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CONSTITUTION  
SOCIETY FOR  
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## **Judge Alito and the Death Penalty**

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**December 2005**

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## Judge Alito and the Death Penalty

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### SUMMARY

This month, a North Carolina inmate named Kenneth Boyd became the 1,000th person executed in the United States since the Supreme Court reinstated the death penalty in 1976. Over this period, the United States has executed an average of one person every 10 days. The use of capital punishment continues today amid growing evidence of its uneven application, departure from international norms, and high susceptibility to error. As the final arbiter of due process of law, the Supreme Court has the ultimate responsibility for ensuring fairness in the administration of the death penalty. In evaluating a Supreme Court nominee, it is important to know how the nominee would approach this critical issue.

In his 15-year career on the U.S. Court of Appeals for the Third Circuit, Judge Samuel Alito has participated in 10 capital cases. Five were decided unanimously by three-judge panels. The other five provoked strong disagreement between Judge Alito and his colleagues. In each of the five contested cases, Judge Alito ruled against the inmate. His opinions, which we examine in detail, show a disturbing tendency to tolerate serious errors in capital proceedings. They reveal troubling perspectives on federalism, race, and due process of law, and they have worrisome implications for the protection of individual liberties in the war on terror.

Although Justice Sandra Day O'Connor, whom Judge Alito would replace, has long supported capital punishment, she has at times supplied a crucial vote in contentious cases in favor of greater vigilance and care in the application of the death penalty. Yet it is precisely in the most contentious cases that Judge Alito has shown an unbroken pattern of diluting norms of basic fairness. At a time when America's commitment to due process of law is being closely scrutinized at home and abroad, Judge Alito's record raises serious concerns.

### BACKGROUND

The issue of capital punishment deserves special attention in the evaluation of a Supreme Court nominee for three reasons. First, capital cases comprise a substantial portion of the Court's caseload. The Court typically receives over 300 petitions for certiorari from capital defendants each year, and it has decided more than 60 capital cases over the past decade. This Term, the Court has granted review in five capital cases, including one raising a substantial question of actual innocence.<sup>1</sup> In this area, the Court often goes beyond its typical role of

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<sup>1</sup> See *House v. Bell*, 386 F.3d 668 (6th Cir. 2004), *cert. granted*, 125 S. Ct. 2991 (2005) (involving actual innocence claim); *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004), *cert. granted sub nom Brown v. Sanders*, 125 S. Ct. 1700 (2005); *Kansas v. Marsh*, 102 P.3d 445 (Kan. 2004), *cert. granted*, 125 S. Ct. 2517 (2005); *Oregon*

resolving circuit splits and deciding unsettled questions of law. It also serves as a court of last resort to correct errors in the application of established legal principles to the facts in individual cases.

Second, given their unique and irrevocable stakes, capital cases require judges to exercise utmost care and vigilance in ensuring due process of law. This imperative has been underscored by findings of remarkably high error rates in capital proceedings.<sup>2</sup> In recent years, the Supreme Court—with Justice O’Connor’s assent—has granted relief to capital defendants because of flawed jury instructions,<sup>3</sup> ineffective assistance of counsel,<sup>4</sup> racial discrimination in jury selection,<sup>5</sup> and prosecutorial misconduct.<sup>6</sup> In an August 2005 speech before the American Bar Association, Justice John Paul Stevens highlighted these problems and others, adding that “with the benefit of DNA evidence, we have learned that a substantial number of death sentences have been imposed erroneously.”<sup>7</sup> Powerful evidence of the system’s fallibility includes dozens of exonerations of death-row inmates as well as a substantial likelihood that innocent persons have been executed.<sup>8</sup>

Third, capital cases illuminate judicial perspectives on due process of law that may be applicable to the protection of individual liberties in the war on terror. The Supreme Court last year examined the due process rights of U.S. citizens and non-citizens facing indefinite detention

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v. Guzek, 86 P.3d 1106 (Or. 2004), *cert. granted*, 125 S. Ct. 1929 (2005); *South Carolina v. Holmes*, 605 S.E.2d 19 (S.C. 2004), *cert. granted*, 126 S. Ct. 34 (2005).

<sup>2</sup> See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000) (reporting 68% overall rate of prejudicial error in capital cases between 1973 and 1995, with the two most common sources of errors being ineffective assistance of counsel and prosecutorial suppression of evidence); see also REPORT OF THE ILLINOIS GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 7-10 (2002) (finding high error rates in a review of Illinois capital cases since 1977).

<sup>3</sup> See *Smith v. Texas*, 543 U.S. 37 (2004); see also *Deck v. Missouri*, 125 S. Ct. 2067 (2005) (visibly shackling defendant in capital sentencing proceeding adversely and unconstitutionally influences jury’s perception of whether defendant deserves death); *Tennard v. Dretke*, 542 U.S. 274 (2004) (reversing Fifth Circuit’s denial of a certificate of appealability where inmate argued that Texas’s capital sentencing scheme was inadequate for the jury to take into account his evidence of his low IQ).

<sup>4</sup> See *Rompilla v. Beard*, 125 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

<sup>5</sup> See *Miller-El v. Dretke*, 125 S. Ct. 2317 (2005).

