

## Judge Alito and the Death Penalty: A Closer Look

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In the public discussions of the nomination of Judge Samuel Alito to the United States Supreme Court, there has been considerable interest in the cases involving capital punishment. These cases often involve the most contentious issues and the most complex law. Because of that complexity, superficial summaries of the cases can be misleading, and a relatively lengthy analysis is necessary. This paper reviews all ten capital cases identified by Liu and Skiba, *Judge Alito and the Death Penalty* (American Constitution Society, Dec. 2005), [http://www.acslaw.org/pdf/Alito\\_Death\\_Penalty.pdf](http://www.acslaw.org/pdf/Alito_Death_Penalty.pdf), rather than the five discussed in that paper.

All of the cases discussed here arose on federal habeas corpus review of state judgments. There are no cases of defendants convicted of violating federal law and sentenced to death in federal district court, in which case the Third Circuit would review the decision in a regular appeal.

Habeas corpus is a unique kind of review, which must be kept in mind while evaluating the cases. It is a “heads I win, tails we take it over” review. That is, if the defendant wins in the state appellate court, and the U. S. Supreme Court does not take the case (as it rarely does), the case is over. However, if the state court affirms the conviction, the defendant can take his case to the lower federal courts. The cases that reach the Third Circuit, then, are a filtered sample from which the cases that the defendant should obviously win have already been removed. It would not be surprising to find fewer reversals in these cases than in regular criminal appeals, and in noncapital cases less than 1% of these petitions are granted nationwide. In capital cases, however, the rate is much higher, and that is also true of the cases Judge Alito has participated in.

1. *Bronshtein v. Horn*, 404 F. 3d 700 (2005), certiorari pending in *Beard v. Bronshtein*, No. 03-346.

Antuan Bronshtein was convicted of robbing and killing Alexander Gutman, who owned a jewelry store in Montgomery County, Pennsylvania. He was also convicted in separate proceedings of the murder of another jeweler in Philadelphia. He was sentenced to death. The principal issues were (1) 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, and (2) whether the federal court could reach that 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. Judge Alito, writing for the three-judge panel, resolved these issues in favor of the defendant and overturned the death sentence.

Judge Alito’s decision on the procedural issue contrasts sharply with the popular perception that he always sides with the prosecution on debatable issues. This decision is regarded on the law enforcement side as extending existing law substantially further in the defendant’s favor than is justified by Supreme Court precedent. In a series of decisions, many written by Justice O’Connor, 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. See, e.g., *Murray v. Carrier*, 477 U. S. 478, 497 (1986); *Teague v. Lane*, 489 U. S. 288, 297 (1989); *Coleman v. Thompson*, 501 U. S. 722, 751 (1991).

There are exceptions to this rule, one of which is that it does not apply unless the state rule is “adequate to support the judgment.” See *Coleman*, at 729. In *Bronshtein*, the state’s deadline clearly

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 the default. See *Bronshtein*, at 709-710.

On the merits, Judge Alito held that the failure to tell the jury about parole violated the Supreme Court precedents of *Simmons v. South Carolina*, 512 U.S. 154 (1994) and *Kelly v. South Carolina*, 534 U.S. 246 (2002). That holding would be a stretch under *Simmons*, although it is probably correct under *Kelly*. *Kelly* was decided by the Supreme Court long after Bronshtein’s state appeal was final and would not have applied retroactively to this case if the state had made that argument against its use. Judge Alito declined to rescue the prosecution from its oversight and applied the *Kelly* rule to a trial conducted eight years before that rule was announced.

While his opponents claim that he applies default rules strictly against defendants and excuses defaults by the prosecution, in *Bronshtein* Judge Alito did just the opposite.

Prior to Judge Alito’s nomination, both parties asked the Supreme Court to review this decision. Those petitions are pending as of this writing.

## 2. *Crews v. Horn*, 360 F. 3d 146 (2004).

Crews robbed a couple at an overnight shelter on the Appalachian Trail, raped the woman, and murdered them both. After his conviction and death sentence were affirmed by the Pennsylvania Supreme Court, he filed a federal habeas corpus petition, including claims he had raised to the state court plus new claims raised for the first time.

Congress has long forbidden federal courts to grant “unexhausted” claims not previously presented to the state courts, see 28 U. S. C. § 2254(b), and the Supreme Court had previously held that “mixed” petitions of exhausted and unexhausted claims should be dismissed. See *Rose v. Lundy*, 455 U. S. 509 (1982). However, Congress’s enactment of a one-year statute of limitations in 1996, see 28 U. S. C. § 2244(d), raised the possibility that dismissal of a petition could mean that the claims are barred forever, a consequence not foreseen when the Supreme Court established the *Lundy* dismissal rule.

