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*Habeas Review in Death Penalty Cases: Selected Opinions of
Judge Samuel Alito*

Alison M. Smith, American Law Division

December 20, 2005

Abstract. On October 31, 2005, President Bush nominated Judge Samuel A. Alito to replace retiring Associate Justice Sandra Day O'Connor. During Alito's 15-year tenure with the U.S. Court of Appeals for the Third Circuit, the court has considered several habeas corpus petitions concerning the imposition of death sentences. This report provides an overview of selected opinions (majority and dissenting) by Judge Alito addressing habeas review in death penalty cases.

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Habeas Review in Death Penalty Cases: Selected Opinions of Judge Samuel Alito

Summary

On October 31, 2005, President Bush nominated Judge Samuel A. Alito to replace retiring Associate Justice Sandra Day O'Connor. During Alito's 15-year tenure with the U.S. Court of Appeals for the Third Circuit, the court has considered several habeas corpus petitions concerning the imposition of death sentences. This report provides an overview of selected opinions (majority and dissenting) by Judge Alito addressing habeas review in death penalty cases. This report will not be updated.

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Habeas Review in Death Penalty Cases: Selected Opinions of Judge Samuel Alito

During his 15 years on the U.S. Court of Appeals for the Third Circuit, Judge Samuel Alito has participated in habeas corpus¹ review in 10 capital cases. Five cases were decided unanimously by three-judge panels;² the other five provoked disagreement between the judges.³ These cases have addressed procedural issues, issues concerning jury selection and instructions, and the ineffective assistance of

¹ The process by which state prison inmates can get their constitutional claims before a federal court.

² See *Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005)(Alito J.)(upholding the district court's invalidation of a death sentence due to the trial court's failure to inform the jury that a Pennsylvania prisoner sentenced to life imprisonment may not be paroled, but rejecting inmate's *Batson's* claim and finding erroneous jury instruction in guilt phase to be harmless); *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004)(requiring federal district court 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 the 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).

³ *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997)(holding that [1] a reasonable likelihood existed that the jury improperly understood instructions as permitting it to convict defendant of first-degree murder without first finding that the defendant intended that the victim be killed; [2] the instruction on first-degree murder that improperly removed Pennsylvania's burden of proving specific intent violated the defendant's federal due process rights; and [3] jury instruction permitting the jury to convict the defendant of first-degree murder without first finding that he had the requisite specific intent to kill was not harmless error); *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001)(en banc)(holding that deference was not owed to state court findings that did not reflect completion of third step of *Batson* analysis); *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004)(concluding that the Pennsylvania Supreme Court's decision regarding Rompilla's sentencing proceeding was not contrary to and did not involve an unreasonable application of clearly established Supreme Court precedent); *Flamer v. Delaware*, 68 F.3d 736 (3d Cir. 1995)(en banc)(consolidated with *Bailey v. Snyder*)(finding that Delaware's sentencing scheme was a "weighing" one, thus warranting analysis under *Zant* as opposed to *Clemons*). 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).

counsel. In reviewing these issues, the court arguably has relied on and applied Supreme Court precedent.

Under the “deference” provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), federal courts are not to overturn state judgements on a habeas corpus review merely because they would have decided the case differently. They may overturn only state decisions contrary to Supreme Court precedent or applied unreasonably.⁴ Generally, within the broad zone in which reasonable judges may differ, the state court decision stands. As such, the Third Circuit has upheld some death sentences and vacated others.

Jury Instructions

In *Bronshtein v. Horn*,⁵ Judge Alito, writing for the three-judge panel, vacated a defendant’s death sentence but upheld the underlying conviction. Antuan Bronshtein was convicted of robbing and killing Alexander Gutman, a jewelry store owner. One of the principal issues was whether the state trial court had denied Bronshtein due process of law by not telling the jury that a sentence of life in prison would not have a possibility of parole.⁶ The court found that the prosecution’s arguments and the testimony elicited at the penalty phase put the issue of the defendant’s future dangerousness at issue. In *Simmons v. South Carolina*,⁷ the U.S. Supreme Court held that when a defendant’s “future dangerousness” is at issue, the jury must be accurately informed whether there is any possibility of parole under the alternative lifetime sentence. Because the trial court failed to provide the jury with such an instruction, the appellate court affirmed the District Court’s holding that the death sentence was unconstitutional.⁸

In *Smith v. Horn*,⁹ Judge Alito dissented from a panel decision invalidating the capital murder conviction of Clifford Smith. Smith and his friend, Roland Alston, robbed a Pennsylvania pharmacy in 1983. They subsequently shot one of the robbery victims, Richard Sharp. The state charged Smith with first-degree murder. 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.

