty for both defendants. *Ibid*. On appeal, the Supreme Court reversed the judgment upholding Enmund's death penalty. *Id*. at 801. The Court said that the focus must be on Enmund's culpability and not on those who committed the robbery and shot the victims. *Id*. at 798. *Enmund* was limited in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), which held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement. Getsy's case is very different from Enmund's. Getsy personally participated in the killing of the victim and acted with specific intent to kill.

A survey of the legal landscape shows that proportionality review of the sentence imposed on a defendant relative to codefendants is not required in a number of the federal circuits. The Tenth Circuit rejected habeas petitioner's argument that the Constitution requires that his sentence be no more severe than his codefendant's when he asserts that his codefendant is more culpable. *Hatch v. Oklahoma*, 58 F.3d 1447, 1466 (10th Cir. 1995). While defendant waited outside in a car, his codefendant shot four different victims, killing two of them. *Id*. at 1451. Defendant received the death penalty, but his codefendant eventually received life imprisonment. *Id*. at 1466 n.14. The court first quoted *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984),

> " 'there is . . . no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.' " *Id*. at 1466.

Additionally, the *Hatch* court noted, in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court, relying on *Harris*, held that McCleskey could not "prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.' " 58 F.3d at 1466. The court concluded that Hatch was "constitutionally entitled to a determination of his individualized culpability" based on *Enmund* and that he received this. *Ibid*. "The Constitution does not demand that he receive a review of his comparative responsibility as well." *Ibid*.

Other circuits have reached similar conclusions. In *Mills v. Singletary*, 161 F.3d 1273, 1282-1283 (11th Cir. 1998), the court rejected habeas petitioner's argument that the state supreme court and lower federal court erred in ignoring his codefendant's grant of total immunity. Intracase comparison is noted only as a matter of Florida law, not a federal constitutional mandate. *See* also *Russell v. Collins*, 998 F.2d 1287, 1294 (5th Cir. 1993) (rejecting argument that the disparity between habeas petitioner's death sentence and codefendant's sentence of 60 years for the same offense is an invidious discrimination); *Beardslee v. Woodford*, 327 F.3d 799, 817-818 (9th Cir. 2003) (rejecting argument that different sentences for equally culpable codefendants violates the prohibition against arbitrary imposition of the death penalty and noting that a trial court does not commit constitutional error by refusing to allow evidence of codefendant sentences).

Overall, four circuits have rejected the argument that intracase proportionality review is required or the logically prerequisite position that evidence of codefendants' sentences must be considered. The panel opinion, 456 F.3d at 585, cites three state high-court cases for intracase proportionality reviews: *People v. Kliner*, 705 N.E.2d 850, 897 (Ill. 1998); *Larzelere v. State*, 676 So.2d 394, 406 (Fla. 1996); *Hall v. State*, 244 S.E.2d 833, 839 (Ga. 1978). None of these decisions holds that intracase proportionality review is mandated by the federal Constitution. They are all in states where the state high court conducts proportionality review as a matter of state law. See *Pulley v. Harris*, 465 U.S. at 43 n.7 ("much-copied Georgia scheme" includes proportionality review); *id*. at 46 n.8 (Florida); 720 Ill. Comp. Stats. § 5/9-1(i) (broad review power for "fundamentally unjust" sentence). The Supreme Court made quite clear in *Sawyer*, 497 U.S. at 238-241, that practice under state law, no matter how widespread and notwithstanding that it might have been guided by general Eighth Amendment principles, cannot establish a rule as a federal constitutional rule for the purpose of *Teague*.

Similarly, while the panel correctly notes that Congress has allowed the jury to consider lesser sentences imposed on other perpetrators, 18 U.S.C. § 3592(a)(4), this is a policy choice. Where the statutes do not provide for this factor to be considered, it is not constitutionally mandatory, see *People v. Dyer*, 45 Cal.3d 26, 69-70, 753 P.2d 1, 26-27 (1988), not even in the Ninth Circuit. See *Beardslee*, 327 F.3d 816-817.

In *Caspari v. Bohlen*, 510 U.S. at 393-394, the Supreme Court addressed an issue where Supreme Court precedents established general principles but no rule on point, one federal circuit and two state high courts had ruled one way, and another circuit and two other state high courts had ruled the other way. This split was sufficient to establish that the question was a

> " 'developmen[t] in the law over which reasonable jurists could disagree,' *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), [and therefore] the Court of Appeals erred in resolving it in the [habeas petitioner's] favor." *Id*. at 395.

In the present case, the consensus against the panel's rule as a constitutional mandate is far stronger. To impose this new limitation on the states in a habeas case is patent error.