Judge Alito joined an opinion by Judge Roth, holding that the petition should be stayed rather than dismissed, despite the seemingly binding precedent of *Lundy*. Although this holding was eventually confirmed by the Supreme Court, see *Rhines v. Weber*, 125 S. Ct. 1528 (2005), it was by no means “straightforward” at the time, as Liu and Skiba claim. The decision reversed the contrary decision of the federal District Court and was contrary to a decision of the Eighth Circuit on the question.

## 3. *Rompilla v. Horn*, 355 F. 3d 233 (2004), reversed by *Rompilla v. Beard*, No. 04-5462 (U. S., June 20, 2005)

Ronald Rompilla climbed through the bathroom window of a bar owned by James Scanlon after the bar had closed for the night. He then robbed Mr. Scanlon, stabbed him to death, set him on fire, and left him in a pool of blood.

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. The crime itself involved no provocation by the

victim or anyone else and no duress or domination by any third party. However, the case for mitigation is not limited to the circumstances of the crime and the defendant's criminal history or lack of one. The defendant is allowed to proffer any circumstance he chooses as mitigating.

Rompilla's lawyers interviewed him and his family to determine if any "abuse excuse" evidence existed. They told him there was nothing remarkable along those lines in Rompilla's childhood. The lawyers directed their limited resources elsewhere. They had Rompilla evaluated by three different mental health professionals, who they believed to be the best available, and made the best case they could. The jury decided on the death penalty. During the multiple reviews of this case, later attorneys found leads to mitigation evidence in the records of Rompilla's prior crime. The Pennsylvania Supreme Court reviewed the performance of trial counsel and found that they had rendered effective assistance.

The case then moved to federal District Court, where review is governed by an act of Congress, the Antiterrorism and Effective Death Penalty Act of 1996, known as AEDPA. Under the "deference" provision of AEDPA, 28 U. S. C. § 2254(d), federal courts are not to overturn state judgments on habeas corpus merely because they would have decided the case differently. Only state decisions that are contrary to Supreme Court precedent or that apply it unreasonably may be overturned. Within the broad zone in which reasonable judges may differ, the state court decision stands.

When the case reached the Third Circuit, the governing law required 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. Applying these standards to the facts of the case, Judge Alito wrote that the state supreme court had applied the correct standard and done so in a reasonable way. The state court's finding that the attorneys had made reasonable choices in allocating their limited investigative resources was not clearly wrong. In obedience to the command of Congress, that is as far as the federal court needed to go.

Four Justices of the Supreme Court saw the case the same way Judge Alito did, but five disagreed. Justice Souter's majority opinion in Rompilla barely mentions the act of Congress that provides the rule of decision for the case. He discusses standards issued by the American Bar Association at considerably greater length. While it is arguable that the Court reached a result that would have been correct if it were deciding the case from scratch, Congress has expressly forbidden the use of habeas corpus for that purpose. 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). [Citing 6 cases.] By ignoring our own admonition today, the Court adopts a do-as-we-say, not-as-we-do approach to federal habeas review."

#### 4. *Carpenter v. Vaughn*, 296 F. 3d 138 (2002).

In 1983, James Carpenter, a convicted murderer, had a confrontation on the street with Jimmie Taylor, his girlfriend's previous boyfriend. He stabbed Taylor in the heart with a knife and then proceeded with his plans for the evening, meeting another couple at a bar for drinks. He later threatened his girlfriend that he would kill her if she told anyone what happened. See *Commonwealth v. Carpenter*, 511 Pa. 429, 432-433, 515 A. 2d 531, 532-533 (1986).

The jury convicted Carpenter of murder. During their deliberation on the penalty, they sent out a note asking, "Can we recommend life imprisonment with a guarantee of no parole?" The judge gave the following answer, without objection by defense counsel:

“The answer is that simply, no absolutely not. Moreover, ladies and gentlemen, you talk about recommendation. I don’t know exactly what you mean, but I assume you remember what I told you before, that you as a jury at this point are not making a recommendation of death or life imprisonment. I hope you understand that.

“You folks are actually fixing the sentence, and not the Court. It is not the recommendation. Whether you mark on there death, that’s the sentence and there is nothing this Court can do about it. The Court has nothing to do on it. If you mark life imprisonment, there is nothing this Court can do about it or wants to do about it, because that decision is entirely up to you as members of the jury. So, I hope you understand that it is not a recommendation, it is a sentence that will bind all of us here to whatever you fix and it’s going to have to be very simply death or life imprisonment. *And the question of parole is absolutely irrelevant.* I hope you understand that.” *Commonwealth v. Carpenter*, 533 Pa. 40, 53, 617 A. 2d 1263 (1992) (emphasis added).

This was a correct answer to the question the jury actually asked: whether they could make a recommendation of life with a guarantee of no parole. No, they could not. They could return a verdict of life or death, not a recommendation. The judge did not tell the jury that a sentence of life imprisonment under Pennsylvania law at the time did not provide for a possibility of parole. This is not the same thing as an absolute guarantee that the prisoner will never be released, which was probably their actual concern, because the law does not preclude the possibility of a commutation to a sentence less than life, nor is there any guarantee that the law will not be amended in the future to provide for a possibility of parole. Rather than give a complete explanation of all the possibilities, the judge simply told them that the question of parole was irrelevant to their deliberations, which was the general rule in the United States at that time. See *California v. Ramos*, 463 U. S. 992, 1025-1027 (1983) (Marshall, J., dissenting).