⁴ See *Williams v. Taylor*, 529 U.S. 362, 405-406 (stating that a state court’s decision is “contrary to” clearly established law if it “applies a rule that contradicts the governing law set forth in our cases” or if it “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”).

⁵ 404 F.2d 700 (3d Cir. 2005).

⁶ Another issue was whether the court could reach the issue despite Bronshtein’s failure to raise it on appeal, his decision to drop his first state postconviction petition, and his failure to file another one until after the state’s statutory one-year limit had expired.

⁷ 512 U.S. 154 (1994).

⁸ 404 F.2d at 720.

⁹ 120 F.3d 400 (3d Cir. 1997).

The accomplice liability theory did not require the state to prove that Smith committed the killing; however, the state needed to prove that Smith had the specific intent to kill. The trial court’s jury instructions failed to make this requirement 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.¹⁰

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 majority held that the instruction led “the jury to believe that an accomplice for one purpose is an accomplice for all purposes,” contrary to state law.¹¹

The Third Circuit invalidated Smith’s first-degree murder conviction, explaining 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. The court concluded that a “fair reading of 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.”¹² The court concluded that the delivery of these improper instructions amounted to a violation of Smith’s right to a fair trial pursuant to the Due Process Clause of the Fourteenth Amendment.

Judge Alito dissented, making 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.*’”¹³ Judge Alito then declared that “[w]hen a trial judge, in instructing a jury, provides a definition of a complicated legal term, the judge is not generally required to repeat

¹⁰ For example, the instructions said the following:

[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*.

¹¹ *Ibid.*, at 412.

¹² *Ibid.*, at 411.

¹³ *Ibid.*, at 423 (quoting trial court’s instructions)(emphasis added by Judge Alito).

that definition every time the term is subsequently employed.”¹⁴ 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.”¹⁵

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.¹⁶ This was viewed as an interesting argument inasmuch as the Commonwealth never raised the issue at any time. The majority rejected Judge Alito’s 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 impartial magistrates. *See United States v. Burke*, 504 U.S. 229-246 (1992)(Scalia J., concurring in the judgment).¹⁷

In *Flamer v. Delaware*,¹⁸ Judge Alito, again writing for the majority, upheld a defendant’s death sentence. The Third Circuit en banc held that Delaware’s death penalty statute prior to its 1991 amendment was a “nonweighing statute,”¹⁹ thus governed by the Supreme Court precedent in *Zant v. Stephens*,²⁰ as opposed to *Clemons v. Mississippi*.²¹ The court held that the jury instructions and interrogatories used did not violate the Eighth Amendment.

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

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ See *ibid.*, at 420-23 (Alito, J., dissenting)(requesting briefing on whether Smith failed to exhaust his state remedies and whether he procedurally defaulted his claim).

¹⁷ *Ibid.*, at 409.

¹⁸ 68 F.3d 736 (3d Cir. 1995).

¹⁹ “Weighing” and “nonweighing” states make the sentence-selection decision in different ways. In “weighing” states, the sentencer first determines that a defendant is eligible for the death penalty by finding the existence of certain statutory aggravating factors. The sentencer then weighs the aggravating factors against any mitigating factors to decide whether the death penalty is appropriate. In “nonweighing” states, the sentencer may impose a capital sentence only after finding one or more aggravating factors. The sentencer then considers whether any mitigating circumstances warrant a noncapital sentence. An invalid aggravating factor invalidates any subsequent “weighing.” In a “nonweighing,” statutory scheme, it does not invalidate a capital sentence as long as there is at least one valid aggravating factor. *Stringer v. Black*, 503 U.S. 222, 231-32 (1992).

²⁰ 462 U.S. 862 (1983)(holding that when a sentencing jury relies on an unconstitutional statutory aggravating factor, 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).

²¹ 494 U.S. 738 (1990).

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.”²² This factor, listed in a Delaware statute among 18 other aggravating factors, was subsequently invalidated by the Delaware Supreme Court for being unconstitutionally vague.²³ 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.

To pass constitutional muster, a death penalty sentencing process must perform two functions. First, a state must apply rational criteria to narrow the class of offenders eligible for the death penalty.²⁴ Once a defendant is determined to be death-eligible, the sentence-selection process must allow for individualized consideration that accounts for all relevant mitigating evidence.

At issue for the Third Circuit was which of two legal frameworks governed the jury’s consideration of aggravating factors: weighing or nonweighing. In a nonweighing sentencing scheme, 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*,²⁵ 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.