<sup>6</sup> See *Banks v. Dretke*, 540 U.S. 668 (2004).

<sup>7</sup> See Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005) [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-06-05.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html); see also *Justice Stevens Speaks*, WASH. POST, Aug. 22, 2005, at A16.

<sup>8</sup> See, e.g., JOHN C. TUCKER, *MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT* (1997) (Virginia execution of Roger Keith Coleman in 1992); Lise Olsen, *The Cantu Case: Death and Doubt; Did Texas Execute an Innocent Man?*, HOUSTON CHRON., Nov. 20, 2005, at A1 (Texas execution of Ruben Cantu in 1994); Kate Zernike, *In a 1980 Killing, a New Look at the Death Penalty*, N.Y. TIMES, July 19, 2005, at A15 (Missouri execution of Larry Griffin in 1995; case reopened for investigation by St. Louis prosecutor because of new evidence of actual innocence); Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics; Fire That Killed His 3 Children Could Have Been Accidental*, CHICAGO TRIB., Dec. 9, 2004, at C1 (Texas execution of Cameron Todd Willingham in 2004).

as enemy combatants.<sup>9</sup> This Term, the Court will consider the constitutionality of military tribunals authorized to try non-citizen enemy combatants and to impose punishment up to and including the death penalty.<sup>10</sup> On these questions and others, a nominee's approach to civilian justice may shed light on how he would approach similar issues in the evolving military context.<sup>11</sup>

So what do we know about Judge Alito's views on capital punishment? To answer this question, we read the 10 capital cases in which he participated during his 15-year career on the U.S. Court of Appeals for the Third Circuit. Five cases, involving fairly straightforward issues, were decided by unanimous three-judge panels.<sup>12</sup> The other five provoked strong disagreement between Judge Alito and his colleagues. We focus on the latter five cases because they present the kind of contested issues and judgment calls that reflect the Supreme Court's caseload in this area. In every one of the five contested cases, Judge Alito voted against the inmate and issued an opinion. Individually and especially as a whole, these opinions show a troubling tendency to tolerate serious errors in capital proceedings and to indulge mechanical rationalization with the effect of diluting due process of law.

### ***SMITH V. HORN: LEGAL ALGEBRA AND JUDICIAL ACTIVISM***

Perhaps the most disturbing example—and the most revealing—is a 1997 case in which Judge Alito dissented from a panel decision invalidating the capital murder conviction of Clifford Smith.<sup>13</sup> Smith and his friend Roland Alston robbed a Pennsylvania pharmacy in 1983. During the robbery, one of them shot and killed a man, Richard Sharp, who was inside the store. The state charged Smith with first-degree murder. But instead of showing that he was the shooter, the prosecutor proceeded against Smith on the theory that he and Alston were accomplices, making each liable for the acts of the other under Pennsylvania law, regardless of who pulled the trigger.

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<sup>9</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>10</sup> See *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 2005 WL 2922488 (U.S. Nov. 7, 2005).

<sup>11</sup> Judge Alito has not participated in any cases involving the war on terror during his judicial career.

<sup>12</sup> See *Bronshstein v. Horn*, 404 F.3d 700 (3d Cir. 2005) (Alito, J.) (rejecting inmate's *Batson* claim and finding erroneous jury instruction in guilt phase to be harmless, but upholding district court's invalidation of death sentence in light of trial court's failure to give *Simmons* instruction); *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004) (requiring federal district courts to stay instead of dismiss mixed habeas petitions with exhausted and unexhausted claims pending exhaustion in state court, where dismissal would jeopardize petition's timeliness under Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)); *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002) (Alito, J.) (rejecting, under pre-AEDPA standard of review, claims of ineffective assistance of counsel in guilt phase, but sustaining ineffective assistance claim in penalty phase where defense counsel failed to object to trial judge's misleading answer to jury's question about availability of parole if defendant received life sentence); *Terry v. Petsock*, 974 F.2d 372 (3d Cir. 1992) (Alito, J.) (finding no constitutional violation where jury convicting defendant of first-degree murder was not instructed on lesser-included offense of third-degree murder); *Riley v. Taylor*, 62 F.3d 86 (3d Cir. 1995) (reversing district court's denial of leave to amend initial habeas petition). Another capital case, not included in our tally, was *Duffey v. Lehman*, 84 F.3d 668 (3d Cir. 1996) (en banc), reviewing a district court's denial of a stay of execution sought by an inmate in order to file a counseled habeas petition. In a short unanimous order, the Third Circuit vacated the appeal as moot because the district court eventually appointed counsel and the inmate's death warrant expired.

<sup>13</sup> *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997).