In his state postconviction review petition, Carpenter claimed that his lawyer had rendered ineffective assistance by failing to object to the judge’s answer. The Pennsylvania Supreme Court unanimously rejected this claim, noting the judge’s statement that the question of parole was irrelevant. See *Commonwealth v. Carpenter*, 533 Pa., at 53-54.

On federal habeas corpus, the Third Circuit read the answer differently. In an opinion by Judge Alito, that court held that the judge’s answer “misstated Pennsylvania law,” *Carpenter v. Vaughn*, F. 3d, at 158, a matter on which federal courts normally treat the state supreme court’s opinion as final. Judge Alito believed that the judge had implied that the defendant would be eligible for parole. He gave short shrift to the judge’s statement to the jury that parole was “absolutely irrelevant,” calling that statement “brief and weak.” See *ibid.* Brief it surely is, but it is hard to see how the words “absolutely irrelevant” can be characterized as “weak.”

The Third Circuit overturned Carpenter’s death sentence and sent the case for either a new penalty trial or resentencing to life in prison.

##### 5. *Riley v. Taylor*, 277 F. 3d 261 (2001) (en banc).

Riley and an accomplice robbed a liquor store owned by James Feeley. During the robbery, Riley shot Feeley in the leg. On his way out of the store, Riley shot Feeley again in the chest, killing him.

The principal issue in this case involved application of the Supreme Court’s decision in *Batson v. Kentucky*, 476 U. S. 79 (1986) regarding peremptory challenges to potential jurors during the jury selection process. Although historically lawyers have been able to challenge a limited number of jurors for any reason they wish and without giving any explanation, 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." See *Batson*, at 98, n. 21; *Hernandez v. New York*, 500 U. S. 352, 364-365 (1991). In addition, unlike the *Batson* and *Hernandez* cases, the *Riley* case arose on federal habeas corpus. The governing Act of Congress at the time provided that a state court finding of fact was presumed correct unless one of eight exceptions applied. See 28 U. S. C. § 2254, former subd. (d). (This subdivision was repealed in 1996, but it continued to govern cases, including this one, filed before the date of the 1996 Act. See *Riley*, at 278.)

The majority of the Third Circuit 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. See *Riley*, at 281. This holding simply ignores the law of *Batson* and the reality of race and the death penalty in America. Lawyers are not required to exercise their challenges randomly. If a legitimate factor happens to correlate with race, it will produce a nonrandom racial pattern. Even so, it still remains legitimate, as the *Hernandez* case illustrates. A juror's view of the death penalty is a highly relevant and legitimate factor, invariably considered by both sides in their peremptory challenges in capital cases. Polls consistently show that opposition to the death penalty runs far stronger among blacks while support runs far stronger among whites. See, e.g., Saad, Support for Death Penalty Steady at 64% (Gallup, Dec. 8, 2005). If prosecutors and defense lawyers exercise their peremptory challenges on this entirely legitimate factor, those challenges will necessarily correlate with race on both sides. That is, prosecutors will end up challenging proportionately more black jurors, and defense lawyers will end up challenging proportionately more white jurors. This reality, however regrettable, sharply diminishes the probative value of statistics showing a nonrandom pattern.

In dissent, Judge Alito noted the majority's erroneous and misleading use of statistics. See *Riley*, at 326-327. 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. It is beyond question that a juror's demeanor while answering a question, not merely the answer itself, is legitimate for an attorney to consider in assessing whether the answer is candid. Demeanor does not show up in the record, and the judge's finding that the prosecutor was telling the truth about the juror's hesitation should have been given deference. See *Riley*, at 322.

Liu and Skiba claim that Judge Alito's opinion in *Riley* is inconsistent with the Supreme Court's later decision in *Miller-El v. Dretke*, 125 S.Ct. 2317 (2005), where, they say, "the Supreme Court recently inferred racial discrimination in jury selection from a statistical pattern...." See Liu & Skiba, at 7. In fact, the *Miller-El* Court made its finding of discrimination primarily from the powerful, direct evidence of racial discrimination in that case, noting that it was "[m]ore powerful than [the] bare statistics." 125 S.Ct., at 2325. The *Miller-El* opinion mentions the statistics at the beginning and end of the discussion, see *id.*, at 2325, 2339, and the thirteen pages (in the West reporter) in between are all about the other evidence. On any objective analysis, *Miller-El* had a much stronger case than *Riley*, and the Supreme Court's 6-3 decision in his favor does not reflect adversely on Judge Alito's opinion that *Riley's* much weaker case was not good enough.