C. Inconsistent Verdicts.

The panel majority found that,

> "*Morrison* and *Hartzel* now stand for the proposition that inconsistent or repugnant jury verdicts in conspiracy and other cases based on a criminal agreement between two parties cannot stand. This rule adds clarity, detail, and content to the more generalized 'arbitrariness' language of *Furman* and mandates that Getsy's death sentence be vacated." 456 F.3d at 590.

Similarly, the panel majority found,

> "[T]he rule of consistency recognized in *Morrison* and *Hartzel* requires reversal of Getsy's murder for hire conviction and the resulting death sentence because the other necessary participant, the hiring party, was acquitted of the same murder for hire specification." *Id*. at 592.

The panel majority concluded,

> "Under these circumstances, the Ohio Supreme Court's decision affirming Getsy's death sentence without identifying or applying the governing Eighth Amendment principles was 'contrary to' the principles clearly established in *Furman*, *Morrison*, and *Hartzel*." *Ibid*.

Morrison v. California, 291 U.S. 82 (1934), dealt with the issue of burden shifting and did not establish a general consistency requirement for conspiracy cases. In that case, the appellants were convicted of a conspiracy to violate the California Alien Land Law. *Id*. at 83. The Alien Land Law made it illegal to place a person who was ineligible for citizenship in the possession and enjoyment of agricultural land. *Ibid*. The law provided that once the state established possession of the land, the burden of proving citizenship shifted to the defense. *Id*. at 84. The Supreme Court overturned the conviction of the lessor, finding that shifting to him the burden of proving the lessee's citizenship was a denial of due process. *Id*. at 93. The Court noted that imputing knowledge to the lessor was wholly arbitrary because he may have never seen the lessee. Even if the lessee was obviously Japanese, he still may have been a citizen as far as the lessor knew. *Id*. at 92-93. Also, the State knew as much as the lessor and the State could have proven the lessee's ineligibility for citizenship just as easily as the lessor. *Id*. at 93. The lessee's conviction also failed, not because of any requirement of consistent verdicts, but because the evidence in this single trial was insufficient to show two guilty minds, a substantive requirement for conspiracy. *See id*. at 92.

Hartzel v. United States, 322 U.S. 680 (1944), similarly did not establish a consistent verdict requirement. Instead, the Court merely noted in a footnote that the setting aside of the co-conspirator's convictions made it impossible to sustain petitioner's conviction upon the basis of the conspiracy count. *Id*. at 682 n.3. In *Hartzel*, all three defendants were tried together in a single trial. *Ibid*. They were charged with attempting to cause insubordination in the armed forces and willfully obstructing the recruiting and enlistment service of the United States. *Id*. at 681-682. It was alleged that in time of war they published and disseminated pamphlets to numerous persons and organizations. *Id*. at 681. One codefendant's sentence was set aside because there was no evidence that he had any active part in the illegal acts. *Id*. at 682 n.3. The other codefendant's sentence was set aside because there was no proof that he knew how the pamphlets were used. *Ibid*. The footnote is consistent with *Morrison* that, in a single trial, insufficient evidence to prove more than one mind with evil intent is insufficient to establish a conspiracy. In separate trials with different evidence, it is entirely possible for proof to be sufficient against one conspirator but insufficient against the others, especially where one confesses but his confession is inadmissible against the others.

Even in a joint trial, the Supreme Court held that inconsistent verdicts between two defendants were not a ground for reversal in *United States v. Dotterweich*, 320 U.S. 277, 279 (1943). *Harris v. Rivera*, 454 U.S. 339, 345 (1981) (*per curiam*), cited *Dotterweich* and declared, "Inconsistency in a verdict is not a sufficient reason for setting it aside." *See also United States*

v. Powell, 469 U.S. 57, 63 (1984) (citing *Dotterweich* and *Rivera*). If this is true in a joint trial before a single factfinder, it must be true for defendants tried separately on different evidence.

A survey of the legal landscape shows that inconsistency in verdicts is not considered a constitutional defect in a majority of the federal circuits. The Sixth Circuit held that the "rule of consistency" previously recognized in this circuit did not survive *United States v. Powell*, 469 U.S. 57 (1984). *United States v. Crayton*, 357 F.3d 560, 567 (6th Cir. 2004). The court concluded that the reasoning of *Powell* applies to co-conspirator cases even though *Powell* itself does not involve co-conspirators. *Id*. at 566. The court, adopting the First Circuit's reasoning, said, " 'an apparent failure to prove an essential element of the offense would not distinguish conspiracy from any other case involving an inconsistent verdict.' " *Ibid*.