On the accomplice liability theory, although the state did not need to prove that Smith committed the killing, it still needed to prove that Smith had the specific intent to kill. However, the trial court’s jury instructions failed to make this clear, suggesting instead that Smith could be convicted of first-degree murder as an accomplice even if he intended to aid Alston only in the robbery and not in the killing. For example, the instructions said:

[T]he Commonwealth must prove all of the elements of the case beyond a reasonable doubt, but [it] do[es] not have to prove beyond a reasonable doubt which of the two, Smith or Alston, actually brought about the killing of Richard Sharp by showing who pulled the trigger and plac[ed] the shot in his head. If, and I emphasize this, you find that one was the *accomplice of the other and that one of the two actually performed the killing*, you, the jurors, need not agree on the role or roles played by the respective parties; that is, by *this defendant and his accomplice*, if you find that that was the position of both, provided that each of you is satisfied that the crime was actually perpetrated by the defendant *or by the accomplice of the defendant*.<sup>14</sup>

In this passage and others,<sup>15</sup> the trial court used the term “accomplice” without clarifying whether it meant “accomplice in the robbery” or “accomplice in the murder” or both. By blurring this distinction, the instructions led “the jury to believe that an accomplice for one purpose is an accomplice for all purposes,” contrary to state law.<sup>16</sup>

The Third Circuit invalidated Smith’s first-degree murder conviction. The two judges in the majority—Judges Mansmann and Cowen, both former prosecutors appointed to the bench by President Ronald Reagan—explained that the instructions allowed Smith to be convicted of murder even if the jury found that only Alston intended the killing, so long as Smith was an accomplice to the robbery. “A fair reading of the jury instructions given in this case permitted the jury to convict Smith of murder in the first degree without first finding beyond a reasonable doubt that Smith intended that Sharp be killed,” they concluded.<sup>17</sup> “Taken as a whole, there is a reasonable likelihood that the jury understood the instructions in this way.”<sup>18</sup>

Judge Alito dissented, calling his colleagues’ opinion “shocking,” “dangerous,” and “an injustice.”<sup>19</sup> He made two arguments. On the merits, Judge Alito observed that the trial court, before explaining the elements of the charged offenses, instructed the jury that “a person is an accomplice ‘*if with the intent of promoting or facilitating the commission of a crime he solicits, commands, encourages or requests the other person or persons to commit that crime or crimes, or aids, agrees to aid, or attempts to aid the other person in the planning or committing the crime.*’ ”<sup>20</sup> Judge Alito then declared that “[w]hen a trial judge, in instructing a jury, provides a

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<sup>14</sup> *Id.* at 412 (quoting jury instructions) (emphases added by the court of appeals).

<sup>15</sup> *See id.* at 411-14 (quoting and analyzing several portions of the jury instructions).

<sup>16</sup> *Id.* at 412.

<sup>17</sup> *Id.* at 411.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 424, 426 (Alito, J., dissenting).

<sup>20</sup> *Id.* at 423 (quoting trial court’s instructions) (emphases added by Judge Alito).

definition of a complicated legal term, the judge is not generally required to repeat that definition every time the term is subsequently employed.”<sup>21</sup> There would have been no confusion, he argued, had the jury substituted the lengthy definition of “accomplice” each time the term appeared in the jury instructions.<sup>22</sup> The instructions, in other words, made sense algebraically: when the term  $x$  appears, plug in the value of  $x$ .

Rejecting this approach, the panel majority read the word “accomplice” in the context of its actual usage and found it confusing.<sup>23</sup> Indeed, Judge Alito himself conceded that aspects of the instructions were “inadvisable” and “ambiguous.”<sup>24</sup> Although a rule of clear statement, not a rule of legal algebra, would seem appropriate when construing criminal jury instructions involving “a complicated legal term,” Judge Alito nevertheless found the flawed instructions adequate to convict Smith of first-degree murder.

Second, Judge Alito argued that the court should not have considered Smith’s claim at all because Smith’s lawyers did not object to the jury instructions at trial or in prior appeals.<sup>25</sup> Judge Alito’s reliance on this argument was extraordinary because, as the majority noted, “the Commonwealth never raised . . . these issues at any time: not in the district court, not in its briefing before this Court, and not at oral argument.”<sup>26</sup> In raising the argument on his own, Judge Alito apparently took upon himself the task of combing through the trial transcript and the entire record of post-conviction proceedings in an effort “to protect state prerogatives”<sup>27</sup> where the state itself never indicated that its prerogatives were threatened. Although federal courts do have some discretion to raise procedural issues *sua sponte*, Smith’s case presented none of the circumstances warranting such a move.<sup>28</sup>

The court rejected Judge Alito’s federalism argument, explaining that

where the state has never raised the issue at all, in any court, raising the issue *sua sponte* puts us in the untenable position of ferreting out possible defenses upon which the state has never sought to rely. When we do so, we come dangerously close to acting as advocates for the state rather than as impartial magistrates. *See United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 423-24.

<sup>23</sup> *See id.* at 414 (“[N]othing in [the trial court’s definition of ‘accomplice’] would lead the jury to think that, when the court instructed the jury on murder, and the court used the word ‘accomplice,’ that word meant only ‘accomplice in the murder.’”).

<sup>24</sup> *Id.* at 424, 425 (Alito, J., dissenting).

<sup>25</sup> *See id.* at 420-23 (Alito, J., dissenting) (requesting briefing on whether Smith failed to exhaust his state remedies and whether he procedurally defaulted his claim).

<sup>26</sup> *Id.* at 407.

<sup>27</sup> *Id.* at 422 (Alito, J., dissenting).