The other issue decided by the en banc court involved the prosecutor's closing argument to the jury. Generally, the propriety of closing arguments in state criminal cases is a matter of state law and rarely presents issues for the federal courts. However, in *Caldwell v. Mississippi*, 472 U. S. 320 (1985), the Supreme Court, as part of its continuing micromanagement of capital cases, reversed a death sentence based on the prosecutor's closing argument. The Court was sharply divided, splitting 4-1-3 with Justice Powell recused. The defense employed the common tactic of trying to make the jurors feel guilty if they

sentenced the defendant to death, see *id.*, at 324, known in the vernacular as “laying a guilt trip.” The prosecutor responded by hammering on the fact that the case would be reviewed by the state supreme court. See *id.*, at 325-326.

In the plurality opinion, Justice Marshall said that “[t]wo important factors” distinguished Caldwell’s case from *Donnelly v. DeChristoforo*, 416 U. S. 637 (1974), an earlier case where no error was found. *Id.*, at 339. While the trial judge in the earlier case had corrected the prosecutor’s statement, in *Caldwell* the defense objected and the judge overruled the objection. “The trial judge in this case not only failed to correct the prosecutor’s remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor’s portrayal of the jury’s role was correct.” *Ibid.* Second, “the prosecutor’s remarks [in *Caldwell*] were quite focused, unambiguous, and strong.” *Id.*, at 340.

Justice Marshall thought this argument was improper because it minimized the jury’s sense of responsibility, see *id.*, at 341, but that broad formulation did not command a majority. Justice O’Connor’s deciding vote was premised on the fact that the argument also misled the jury regarding the scope of review that the appeals process actually provided. See *id.*, at 342. Nine years later, the full Court confirmed that this narrower view was the correct one. See *Romano v. Oklahoma*, 512 U. S. 1, 9 (1994).

*Riley* presents facts that are somewhere between *Caldwell* and *Donnelly*. In *Riley*, the judge neither refuted nor endorsed the prosecutor’s remarks. The prosecutor’s remarks in *Riley* are neither as ambiguous as those in *Donnelly* nor as focused and strong as those in *Caldwell*. It was a dry statement of a fact that virtually everyone knows anyway, that defendants can appeal a conviction and sentence. (Neither *Riley*’s trial attorney nor his appellate attorney thought the statement warranted an objection, but the Delaware Supreme Court considered the question when it was raised by the ACLU as *amicus curiae*. See *Riley v. State*, 496 A. 2d 997, 1022-1024 (Del. 1985).) The two Supreme Court precedents give lower courts two points on the spectrum but do not precisely draw the line between permissible and impermissible argument. If the facts of *Caldwell* are close to that line – and the narrow division in *Caldwell* and subsequent narrow interpretation in *Romano* indicate that they are – then any substantial distinguishing facts should push it over the line. Judge Alito’s opinion that the prosecutor’s argument in this case did not violate the federal Constitution is well within the judicial mainstream.

Liu and Skiba, at 8, cite this opinion for a “pattern of recognizing but then rationalizing constitutional errors...” That statement is incorrect. There is no rationalizing of error here. Judge Alito’s opinion was that no federal constitutional error occurred, an opinion that may well have been correct.

6. *Smith v. Horn*, 120 F. 3d 400 (1997).

In June, 1983, Clifford Smith and Roland Alston, both armed, entered a pharmacy owned by Richard Sharp. They forced Mr. Sharp, an employee, and a customer to lie on the floor, while the robbers took their jewelry, a watch, and a wallet as well as cash from the register. One of the robbers shot Mr. Sharp in the back of the head at point-blank range. See *Commonwealth v. Smith*, 511 Pa. 343, 347-348, 513 A. 2d 1371 (1986).

The identity of the robbers was amply proved by the testimony of multiple eyewitnesses and accomplices and by their possession of the victims’ distinctive jewelry, as well as fingerprint and serology evidence. See *id.*, at 350-351. The identity of Smith as the shooter was not quite as definitively proved. Apparently neither the employee nor the customer could identify the shooter. However, it was supported by the accomplice testimony, blood on Smith’s shoes, and the fact that all of the cartridges in Alston’s gun were accounted for, unfired. See *ibid.*

In most jurisdictions, participation in a robbery in which a victim is killed is sufficient to make all the robbers guilty of murder. See 2 W. LaFare & A. Scott, *Substantive Criminal Law* § 14.5(c) (2d ed. 2003). Further, the Supreme Court has held that a state may impose capital punishment in this situation where the defendant is a major participant in the felony, as opposed to, for example, a getaway car driver. See *Tison v. Arizona*, 481 U. S. 137, 158 (1987). Pennsylvania has moderated the traditional rule by requiring a showing of a specific intent to kill for first-degree murder. Without such a showing, killing in the course of a robbery is second-degree murder. See 18 Pa. Cons. Stat. § 2502(a),(b); *Smith v. Horn*, 120 F. 3d 400, 410 (1997). First-degree murder is potentially a capital offense, but second-degree murder is not. See 18 Pa. Cons. Stat. § 1102(a),(b).