The *Crayton* court also spelled out the state of the law in the other circuits. *Id*. at 565-566. Five circuits have held that *Powell* rendered the rule of consistency no longer good law. *See United States v. Bucuvalas*, 909 F.2d 593, 597 (1st Cir. 1990); *United States v. Thomas*, 900 F.2d 37, 40 (4th Cir. 1990); *United States v. Zuniga-Salinas*, 952 F.2d 876, 877-79 (5th Cir. 1992) (en banc); *United States v. Valles-Valencia*, 823 F.2d 381, 381-82 (9th Cir. 1987); *United States v. Andrews*, 850 F.2d 1557, 1560-62 (11th Cir. 1988). *Crayton*, 357 F.3d at 565. Three circuits have "recognized that the rule of consistency does not survive without actually so holding." *See United States v. Dakins*, 872 F.2d 1061, 1065 (D.C. Cir. 1989) (*Powell* "casts doubt" upon rule of consistency); *United States v. Mancari*, 875 F.2d 103, 104 (7th Cir.

1989) (rejection of rule of consistency "makes good sense in light of *Powell*"); *Gov't of the Virgin Islands v. Hoheb*, 777 F.2d 138, 142 n.6 (3rd Cir. 1985) (rule of consistency "may be a vestige of the past"). *Crayton*, 357 F.3d at 565-566. Since *Crayton*, the Eighth Circuit has decided that the rule of consistency is no longer good law, *United States v. Morton*, 412 F.3d 901, 904 (8th Cir. 2005), and the Tenth Circuit has changed its position as applied to jury verdicts. *See United States v. Nichols*, 374 F.3d 959, 970-971 (10th Cir. 2004).

Similar to proportionality review, the clear weight of authority is against any constitutional prohibition against inconsistent verdicts. If there is any conflict at all, under *Caspari v. Bohlen*, 510 U.S., at 395, it is error to resolve this conflict against the state-court decision on federal habeas corpus.

II. The state court's decision was reasonable, and overturning it violates AEDPA.

The state court's decision on the merits is immune from collateral attack on federal habeas unless it is "contrary to, or involved an unreasonable application of," the United States Supreme Court's precedents. *See* 28 U.S.C. § 2254(d)(1).

When the state court has ruled on the merits and § 2254(d)(1) applies, the second step of the *Teague* inquiry is essentially the same as the "clearly established" portion of the AEDPA inquiry. Any extension of precedent that would be "new" for *Teague* is not "clearly established" for AEDPA. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). Any rule which is not "clearly established" cannot be used to avoid § 2254(d)'s limitation on granting relief.

See Lockyer v. Andrade, 538 U.S. 63, 71-73 (2003). As established above, the panel majority created a new rule under *Teague*. Therefore, this new rule was not clearly established for purposes of AEDPA and the panel majority acted outside the scope of the limitation on granting relief.

Section 2254(d)(1)'s "clearly established" phrase "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. In other words, "clearly established federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. *Id*. at 405. A state court decision is

> " 'contrary to' our clearly established precedent if the state court either 'applies a rule that contradicts the governing law set forth in our cases,' or 'confronts a set of facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from our precedent." *Id*. at 405-406.

The decision of the Ohio Supreme Court is not contrary to any specific rule established by the United States Supreme Court. Instead, the panel found that the decision was contrary to a rule that the panel derived from general principles in Supreme Court cases. This mode of reasoning is precisely what the Supreme Court found to be reversible error in *Andrade*, 538 U.S. at 71-73. In three decades of post-*Furman* capital litigation, no circuit has found in *Furman* the rule that the panel claims follows from it, even though the issue comes up all the time. That, by itself is sufficient to prove that no such rule is *clearly* established.

Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous. *Id*. at 410, 412. The state court's application of clearly established law must be objectively unreasonable. *Id*. at 409. Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *Id*. at 411.

If one were to look for an opinion that was a pristine example of exactly what Congress intended to *prohibit* when it enacted AEDPA, it would be very difficult to find a better one than the panel opinion in this case. The highest court of a state heard all the arguments the appellant chose to make and decided them reasonably, in accord with existing Supreme Court precedent, and well within the bounds in which reasonable, competent judges may differ. The panel overturned that decision on collateral attack by claiming to find in Supreme Court precedents specific rules that numerous other courts have held are not there. This is a flagrant violation of both an Act of Congress and of Supreme Court precedent.

CONCLUSION

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

September 26, 2006

Respectfully submitted,

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Form 8. Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-3200.

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *And Attached to the Back of Each Copy of the Brief*

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September 26, 2006
Date

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Signature of Attorney or
Unrepresented Litigant

DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below, I served the attached document by third-party commercial carrier for delivery on the next business day, addressed to counsel for the parties as follows:

Mr. Michael J. Benza
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On the same date and in the same manner, I dispatched an original and six copies to the clerk of the court.

Executed on September 26, 2006, at Sacramento, California.

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Irma H. Abella