<sup>28</sup> As the court explained, the case presented no unresolved question of state law on which state courts might provide guidance; the record supporting Smith’s claim was well-developed while the facts supporting procedural default were not; and the strength of Smith’s claim on the merits counseled against undue delay. *See id.* at 407-09 (applying factors set forth in *Granberry v. Greer*, 481 U.S. 129 (1987)).

judgment) (“The rule that points not argued will not be considered . . . at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.”) . . . . While considerations of federalism and comity sometimes weigh in favor of raising such issues *sua sponte*, consideration of that other great pillar of our judicial system—restraint—cuts sharply in the other direction.<sup>29</sup>

Unless the circumstances “clearly indicate[] that we should depart from our standard practice,” the court warned, judges must decline to address issues not raised by the parties “lest we subtly transform our adversarial system into an inquisitorial one.”<sup>30</sup>

### **RILEY V. TAYLOR: RACE, “HANDEDNESS,” AND MISLEADING THE JURY**

Judge Alito also failed to find serious constitutional errors in a 2001 case involving a black defendant, James Riley, convicted of killing a white man and sentenced to death by an all-white jury in Kent County, Delaware, whose population is 20 percent black.<sup>31</sup> Before trial, the prosecutor had struck all three prospective black jurors from the jury pool. Riley challenged this action as racially discriminatory under *Batson v. Kentucky*.<sup>32</sup> To support his claim, Riley showed that the prosecution had struck black but not white prospective jurors who had given the same testimony at voir dire.<sup>33</sup> His evidence also included the fact that the prosecution had struck every prospective black juror in the three other capital murder trials in Kent County within the prior year.<sup>34</sup>

Judge Alito refused to infer racial discrimination from this pattern, stating that “a careful multiple-regression analysis” would be necessary to determine whether the strikes were based on race or some other variable.<sup>35</sup> To support his point, Judge Alito offered the following analogy to the racial pattern in peremptory strikes: “Although only about 10% of the population is left-handed, left-handers have won five of the last six presidential elections. . . . But does it follow that the voters cast their ballots based on whether a candidate was right- or left-handed?”<sup>36</sup>

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<sup>29</sup> *Id.* at 409.

<sup>30</sup> *Id.*

<sup>31</sup> See Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001) (en banc). The demographics of Kent County, which includes Dover, are available at <http://quickfacts.census.gov/qfd/states/10/10001.html>.

<sup>32</sup> 476 U.S. 79 (1986).

<sup>33</sup> See Riley, 277 F.3d at 279-80.

<sup>34</sup> See *id.* at 280 (noting that, in the four trials (including Riley’s), the prosecution had struck all eight prospective black jurors while striking only 23 of 71 prospective white jurors).

<sup>35</sup> *Id.* at 327 (Alito, J., dissenting). In fact, Judge Alito said that even a careful multiple regression analysis might not be sufficient in light of *McCleskey v. Kemp*, 481 U.S. 279 (1987). *McCleskey* held that large disparities in the rate of imposition of the death penalty for black defendants who kill whites compared to whites who kill blacks, whites who kill whites, or blacks who kill blacks do not violate the guarantee of equal protection. See *id.* at 286-87 (discussing the Baldus study of racial disparities in capital sentencing); *id.* at 291 n.7 (assuming the statistical validity of the Baldus study). Yet the Supreme Court, unlike Judge Alito, has never sought to apply *McCleskey* to statistical evidence supporting a *Batson* claim.

<sup>36</sup> Riley, 277 F.3d at 327 (Alito, J., dissenting).

A majority of the Third Circuit *en banc* disagreed with Judge Alito and sustained Riley’s *Batson* claim. The court criticized his analogy for “minimiz[ing] the history of discrimination against prospective black jurors and black defendants, which was the *raison d’être* of the *Batson* decision.”<sup>37</sup> *Batson* made clear that “[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure”<sup>38</sup>—clearly a relevant basis for distinguishing the inferences that can be sensibly drawn from the “handedness” of presidents versus the race of stricken jurors. Judge Alito’s dissent nowhere addressed or acknowledged the fact that “[o]ne of the principal objections to the operation of the death penalty in this country is that it is applied unevenly, particularly against poor black defendants.”<sup>39</sup>

In contrast to Judge Alito’s approach, the Supreme Court recently inferred racial discrimination in jury selection from a statistical pattern without requiring “careful multiple-regression analysis.” In *Miller-El v. Dretke*, the Court reversed the conviction of a black defendant convicted of murder and sentenced to death by a jury seated after the prosecution had struck 10 out of 11 black persons on the venire.<sup>40</sup> In an opinion joined by Justice O’Connor, the Court had no difficulty concluding that the racial pattern was “unlikely” the product of “[h]appenstance.”<sup>41</sup>

Apart from the *Batson* claim, *Riley* involved a second constitutional error that Judge Alito also voted to ignore. In *Caldwell v. Mississippi*, the Supreme Court held that a prosecutor at sentencing violates the Eighth Amendment if he or she misleads the jury about the gravity of its responsibility in the state’s death penalty scheme.<sup>42</sup> The prosecutor in *Caldwell*, responding to opposing counsel’s pleas to spare the defendant’s life, told the sentencing jury that “they would have you believe that you’re going to kill this man and they know—they know that your decision is not the final decision. . . . Your job is reviewable. . . . [T]he decision you render is automatically reviewable by the Supreme Court.”<sup>43</sup> The Court found this statement impermissible and invalidated the death sentence.<sup>44</sup> Justice O’Connor, who cast the swing vote, explained that, because appellate review under Mississippi law was narrowly limited to whether

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<sup>37</sup> *Id.* at 292. Kent County, like many jurisdictions across America, is no stranger to this history. The Third Circuit heard Riley’s case just two months after a black man died in Dover police custody, fueling minority distrust of law enforcement. See J.L. Miller & James Merriweather, *Black Anger Has a History*, WILMINGTON NEWS J., Apr. 8, 2001, at 1A.