The judge instructed the jury on the elements of murder and on the accomplice liability rule. The judge instructed, “Conversely, if you find that one was not the accomplice of the other but that a criminal homicide occurred, then you must decide who performed the act of killing and, of course, it follows that if Alston was the killer and Smith was not his accomplice, he, Smith would not be guilty of the crime of murder . . . .” If the jury understood the word “accomplice” in the latter instruction to mean “accomplice in the murder,” they would have to find intent to kill on the part of Smith to convict on an accomplice theory, because an accomplice, by definition, must share the criminal intent. However, if they understood that word to refer to “accomplice in the robbery,” then they could convict based on a finding that Smith intended to rob without finding that he intended to kill. See *Smith*, 120 F. 3d, at 411-412.

Smith’s lawyer did not object to the instructions that the Third Circuit would later find ambiguous. As a general rule, reviewing courts will not consider an objection to an instruction unless the defendant objected when the instruction was given. See, e.g., *Sochor v. Florida*, 504 U. S. 527, 534 (1992). The facts of this case illustrate one of the most powerful reasons for this rule. An ambiguity in an instruction can cut both ways. It might affect the jury in the defendant’s favor as well as against him. Without a requirement for objection at trial, a defendant could get the benefit of the instruction if it ends up working in his favor, because the prosecution cannot appeal, while getting a reversal on appeal if it ends up going against him.

In *Smith*, the defense lawyer might not *want* the jury focused in the guilt phase on a decision of who was the actual killer. Although not conclusive, the evidence that Smith did it was strong. The always dubious accomplice testimony was bolstered by two substantial pieces of objective physical evidence. If the jury had to reach a definite, unanimous decision on who did it in the guilt phase, that issue would be psychologically cleared off the deck for the penalty phase, where a single juror can veto the death penalty under Pennsylvania law. See *Sattazahn v. Pennsylvania*, 537 U. S. 101, 104-105 (2003). From the manner of killing, there can be little doubt that the triggerman intended to kill and brutally butchered a helpless, prone victim. Given the very strong likelihood that the jury would convict Smith of first-degree murder, a reasonable attorney might want to keep some doubt alive for the penalty phase regarding who was the actual killer.

The instruction issue remained dormant for the nine years of state-court reviews of this case. Neither the attorney briefing the case on direct appeal nor the attorney who handled the postconviction petition thought the issue warranted briefing. See *Commonwealth v. Smith*, 511 Pa. 343, 513 A. 2d 1371 (1986) (no mention of issue); *Commonwealth v. Smith*, 539 Pa. 128, 650 A. 2d 863 (1994) (same). When the case went to federal habeas corpus, the attorney did raise it, but the federal district judge thought it was so meritless as to not warrant discussion. See *Smith v. Horn*, 120 F. 3d, at 410 (quoting *Smith v. Horn*, 1996 WL 172047, \*15 (DC ED Pa.)).

When the Third Circuit reached the issue, the first question was whether the claim was precluded by the defendant’s failure to raise it in the state court reviews of his case. It would have been if the prosecution had raised this objection, but it did not. The question then became whether the court should

raise the issue on its own. In *Granberry v. Greer*, 481 U. S. 129 (1987), the Supreme Court discussed this situation, but its guidance is nebulous. “The appellate court is not required to dismiss for nonexhaustion notwithstanding the State’s failure to raise it, and the court is not obligated to regard the State’s omission as an absolute waiver of the claim.” *Id.*, at 133. The controlling principle is “whether the interests of comity and federalism are better served by addressing the merits forthwith,” *id.*, at 134, a less than precise standard, to put it mildly.

*Granberry* gives several concrete examples, but none of them fits the facts of *Smith*. The high court indicated that “if a full trial has been held in the district court *and it is evident that a miscarriage of justice* has occurred, it may also be appropriate for the court of appeals to hold that the nonexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted.” *Id.*, at 135 (emphasis added). Miscarriage of justice, in the context of defaulted claims, means simply that the defendant really didn’t do it, see *Schlup v. Delo*, 513 U. S. 298, 329 (1995), or is almost certainly ineligible for the penalty he received. See *Sawyer v. Whitley*, 505 U. S. 333, 336 (1992). *Smith* was certainly guilty of felony murder, and the evidence was quite strong that he was the actual, cold-blooded killer. In addition, his claim on the instruction issue was so far from “plainly warranted” that two defense attorneys thought it was not worth briefing, and the district judge thought it was not worth discussing.

