

To: Governor Ted Strickland

From: Attorney General Rich Cordray

Date: August 5, 2009

Re: Parole Board Clemency Recommendation on Inmate Jason Getsy.

Introduction

As you know, on July 17, 2009, the Ohio Parole Board, by a five to two vote, recommended that you exercise your clemency powers to reduce Jason Getsy's death sentence to a sentence of life without parole. Although my staff and I do not contest the premise that comparative sentences could be relevant to the clemency determination in certain appropriate cases, we feel strongly that this is not a justifiable basis for commuting the death sentence on the facts of this case, and we believe the precedent set by the Parole Board here would be detrimental to Ohio's system of justice.

The Parole Board recommendation rests on the majority premise that Getsy does not warrant a death sentence because an accomplice, John Santine, was acquitted of the Murder for Hire specification, and therefore was not death-eligible. Santine is mentioned directly or indirectly in five of the six "pivotal" paragraphs of the recommendation.¹ We disagree for the following reasons:

1. It would be unjust to conclude that the sentence for every defendant should be reduced to be consistent with the verdict or sentence for a less culpable co-defendant, or the co-defendant against whom the State had the weaker case. Just because a case involves multiple defendants does not mean that all of them are equally culpable on the facts.
2. Getsy confessed to murdering Ann Sarafino and to being hired to commit this murder. Santine's verdict does not create any question about Getsy's verdict for the aggravated murder offense, and indeed Getsy was also convicted of two other death specifications, neither of which was applicable to Santine – attempt to kill two victims and murder committed as a principal offender during the course of an aggravated burglary. See R.C. 2929.04(A)(2, 5, 7).
3. The cases against Getsy and Santine were markedly different. Getsy was the shooter. Santine was not even present during the murder. Getsy confessed. The case against Santine was indirect, being based primarily on accomplice testimony.
4. Sentencing is required to be an individualized decision based on each defendant's distinct culpability and background. Thus, it is unusual for all co-defendants in a murder case to be sentenced to death, as juries can reasonably assess their culpability and backgrounds differently on their own distinctive facts.

¹ Parole Board Recommendation, 17-18.

5. This was a premeditated crime. Getsy broke into the victims' home for the sole purpose of murdering Chuck Serafino. He came armed with two guns. He shot Chuck Serafino multiple times and thought he was successful in killing him. When he discovered Chuck's mother in the home, who was a defenseless 68-year-old woman, he shot and killed her in a brutal slaying that included pursuing her and executing her after first having incapacitated her. Getsy went on with his life as if nothing had happened, bragging afterwards about the offense. When Getsy appeared before the Parole Board, many years later, he still was less than honest about the facts of the crime. He is not the kind of individual who is deserving of special mercy in the clemency process.

Legal Issue – Inconsistent Verdicts

The legal issue in this case is simple: where a jury acquits the instigator of a murder for hire specification, can the hired offender's conviction for the murder for hire specification be sustained? The legal question was answered in this case before it ever got to the Parole Board, as the Sixth Circuit ruled 8-6 that the Getsy verdict was justified on the facts established and that different juries could rule as they did without invalidating the verdict and sentence in Getsy's case as a matter of law. The majority concluded that because the verdicts were issued by jurors (who, after all, are empaneled to exercise their discretion in evaluating first-hand the facts and testimony presented to them at the trial and sentencing), the inconsistent verdicts should not benefit Getsy, who was hired to commit the murder. The lead dissent concluded that the presence of a jury as a factfinder was irrelevant, and that the only important question was whether the verdicts were inconsistent, but this position did not carry the day.

American law has struggled with inconsistent verdicts, and originally followed the "traditional rule," based on English common law. Under the traditional rule, if two defendants are charged with conspiracy and one is acquitted while the other is convicted, the convicted defendant must also be acquitted.

But the traditional rule has since been rejected in American law. The Sixth Circuit concluded in 1986 that the traditional rule could not be applied to co-conspirators tried by separate juries, as in Getsy's case.² The rule was abolished entirely in 2004, when the Sixth Circuit concluded that it no longer applied in multi-defendant cases tried by the same jury.³

At the heart of the rejection of the traditional rule is the judicial acknowledgment that the acquittal is not necessarily "the one the jury 'really meant[.]'" but that it is "equally possible that the jury, convinced of guilt, properly reached its conclusion on [one] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the [other] offense."⁴

² *United States v. Sachs* (6th Cir. 1986), 801 F.2d 839, 845. ("Further, if coconspirators are tried together, an acquittal on conspiracy charges as to all but one coconspirator mandates acquittal on conspiracy charges as to the remaining defendant. . . . However, if coconspirators are tried separately, the acquittal of all other coconspirators does not mandate acquittal as to the remaining conspirator.") (citations omitted)

³ *United States v. Crayton* (6th Cir. 2004), 357 F.3d 560, 565-566.

⁴ *United States v. Powell* (1984), 469 U.S. 57, 68.

Moreover, in this case, Santine was convicted of aggravated murder. He was simply acquitted of the murder for hire specification. Getsy was convicted of three separate death specifications – murder for hire, attempt to kill two persons, murder committed in the course of an aggravated burglary. Santine, who was not present during the murder and whose involvement was in encouraging and hiring those who carried out the murder, was only charged with one death specification – murder for hire.