<sup>38</sup> *Batson*, 476 U.S. at 85 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

<sup>39</sup> *Riley*, 277 F.3d at 299; see also *McCleskey*, 481 U.S. at 328-30 (Brennan, J., dissenting) (recounting history of racial discrimination in the application of the death penalty).

<sup>40</sup> 125 S. Ct. 2317 (2005).

<sup>41</sup> *Id.* at 2325 (internal quotation marks and citation omitted). The Court went on to find that the prosecution had accorded different treatment to black and white jurors who gave similar testimony at voir dire—a pattern also deemed probative of unconstitutional discrimination by the *en banc* court in *Riley*, but not by Judge Alito. Compare *Miller-El*, 125 S. Ct. at 2325-32, and *Riley*, 277 F.3d at 282-83, with *Riley*, 277 F.3d at 318-25 (Alito, J., dissenting).

<sup>42</sup> 472 U.S. 320 (1985).

<sup>43</sup> *Id.* at 325-26 (quoting assistant district attorney at sentencing hearing).

<sup>44</sup> *Id.* at 328-29 (plurality opinion); *id.* at 343 (O’Connor, J., concurring in part and concurring in the judgment).

the verdict was “so arbitrary that it ‘was against the overwhelming weight of the evidence,’ ”<sup>45</sup> “the prosecutor’s misleading emphasis on appellate review misinformed the jury concerning the finality of its decision.”<sup>46</sup>

In *Riley*, the prosecutor opened his comments at sentencing by stating: “Let me say at the outset that what you do today is automatically reviewed by our Supreme Court and that is why there is an automatic review on the death penalty. That is why, if you return a decision of death, that is why you will receive and have to fill out a two-page interrogatory . . . . This goes to the Supreme Court.”<sup>47</sup> Here, as in *Caldwell*, appellate review of the jury’s sentence under state law was limited to whether “ ‘the death penalty was either arbitrarily or capriciously imposed or recommended.’ ”<sup>48</sup> The *en banc* court held that the prosecutor’s statement—emphasizing automatic appellate review, but failing to mention “the exceptionally narrow scope of appellate review”—misled the jury and violated *Caldwell*.<sup>49</sup>

In dissent, Judge Alito characterized the prosecutor’s statement as “accurate, unemotional, passing remarks in the context of describing the state statute and explaining why the jury would have to ‘fill out a two-page interrogatory’ if it returned a capital sentence.”<sup>50</sup> Judge Alito gave little consideration to the possibility that the statement was technically accurate but nonetheless misleading.<sup>51</sup> Further, he left unexplained how he determined from the paper record that the prosecutor’s statement was “unemotional” and why the statement, which was the first comment the jury heard at sentencing, should be construed as “passing remarks.”

Judge Alito described *Riley* as “a troubling case”<sup>52</sup>—but, in his view, not troubling enough to grant relief. This pattern of recognizing but then rationalizing constitutional errors appears throughout Judge Alito’s opinions in the cases discussed here.

### ***ROMPILLA V. HORN: INEFFECTIVE ASSISTANCE OF COUNSEL***

In 2004, Judge Alito ruled against another capital defendant, Ronald Rompilla, who claimed ineffective assistance of counsel at his sentencing hearing because his lawyers did not present crucial mitigating evidence that might have led the jury to spare his life.<sup>53</sup> Although Rompilla’s lawyers consulted family members and mental health experts, they failed to examine

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<sup>45</sup> *Id.* at 343 (quoting *Williams v. State*, 445 So.2d 798, 811 (Miss. 1984)).

<sup>46</sup> *Id.*

<sup>47</sup> *Riley*, 277 F.3d at 296 (quoting prosecutor’s statement to the sentencing jury).

<sup>48</sup> *Id.* (quoting Del. Code Ann. tit. 11, § 4209(g)(2) (1982)).

<sup>49</sup> *Id.* at 298.

<sup>50</sup> *Id.* at 330 (Alito, J., dissenting).

<sup>51</sup> As the majority explained, the interrogatory contained only two questions; it was “simple and straightforward” and “hardly needed an explanation.” *Id.* at 297. “Instead, that ‘explanation’ appears to have been used as a segue to alert the jury to the fact that the Delaware Supreme Court would automatically review its decision to impose a death sentence.” *Id.*; see *id.* at 298 (citing *Driscoll v. Delo*, 71 F.3d 701, 713 (8th Cir. 1995), as an example where a technically accurate but misleading statement by the prosecutor was held to violate *Caldwell*).

<sup>52</sup> *Id.* at 317 (Alito, J., dissenting).