In his dissenting opinion in *Smith*, Judge Alito concluded that the court should *raise* the issue itself and call for briefing from the parties. See 120 F. 3d, at 422. In their vitriolic denunciation of this opinion, Liu and Skiba strongly imply, but stop just short of saying, that Judge Alito reached out and *decided* the issue without briefing from the parties. For example, they say, “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 postconviction proceedings . . . .” Liu & Skiba, at 5. This accusation is completely unwarranted. The published opinions of the Pennsylvania Supreme Court in the direct appeal and post-conviction review list the claims made, and an attack on the instruction in question is not among them. That is sufficient to raise the likelihood that the defendant did not exhaust his state remedies and to make a call for briefing on the subject proper and within the discretion of the Court of Appeals under *Granberry*.

Given the fuzziness of *Granberry*’s guidance, it is not surprising that judges will occasionally disagree on how to exercise the discretion that rule gives them. Neither Judge Alito’s call for further briefing nor the majority’s rejection of that call, see 120 F. 3d, at 407, can be said to be clearly wrong under the law in effect at the time. Five months after *Smith*, the Supreme Court reversed another Court of Appeals ruling for not exercising judgment and instead adopting a rule of automatically raising the issue on its own motion. See *Trest v. Cain*, 522 U. S. 87 (1997). Although the high court’s holding in that case is carefully limited, the language of Justice Breyer’s unanimous opinion suggests that Judge Alito’s approach in *Smith* was the correct one. “We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way ‘round is the shortest way home.’” *Id.*, at 92.

Also worth noting in this context is the fact that Congress had already acted to change the exhaustion rule in 1996, although the change did not apply to already pending cases. Federal courts now *must* consider the exhaustion rule unless the state expressly waives it. See 28 U. S. C. § 2254(b)(3). The decision of Congress to make a formerly discretionary practice mandatory is surely a proper factor to consider in exercising discretion, in those cases where discretion is still available.

On the merits of the case, Judge Alito first noted that if the jury applied the instructions in a logically precise manner, the definition of “accomplice” would have required that they find intent to kill before convicting *Smith* on an accomplice theory. See 140 F. 3d, at 423-424. From this, Liu and Skiba conclude that Judge Alito used “legal algebra” rather than “a rule of clear statement” to find “the flawed



instructions adequate to convict Smith of first-degree murder.” Liu & Skiba, at 5. But that is not what Judge Alito’s opinion says. He does not purport to decide whether the instructions were reversible error as a matter of state law. “To be sure, if Smith’s trial attorney had objected to this and the other instructions at issue on the ground that they were susceptible to the misinterpretation that troubles the majority, if the trial judge had overruled this objection, if the objection had been raised on direct appeal, and if we sat on a Pennsylvania appellate court, rather than a federal court, I could understand a decision requiring a new trial.” 140 F. 3d, at 424.

As the Supreme Court has said many times, federal courts have no authority to overturn state criminal convictions merely because they perceive an error of state law. See, e.g., *Estelle v. McGuire*, 502 U. S. 62, 67 (1991). The essence of Judge Alito’s opinion on the merits is the distinction between state law and federal constitutional law.

The Supreme Court has never held that an ambiguity such as the one at issue in the *Smith* case violates the Constitution of the United States. There are cases overturning state convictions for ambiguous instructions where the ambiguity relates to a federal constitutional requirement. See, e.g., *Mills v. Maryland*, 486 U. S. 367 (1988). The Supreme Court case that comes closest to *Smith* is *Gilmore v. Taylor*, 508 U. S. 333 (1993). In that case, a poorly drafted instruction might have been interpreted by the jury in a way that allowed them to convict the defendant of murder without considering whether “sudden and intense passion” reduced the crime to manslaughter. See *id.*, at 337-339. The Seventh Circuit overturned the conviction, but the Supreme Court reversed, reinstating the conviction. The high court held that no existing rule made the problem with the instruction a federal constitutional defect, and a new rule could not be created retroactively after the conviction was final on direct appeal. See *id.*, at 344-345. In *Smith*, Judge Alito concluded that the challenged instruction did not violate the federal constitution, a result entirely consistent with the controlling precedents.

Liu and Skiba’s attack on this opinion does not once mention the distinction between state law and the federal Constitution that lies at its heart. This distinction is an essential part of judicial federalism and is a major theme of the law of federal habeas corpus.

#### 7. *Flamer v. Delaware*, 68 F. 3d 736 (1995) (en banc).

In 1979, William Flamer and Andre Deputy robbed and murdered Flamer’s own elderly aunt and uncle, Alberta and Byard Smith, in their home. They stabbed Mr. Smith 79 times and Mrs. Smith 66 times. Some of the items stolen were found in Deputy’s possession and others were in Flamer’s home. Flamer had blood on his coat and hands when arrested. See *Flamer v. State*, 490 A. 2d 104, 107-110 (Del. 1983).

Under the Delaware law in effect at the time, the jury must find at least one of 19 aggravating circumstances listed in the statute before the defendant is eligible to be considered for the death penalty. In deciding whether to impose that penalty, the jury can consider any aggravating circumstance supported by the evidence, whether listed in the statute or not. See *id.*, at 122. In Flamer’s case, the jury found four statutory aggravating circumstances: murder in the course of a robbery, murder for pecuniary gain, killing two people, and that the murders were “outrageously or wantonly vile, horrible, or inhuman.” See 68 F. 3d 736, at 741.