Under an alternative framework (weighing) the sentencing jury is specifically instructed to weigh statutory aggravating factors against all mitigating factors in deciding whether to impose death. With this approach, statutory factors 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*,²⁶ the Supreme Court has held that the jury’s reliance on an invalid statutory aggravator within a weighing state cannot stand unless there is a judicial reweighing of the evidence without consideration of the invalid circumstances or unless it is determined that the jury’s consideration of those circumstances was harmless.²⁷

²² *Flamer*, 68 F.3d at 741, 744 (citing Del. Code Ann. tit. 11, § 4209(e)(1)(n)).

²³ See *id.* at 743 (citing Petition of State for Writ, 433 A.2d 325 (Del. 1981)).

²⁴ See *Zant v. Stephens*, 462 U.S. 862, 878 (1983)(stating that “statutory aggravating circumstances play a constitutional function at the state of legislative definition: they circumscribe the class of persons eligible for the death penalty”).

²⁵ 462 U.S. 862 (1983).

²⁶ 494 U.S. 738 (1990).

²⁷ *Stringer v. Black*, 503 U.S. 222, 232 (1992); see *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

The majority concluded that Delaware is a “nonweighing” state due to the jury’s freedom during the penalty phase to consider all relevant evidence in aggravation. The court concluded that the Delaware scheme mirrored the capital sentencing scheme in *Zant* and contrasted sharply with the sentencing scheme in *Clemons*. As such, the court affirmed the lower court’s decision to deny the petitions.

Jury Selection

In *Riley v. Taylor*,²⁸ the principal issue involved application of the Supreme Court’s decision in *Batson v. Kentucky*²⁹ regarding peremptory challenges to potential jurors during the jury selection process. Although lawyers historically have been able to challenge a limited number of jurors for any reason they wish and without any explanation given, the Supreme Court held in the *Batson* case that jurors may not be challenged because of their race. However, the high court also held that the trial judge’s finding of fact on whether a challenge is racially motivated or made for some other legitimate reason is entitled to “great deference.”³⁰ The court set out a three-step process for adjudicating a claim that a particular peremptory challenge was racially based.

[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.³¹

A majority of the Third Circuit en banc sustained Riley’s claim, effectively overruling the trial judge’s determination that the prosecutor had provided credible, race-neutral reasons for the challenges. In doing so, the majority placed great reliance on statistics, noting that there was little chance that the patterns of selection in the statistics were random.³²

In dissent, Judge Alito contended the majority’s statistics were erroneous and a misleading use of statistics.³³ He also noted the importance of deferring to the trial judge, particularly where important evidence is of a type not likely to show up in the record. One issue, for example, was whether one of the jurors hesitated before answering a question about the death penalty. Another was the issue of the prosecutor’s credibility at the *Batson* hearing. Judge Alito opined that due to the

²⁸ 277 F.3d 261 (3d Cir. 2001).

²⁹ 476 U.S. 79 (1986).

³⁰ See *Batson*, at 98, n. 21; *Hernandez v. New York*, 500 U.S. 352, 364-65 (1991).

³¹ *Hernandez v. New York*, 500 U.S. 352, 358-359(1991); *ibid.*, at 375 (O’Connor, J., concurring in judgment); *Batson*, 476 U.S. at 96-98.

³² See *Riley*, at 281.

³³ *Ibid.*, at 326-27.

narrow review of the hearing judge's findings, a reviewing court should give those findings great deference.³⁴

Ineffective Assistance of Counsel

In *Rompilla v. Horn*,³⁵ the Third Circuit addressed the issue of ineffective assistance of counsel. Ronald Rompilla robbed and killed Mr. Scanlon. In Pennsylvania, as in most states, the penalty in a capital murder case is determined by weighing the aggravating circumstances against the mitigating circumstances. Rompilla's case gave the defense lawyers little to work with in the way of mitigation. Rompilla's lawyers interviewed him and most of his immediate family to determine if any "abuse excuse" evidence existed. The lawyers were told that nothing remarkable along those lines existed in Rompilla's childhood. The lawyers directed their limited resources elsewhere. They had Rompilla evaluated by three different mental health professionals, whom they believed to be the best available, and apparently made the best case they could. The jury decided on the death penalty. During the multiple reviews of the case, later attorneys found leads to mitigation evidence in the records of Rompilla's prior crimes. The Pennsylvania Supreme Court reviewed the performance of trial counsel and found that they had rendered effective assistance.