<sup>53</sup> *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004).

school, medical, and court records containing stark evidence of his troubled childhood and limited mental capacity.<sup>54</sup> Those records showed:

Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.<sup>55</sup>

In a 2-1 panel decision, Judge Alito concluded that, despite the neglected evidence, the performance of Rompilla's lawyers was reasonable.<sup>56</sup> He suggested that, while a "good" or "prudent" lawyer might have examined the records, Rompilla's lawyers had done all that was "constitutionally compelled" by interviewing him, some of his family members, and three mental health professionals.<sup>57</sup> In reaching this conclusion, Judge Alito rejected the relevance of the American Bar Association (ABA) Standards for Criminal Justice to determining the scope of defense counsel's duty to investigate.<sup>58</sup>

The Supreme Court reversed.<sup>59</sup> In a 5-4 decision, with Justice O'Connor casting the swing vote, the Court found Judge Alito's position "objectively unreasonable" under "clearly established" law.<sup>60</sup> Citing the failure of Rompilla's lawyers to examine the court file on his criminal history, the Court explained: "There is an obvious reason that [this] failure . . . fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. . . . [T]he prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried."<sup>61</sup> Had Rompilla's lawyers examined the prior conviction file, "it is uncontested that they would have found a range of mitigation leads that no other source had

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<sup>54</sup> *See id.* at 240-44.

<sup>55</sup> *Id.* at 279 (Sloviter, J., dissenting) (citing record). These facts were not disputed. *See id.* at 243-44.

<sup>56</sup> *See id.* at 258-59.

<sup>57</sup> *Id.* at 258-59 (internal quotation marks and citations omitted).

<sup>58</sup> *See id.* at 259 n.14. The relevance of the ABA Standards is discussed further below.

<sup>59</sup> *See Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

<sup>60</sup> *Id.* at 2462 (applying the standard of review under AEDPA, 28 U.S.C. § 2254(d)(1)).

<sup>61</sup> *Id.* at 2464.

opened up.”<sup>62</sup> “It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking.”<sup>63</sup>

In reaching its holding, the Court—contrary to Judge Alito—relied on the description of defense counsel’s obligations in the ABA Standards of Criminal Justice: “ ‘It is the duty of the lawyer . . . to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. *The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities.*’ ”<sup>64</sup> Although the district court had also relied on the same ABA language in granting relief to Rompilla,<sup>65</sup> remarkably Judge Alito said he saw “nothing in the quoted portions of the ABA standards that dictates that records of the sort at issue here must always be sought.”<sup>66</sup> The Supreme Court decided otherwise, adding that “ ‘[w]e have long referred [to these ABA Standards] as “guides to determining what is reasonable.” ’ ”<sup>67</sup>

### ***FLAMER V. DELAWARE AND BAILEY V. SNYDER: TIPPING THE SCALES AT SENTENCING***

In 1995, Judge Alito excused flawed jury instructions in two consolidated capital cases from Delaware raising the same issue.<sup>68</sup> In separate and unrelated trials, William Flamer and Billie Bailey were convicted of first-degree murder and sentenced to death. The sentencing jury in each case returned an interrogatory indicating that one of the aggravating factors informing its decision to recommend death was that the murders were “outrageously or wantonly vile, horrible, or inhuman.”<sup>69</sup> This factor, listed in a Delaware statute among eighteen other aggravating factors, was subsequently invalidated by the Delaware Supreme Court for being unconstitutionally vague.<sup>70</sup> The issue before the Third Circuit was whether the jury’s reliance on the unconstitutional statutory aggravating factor rendered the death sentence invalid in each case.

The issue turned on which of two legal frameworks governed the jury’s consideration of aggravating factors. Under settled law, a state capital sentencing scheme must narrow the class

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<sup>62</sup> *Id.* at 2468. The Court noted that Pennsylvania “does not even contest” the prejudicial effect of the omission on Rompilla’s sentencing. *Id.* at 2467.

<sup>63</sup> *Id.* As Justice O’Connor observed, “Rompilla’s attorneys knew that their client’s prior conviction would be at the very heart of the prosecution’s case.” *Id.* at 2470 (O’Connor, J., concurring).

<sup>64</sup> *Id.* at 2466 (quoting ABA Standards of Criminal Justice 4-4.1 (2d ed. 1982 Supp.)) (emphasis added).

<sup>65</sup> *See Rompilla v. Horn*, 2000 WL 964750, at \*9 (E.D. Pa. July 11, 2000) (quoting the same ABA standard quoted by the Supreme Court).

<sup>66</sup> *Rompilla*, 355 F.3d at 259 n.14.

<sup>67</sup> *Rompilla*, 125 S. Ct. at 2466 (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984))).

<sup>68</sup> *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995) (en banc) (consolidated with *Bailey v. Snyder*). Additional issues in Billie Bailey’s case unrelated to the issue common to Flamer’s case were decided by the Third Circuit in the same opinion. *See id.* at 754-59. Additional issues in William Flamer’s case were decided by the Third Circuit in *Flamer v. Delaware*, 68 F.3d 710 (3d Cir. 1995).

<sup>69</sup> *Flamer*, 68 F.3d at 741, 744 (citing Del. Code Ann. tit. 11, § 4209(e)(1)(n)).