Analysis

The purpose of executive clemency is to grant mercy where it is warranted, and to correct injustices that cannot be or are not corrected by the judicial branch. The dissenting Board members have provided a compelling argument that Getsy does not deserve mercy on the facts of his case,⁵ and so this memorandum primarily addresses whether his sentence is just. Getsy has not been subject to an injustice. His conviction for the murder of Ann Serafino is legally sound, and his sentence is appropriate for the crime he committed on the facts established at his trial.

The underlying flaw of the Board's majority's recommendation is the conclusion that the acquittal of Santine on the murder for hire specification undermines Getsy's death sentence. But that conclusion suggests a misunderstanding of the American jury system. A jury may acquit for any reason, including mistake, compromise, leniency, or for no reason at all.

In other words, the criminal justice system is a one-way ratchet: a convicted defendant can *always* seek judicial or executive relief of an improper conviction, while the State can *never* correct an improper acquittal. And so, if there was a jury mistake that *benefited* Santine, that mistake can never be corrected because it is not subject to appeal. But the error should not be compounded by retroactively acquitting Getsy by setting aside the death penalty in this case.

The reality is that the State had a much stronger case against Getsy than against Santine. Getsy confessed both to the murder and to being hired to commit the murder, while Santine's case was based primarily on accomplice testimony. The jury in Santine's case never had an opportunity to learn of Getsy's confession, as that evidence would only be admissible against Getsy. Thus, the different outcomes from the Getsy and Santine trials, were not an inconsistency, but are more accurately described as different results based on receiving different evidence.

Ramifications

In the final paragraph of its conclusion, the majority recommends that, "In imposing a death sentence, it is imperative that we have consistency and similar penalties imposed upon similarly situated co-defendants."⁶ What the Board seems to be asking for is a practical impossibility. Under the Board's theory of justice, if two people clearly deserve a death sentence but only one person receives it, then the other person should also have his death sentence vacated. That, of course, is wrong. If two people both deserve death, they both should receive a death sentence. But there is

⁵ Recommendation, 19-20.

⁶ Recommendation, 18.

no way to force juries to impose death, or to even ensure that juries will not acquit based on mistake, leniency, or compromise.

Moreover, in a capital case, the jury is required to consider the culpability and characteristics of the individual defendant before imposing a death sentence. Many of the mitigating factors which Ohio law requires juries to consider apply to the individual defendant and not to the crime – the offender's background, mental capacity, lack of prior criminal convictions, degree of participation in the offense, and so on. See R.C. 2929.04(B). The statutory factors are based on an understanding that no crime automatically merits a death sentence, and that a death sentence can only be imposed upon an individual defendant after a jury unanimously determines that the aggravating circumstances (death specifications) outweigh the mitigating factors applicable to that defendant beyond a reasonable doubt. R.C. 2929.03(D)(2).

When the death sentence was imposed on Getsy, it was sound. The State proved each element beyond a reasonable doubt, and there has been no serious contention that the State's evidence was insufficient. Using the Board's logic, every death sentence would be undermined if any co-conspirators were acquitted, either of the offense or of a death specification.

The Board also suggests that prosecutors should tread lightly in offering plea deals to co-conspirators, noting that one of the pivotal factors in this case was that "McNulty ranks near Getsy as an active participant and shooter in the home invasions of Serafino's. Yet, he was offered a plea agreement dismissing the death penalty specifications and received a life sentence."⁷

Following the Board's logic to its ultimate conclusion, once a prosecutor has secured one death sentence, the prosecutor should not risk even *indicting* co-conspirators on capital specifications, nor should the prosecutor offer a *plea deal* to the co-conspirators. The Parole Board's recommendation in this case encourages prosecutors who want to protect a death sentence for one defendant to aggressively seek the death sentence for all co-defendants. Thus, the goal of requiring "consistency and similar penalties imposed upon similarly situated co-defendants" would become elevated over seeking the prosecutor's judgment about what is a just result in each individual case.

The Board's decision places prosecutors in a lose-lose situation. If they indict a co-conspirator after obtaining a death sentence for a principal offender, they risk "undermining" the death sentence. If they do not charge a co-conspirator with a capital specification, they open their cases to attack as not being "consistent" among similarly situated co-defendants. And prosecutors are discouraged from resolving the co-defendant's cases for any sentence less than death, as a life sentence for a co-defendant could jeopardize a proper death verdict for a principle offender.

In the instant case, in order to obtain a conviction of Santine, the Trumbull County Prosecutor made the reasonable judgment that he needed to obtain the cooperation of some accomplices, which required entering into plea agreements with some co-defendants. By doing so, the prosecutor was able to obtain some form of life sentence for three participants and a death sentence for Getsy, who was the actual killer. This entirely defensible strategic approach should not be considered as a reason to grant clemency.

⁷ Recommendation, 17.

Conclusion

Consistency of verdicts is a worthy goal. However, it is best achieved by allowing prosecutors the discretion to treat co-conspirators justly, after consideration of the evidence available against each offender, and not by imposing an arbitrary requirement of unanimity between juries in separate trials, which necessarily are evaluating different evidence in distinctive contexts. As the dissenting Board members noted, it would be unjust to give Getsy leniency he does not deserve just because Santine's jury failed to give him the verdict he deserved.⁸ Sentencing is evaluated on an individual basis. Getsy's request for clemency should be evaluated based on his own culpability, and not based on what evidence was available to be presented or how it may have been interpreted in a co-defendant's case.

⁸ Recommendation, 19.