In states where juries do not indicate which factors they relied on, death sentences are routinely attacked for the lack of such findings. See, e.g., *People v. Turner*, 8 Cal. 4th 137, 209, 878 P. 2d 521 (1994). In Flamer’s case, the judge did have the jury list which of the four statutory factors they had relied on in reaching their final sentencing decision, and they indicated all four.

After Flamer's trial, the Supreme Court decided in *Godfrey v. Georgia*, 446 U. S. 420 (1980), that a death sentence based solely on the "outrageously vile" aggravating circumstances could not stand. The language was too vague to separate the cases where the death penalty was imposed from those where it was not. See *id.*, at 433 (plurality opinion). The Delaware Supreme Court affirmed Flamer's conviction but postponed decision on the penalty until the United States Supreme Court decided *Zant v. Stephens*, 462 U. S. 862 (1983), another Georgia case. That case, like *Flamer*, involved a defendant who was eligible for the death penalty based on a proper, unchallenged factor, in a state where the jury is permitted to consider all relevant factors in its final sentencing decision. The high court held the fact that the label "aggravating circumstance" has been attached to a factor too vague for eligibility but proper to consider in the final selection step "cannot fairly be regarded as a constitutional defect in the sentencing process." *Id.*, at 889. Relying on *Zant*, the Delaware Supreme Court upheld the sentence. See 490 A. 2d, at 132.

In subsequent cases, the Supreme Court decided that *Zant* could not be applied in states where the jury is instructed to take the same aggravating circumstances found for eligibility for the death penalty, and only those circumstances, and weigh them against whatever mitigating circumstances it finds. In those states, an appellate court that finds one of the eligibility circumstance to be invalid must either (1) find beyond a reasonable doubt that the jury would have found that circumstance if it had been precisely defined; (2) reweigh the circumstances itself and find that the aggravating outweigh the mitigating without the stricken circumstance; or (3) vacate the sentence and order a new trial. See, e.g., *Stringer v. Black*, 503 U. S. 222, 229-232 (1992). Regrettably, the high court has mislabelled states with systems of this type as "weighing states," see *ibid.*, which incorrectly puts the emphasis on whether the jury engages in a weighing process rather than on what factors may properly be considered. In reality, all sentencers "weigh," and the factors to be considered are the primary difference. This line of cases is difficult to reconcile with the Supreme Court's earlier decision in *Barclay v. Florida*, 463 U. S. 939 (1983), which appeared to have applied a *Zant*-type analysis to a so-called weighing state. See *Stringer*, 503 U. S., at 240-241 (Souter, J., dissenting).

As of 1995, the Supreme Court had not resolved how to apply the *Zant/Stringer* dichotomy to a state like Delaware, where jurors are instructed to consider the statutory aggravating circumstances *plus* a broad range of additional circumstances. The Illinois Supreme Court decided that *Zant* applied to such a statute in *People v. Pasch*, 604 N. E. 2d 294, 317 (1992). The United States Supreme Court took the case to resolve the question but had to dismiss it as moot when the defendant died of natural causes. See *Pasch v. Illinois*, 510 U. S. 910 (1993).

So the Third Circuit had to decide the issue in the *Flamer* case in the face of confusing and possibly conflicting Supreme Court precedents. The court met en banc to consider this issue in *Flamer* and another case presenting the same question, *Bailey v. Snyder*, while leaving the remainder of Flamer's claims to the three-judge panel. See 68 F. 3d, at 739-740.

The Third Circuit upheld the sentence 9-4, with Judge Alito writing the opinion for the majority. The court decided first that, despite the name "weighing state," the real difference in the *Zant/Stringer* dichotomy is whether the jury is allowed to consider additional aggravating factors it may find beyond the statutory list, and that all relevant factors were allowed in Delaware, as they were in the Georgia system at issue in *Zant*. See *id.*, at 748-749. Up to this point, the principal dissent agreed. See *id.*, at 764-765.

As Justice Stevens wrote for the Supreme Court in *Zant*, "it is essential to keep in mind the sense in which that aggravating circumstance is 'invalid.'" 462 U. S., at 885. If a circumstance allowed the jury to consider conduct that was constitutionally protected or irrelevant to culpability, that would require reversal. "But the invalid aggravating circumstance found by the jury in this case . . . because . . . it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed

from those cases in which such a penalty may not be imposed . . . . The underlying evidence is nevertheless fully admissible at the sentencing phase.” *Id.*, at 888.