<sup>70</sup> *See id.* at 743 (citing *Petition of State for Writ*, 433 A.2d 325 (Del. 1981)).

of persons eligible for the death penalty by codifying one or more objective aggravating factors that must be proven as a threshold condition of death eligibility.<sup>71</sup> Once this eligibility threshold is met, two approaches are possible in framing the jury's ultimate decision whether to impose death. Under one framework, the jury is free to consider all aggravating and mitigating evidence in its totality. Although the jury must first find a statutory aggravating factor as a condition of death eligibility, the statutory aggravators thereafter play no role in guiding the jury's discretion. In *Zant v. Stephens*, the Supreme Court held that, when a sentencing jury relies on an unconstitutional statutory aggravating factor in this context, the reliance does not invalidate the death sentence because the underlying facts associated with the invalid factor remain admissible and available for the jury to consider.<sup>72</sup>

Under an alternative framework, the sentencing jury is specifically instructed to weigh *statutory* aggravating factors against all mitigating factors in deciding whether to impose death. On this approach, statutory aggravators serve two functions: first, to narrow the class of death-eligible offenders, and second, to focus the sentencing jury's discretion in making the ultimate decision. In a line of cases beginning with *Clemons v. Mississippi*,<sup>73</sup> the Supreme Court has held that the jury's reliance on an invalid statutory aggravator within this framework—“[e]ven when other valid aggravating factors exist as well”—creates the risk that the defendant was treated as more deserving of death than if the invalid factor had not been considered.<sup>74</sup> “[W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.”<sup>75</sup> In this context, the death sentence is invalid unless “constitutional harmless-error analysis or reweighing at the trial or appellate level” shows that the invalid factor did not have a substantial and injurious effect on the jury's verdict.<sup>76</sup>

In *Flamer* and *Bailey*, the question was whether *Zant* or *Clemons* applied to the jury's reliance on the invalid statutory aggravating factor (*i.e.*, the murder was “outrageously or wantonly vile, horrible, or inhuman”). Nominally, Delaware's capital sentencing scheme resembles the *Zant* framework; a Delaware statute directs the jury to weigh “all relevant evidence in aggravation or mitigation” in deciding whether to recommend death.<sup>77</sup> However, the trial court in each case directed the jury, if it chose death, to indicate on an interrogatory “which statutory aggravating circumstance or circumstances were relied upon.”<sup>78</sup> The interrogatory listed four statutory aggravators, including the one subsequently held unconstitutional. The jury

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<sup>71</sup> See *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (“[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.”); *Godfrey v. Georgia*, 446 U.S. 420, 427-29 (1980).

<sup>72</sup> *Zant*, 462 U.S. at 886.

<sup>73</sup> 494 U.S. 738 (1990).

<sup>74</sup> *Sochor v. Florida*, 504 U.S. 527, 532 (1992) (citing *Clemons*, 494 U.S. at 572).

<sup>75</sup> *Stringer v. Black*, 503 U.S. 222, 232 (1992).

<sup>76</sup> *Id.*; see *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

<sup>77</sup> Del. Code Ann. tit. 11, § 4209(d)(1).

<sup>78</sup> *Flamer*, 68 F.3d at 751 (quoting jury interrogatories).

in Flamer’s case relied on all four listed factors in recommending death; the jury in Bailey’s case relied on two factors, including the one later found invalid.<sup>79</sup>

The defect in these proceedings was clear: Although Delaware law does not require a capital sentencing jury to rely on *any* statutory aggravating factor in making its final decision, the interrogatory indicated otherwise.<sup>80</sup> As a result, the jury was directed to pay greater attention to the statutory factors than Delaware law required. By focusing the jury’s attention on the statutory aggravating factors, the interrogatory transformed the sentencing scheme into a framework resembling the one discussed in *Clemons*. Within this framework, the jury’s reliance on a statutory factor listed in the questionnaire, but later deemed unconstitutional, created a serious risk of sentencing error.

The flaw in the process did not go unnoticed by Judge Alito. Writing for an *en banc* majority, he “strongly disapprove[d]” of the interrogatory and conceded in a footnote that it “is potentially misleading and injects unnecessary confusion in the jury’s deliberations.”<sup>81</sup> Still, however, he upheld the death sentences under the *Zant* framework, finding no risk that the interrogatory had caused the juries to give inordinate weight to the invalid statutory aggravating factor.<sup>82</sup>

Four dissenting judges found this conclusion implausible, since the interrogatory had “singled out the statutory factors for the juries’ special consideration”—“presumably the most damning considerations in support of a death sentence.”<sup>83</sup> By leading the juries to believe they were required to rely on one or more statutory aggravating factors in order to recommend death, the interrogatory heightened the significance of the invalid factor in the sentencing scheme. For both Flamer’s and Bailey’s juries, “it may well have been the invalid circumstance that tipped the scale in favor of death.”<sup>84</sup>

## IMPLICATIONS FOR THE WAR ON TERROR

The cases discussed above show Judge Alito to be undemanding in the due process standards applicable to capital punishment. His tendency to excuse serious errors in the administration of criminal justice appears consistent with his deferential approach to law enforcement in other contexts. For example, in all of the Fourth Amendment cases in which he

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<sup>79</sup> See *id.* at 761, 763.