When the case reached the Third Circuit, the governing law appeared to require a double dose of deference. The governing Supreme Court precedent (written by Justice O'Connor) required reviewing courts to give trial counsel broad latitude in plotting their strategy and to resist the temptation to engage in excessively critical hindsight when evaluating a strategy that turned out to be unsuccessful.³⁶ Applying these standards to the facts of the case, Judge Alito, writing for the majority, wrote that the state supreme court had applied the correct standard and had done so in a reasonable way. The majority concluded that the state court's finding that the attorneys had made reasonable choices in allocating their limited investigative resources was not clearly wrong.

He suggested that, although a "good" or "prudent" lawyer might have examined school, medical, and court records, Rompilla's lawyers had done all that was "constitutionally compelled" by interviewing him, some of his family members, and three mental health professionals.³⁷ Judge Alito distinguished the case at bar from the Supreme Court's decision in *Wiggins v. Smith*,³⁸ where the Court found that counsel's decision not to expand the search for mitigating evidence beyond the

³⁴ *Ibid.*, at 318.

³⁵ 355 F.3d 233 (3d Cir. 2004).

³⁶ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating that "judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable").

³⁷ *Rompilla*, at 258-59.

³⁸ 539 U.S. 510 (2003).

presentence investigation report and department of social services records constituted ineffective assistance of counsel, thus violating the defendant's Sixth Amendment right. The Court found that the attorney's failure to conduct even a minimally adequate mitigation investigation into Wiggins' past robbed the jury of the opportunity to review Wiggins' social history. The Court concluded that it was quite reasonable to assume that the jury would have reached a different sentence had they been apprised of such evidence.³⁹

The majority concluded that critical differences existed between the conduct of Wiggins's and Rompilla's trial attorneys. First, Wiggins's attorneys were presented with leads that "any reasonably competent attorney" would have realized were promising. Rompilla's attorneys had no comparable leads. Second, the defendants described their childhoods differently. Wiggins described his as "disgusting," whereas Rompilla insisted that his was "normal." The majority opined that these were material differences.

Four Justices of the Supreme Court saw the case the way Judge Alito did,⁴⁰ but five disagreed. In *Rompilla v. Beard*,⁴¹ the Court reversed in a 5-4 decision, with Justice O'Connor casting the swing vote. The Court held that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, the defendant's counsel is still bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial. The Court found that the defense counsel's failure to examine the file on the defendant's prior conviction for rape and assault at the sentencing phase fell below the level of reasonable performance.

Procedural Issues

In one of the capital cases in which the Third Circuit granted habeas relief, *Bronshtein v. Horn*,⁴² Judge Alito, writing for the majority, held that Pennsylvania's time limit on state collateral review was inconsistently applied in death penalty cases for the first few years after its enactment in 1996, and because of that, the defendant was not barred from a review of his case on the merits.

In a series of decisions, the Supreme Court has established that a federal court cannot consider a claim if the state court provided a procedure for reviewing that claim and the defendant failed to make it at the time required by state law.⁴³ There

³⁹ Ibid.

⁴⁰ As Justice Kennedy noted in dissent, "We have reminded federal courts often of the need to show the requisite level of deference to state-court judgments under 28 U.S.C. § 2254(d). By ignoring our own admonition today, the Court adopts a do-as-we-say, not-as-we-do approach to federal habeas review." *Rompilla v. Beard*, 125 S.Ct. 2456, 2476 (2005).

⁴¹ 125 S.Ct. 2456 (2005).

⁴² 404 F.3d 700 (3d Cir. 2005).

⁴³ See, e.g., *Murray v. Carrier*, 477 U.S. 478, 497(1986); *Teague v. Lane*, 489 U.S. 288, 297 (continued...)

are exceptions to this rule, one of which is that it does not apply unless the state rule is “adequate to support the judgment.”⁴⁴ In *Bronshtein*, the state’s deadline appeared on the face of a recently enacted statute. Earlier, the Pennsylvania Supreme Court had carved out an exception for capital cases to its own court-created default rule. As of the time Bronshtein withdrew his petition, that court had not specifically stated whether its exception would also apply to the new statutory rule. Later, the court held it did not. Judge Alito ruled that the state statutory deadline was not “adequate” at the time of default.⁴⁵ The State has asked the Supreme Court to review this decision. That petition is currently pending

⁴³ (...continued)
(1989); *Coleman v. Thompson*, 501 U.S. 722, 751 (1991).

⁴⁴ See *Coleman* at 729.

⁴⁵ See *Bronshtein*, at 709-710.