<sup>80</sup> “[T]he clear inference to be drawn from the language of [the] interrogatory . . . is that the death penalty could not be imposed unless the juries relied upon one or more statutory aggravating circumstances. Significantly, the juries were not asked to indicate which, *if any*, statutory aggravating circumstances were relied upon in reaching the decision to recommend the death penalty.” *Id.* at 768 (Lewis, J., dissenting).

<sup>81</sup> *Id.* at 754 n.20.

<sup>82</sup> See *id.* at 753-54.

<sup>83</sup> *Id.* at 776 (Sarokin, J., dissenting); see *id.* at 768-69 (Lewis, J., dissenting, joined by Mansmann & McKee, JJ.).

<sup>84</sup> *Id.* at 771 (Lewis, J., dissenting).

sat on a divided panel, Judge Alito uniformly sided with the government, never once protecting individual rights more vigorously than his Third Circuit colleagues.<sup>85</sup>

Given the limited vigilance he has shown in the context of civilian justice, it is worrisome to contemplate how he would approach the protection of individual liberties against government authority in the context of the war on terror. What standards of proof would he require the government to satisfy in designating an individual an enemy combatant? Under what circumstances would he permit the government to use military tribunals to try and punish enemy combatants away from the battlefield, when civilian courts remain open and available in the United States? What due process rights would he afford to enemy combatants who face detention, interrogation, trial, and possibly capital punishment by the United States military? Perhaps most importantly, how would he describe the proper role of federal courts and judicial review in maintaining the separation of powers during the indefinite war on terror?

At a time when America's commitment to due process of law is being closely scrutinized at home and abroad, these questions should be at the forefront of the Senate hearings on Judge Alito's nomination.

#### **QUESTIONS FOR JUDGE ALITO ON DUE PROCESS OF LAW (CAPITAL PUNISHMENT AND THE WAR ON TERROR)**

- In *Smith v. Horn* (1997), you raised procedural arguments against the court's consideration of the inmate's claims, which were ultimately vindicated. You said that you did this in order "to protect state prerogatives"—even though the state itself never raised those arguments. How do you square this with the principle of judicial restraint?
- In *Riley v. Taylor* (2001), you said that racial discrimination could not be inferred from the fact that the prosecution had struck every black juror—eight total—in four consecutive capital cases tried in the same county within a one-year period. By contrast, the Supreme Court in *Miller-El v. Dretke* held that a pattern of strikes against 10 out of 11 black jurors was "unlikely" to be the product of "happenstance." Do you believe that the Supreme Court in *Miller-El* should have required "careful multiple-regression analysis" before drawing this inference, as you argued in *Riley*?
- In 2005, the Supreme Court reversed your opinion in *Rompilla v. Horn* (2004) in which you rejected a death row inmate's claim of ineffective assistance of counsel at sentencing. The Court concluded that Mr. Rompilla's lawyers should have examined a court file on his prior convictions because they knew the prosecutor intended to use the file in arguing for the death penalty. Had they done so, they would have found important mitigating evidence about Mr. Rompilla's tragic childhood and diminished mental capacity. In reaching its holding, the Court relied on an ABA standard stating that a criminal defense lawyer's "investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." Yet you wrote that "nothing in [this] standard[] . . . dictates

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<sup>85</sup> See Robert Gordon, *Alito or Scalito? If You're a Liberal, You'd Prefer Scalia*, SLATE, Nov. 1, 2005, available at <http://www.slate.com/id/2129107>.

that records of the sort at issue here must always be sought.” Wasn’t the ABA standard exactly on point, as the Supreme Court held?

- In *Rompilla*, no one—not even the state—disagreed that there was a “reasonable probability” that the mitigating evidence overlooked by defense counsel would have led the jury to spare the defendant’s life. Leaving the case law aside, do you think this fact alone should have been enough to invalidate Mr. Rompilla’s death sentence?
- In *Flamer v. Delaware* (1992) and *Smith v. Horn* (1997), you recognized that the jury instructions being challenged were, in some respects, flawed. Yet in both cases, you voted to uphold the conviction and death sentence. Was it your view that the instructions, though flawed, were simply not flawed enough to warrant relief? Given the stakes involved in capital punishment, shouldn’t we insist on the *highest* standards of due process, not a standard of “good enough”?
- As the United States continues to wage the war on terror, civil liberties and government authority have often come into tension. What lessons for the federal courts do you draw from cases involving similar conflicts in our past, such as *Youngstown* and *Korematsu*?
- Claiming exigencies of national security, the government has repeatedly urged a very limited role or none at all for the federal courts, including the Supreme Court, in reviewing executive action involving the detention, interrogation, trial, and punishment of so-called enemy combatants. In general terms, how would you describe the proper role of federal courts in maintaining the separation of powers during an indefinite war on terror? Do you agree with the scope and substance of judicial review recently exercised by the Supreme Court in *Hamdi v. Rumsfeld* and *Rasul v. Bush*?
- The Supreme Court has upheld the power of military tribunals to impose the death penalty through procedures that do not comply with ordinary standards of civilian justice. What *minimum* safeguards, if any, would you require before an individual may be sentenced to death in a non-Article III forum?