These words apply equally to *Flamer*. It is quite obvious what “underlying evidence” the jury considered to find the crime “outrageously vile.” As the Delaware Supreme Court noted in its proportionality review, this was a case of “unprovoked murders of helpless elderly victims . . . .” 490 A. 2d, at 144. Those facts were fully admissible and properly considered. Flamer argued that the statutory label of aggravating circumstances caused the jury to give those facts greater weight than they otherwise would have received, but Judge Alito’s opinion held that this argument was foreclosed by *Zant*. See 68 F. 3d, at 752-753. The opinion also rejected an argument that the interrogatory to the jury regarding which statutory factors it relied on transformed the Delaware system into a “weighing” one. Not so, said Judge Alito, because the instructions made quite clear to the jury that they could rely on other aggravating circumstances, which is the defining characteristic of a so-called “nonweighing” state. See *id.*, at 751-752.

In their December 2005 paper, Liu and Skiba, at 10-12, attack this opinion as “tipping the scales at sentencing.” However, on January 11, 2006, the Supreme Court resolved the issues the same way in *Brown v. Sanders*, No. 04-980. The weighing/nonweighing nomenclature is misleading, and the defining characteristic of a “nonweighing” system is one “that permit[s] the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors . . . .” *Id.*, slip op., at 4-5. By this definition, the Delaware system is definitely “nonweighing,” both on its face and as applied in *Flamer*. Further, in a nonweighing system, an eligibility factor which is invalid but redundant for that purpose is not a constitutional defect in the final choice of sentence if “one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances,” *id.*, slip op., at 7-8, which is what happened in *Flamer*.

Joined Case: *Bailey v. Snyder*

In an unrelated case, escaped prisoner Billie Bailey robbed a liquor store and later murdered Gilbert Lambertson, age 80, and his wife, Clara Lambertson, age 73, in their farmhouse. See *Flamer v. Delaware*, 68 F. 3d 736, 743-744 (1995). In Bailey’s case, the statutory aggravating circumstances were murder by an escapee, murder in the course of flight from a robbery, killing two people, and the same “outrageously vile” circumstance. See *id.*, at 744.

The Third Circuit en banc heard this case together with *Flamer* and rejected Bailey’s claim on the common issue for the same reasons as in *Flamer*. The en banc opinion by Judge Alito rejected Bailey’s other claims, see *id.*, at 754-759, and neither dissent expressed any disagreement with this part of the opinion.

8. *Flamer v. Delaware*, 68 F. 3d 710 (1995) (panel).

The issues in Flamer’s case other than the one decided in the en banc case, above, were decided by a three-judge panel. Judge Alito wrote the decision, which rejected without dissent a number of routine claims previously rejected by the Delaware Supreme Court and the federal District Court.

9. *Riley v. Taylor*, 62 F. 3d 86 (1995).

This opinion is an earlier procedural skirmish in case number 5, above. Riley filed his federal habeas petition in August 1991. In October 1991, he obtained new counsel. The court gave new counsel until January 31, 1992, to file an amended petition (which would add new claims) and put counsel on

notice that a further extension “would not be granted absent extreme circumstances.” See 62 F. 3d, at 88-89.

This is all routine in litigation. Lawyers ask for filing extensions, courts grant them, and courts tell lawyers they are unlikely to get further extensions. In this case, counsel did ask for a further six-month extension on January 10, 1992, which the court did not deny until after the existing deadline had expired.

The Third Circuit, in an opinion by Judge Hutchinson, held that the district judge had abused his discretion by not giving counsel a shorter extension than he had asked for, despite the fact that counsel could have filed within the original time limit and despite the fact that the district courts warned about “extreme circumstances.” See *id.*, at 91-92. Judge Alito concurred in this decision.

This is a relatively minor matter, but it does run contrary to some of the allegations made about Judge Alito’s decisions in capital cases. The decision did allow a petitioner to file additional claims despite his missing a deadline clearly set by the District Court. The decision did disagree with another federal judge, the district judge, in the petitioner’s favor. Thus it contradicts claims that Judge Alito always sides with the prosecution on these procedural points or that he does so whenever there is a disagreement among judges.

10. *Terry v. Petsock*, 974 F. 2d 372 (1992).

In 1971, Benjamin Terry firebombed his former girlfriend’s house when she refused to resume their relationship. Three other people died in the fire, and Terry was sentenced to life in prison. See *Commonwealth v. Terry*, 462 Pa. 595, 342 A. 2d 92 (1975).

On March 29, 1979, within Graterford State Prison, Terry bludgeoned Captain Felix Mokychic to death with a baseball bat. “Captain Mokychic immediately fell to the ground, and Terry continued striking him with the bat. Witnesses heard Terry say words to the effect ‘I’ll kill you. . . . I’ll kill you.’ . . . According to Terry’s confession, he periodically checked to see whether Captain Mokychic was still breathing and then hit him some more . . . . An autopsy subsequently revealed that ‘the entire top of the [victim’s] head [had been] reduced to tiny, little fragments of bone.’ ” 974 F. 3d, at 374.

Terry was tried and sentenced to death for this crime, but the Pennsylvania Supreme Court reversed because a written copy of the defendant’s confession had been taken into the jury room in violation of a state rule. See *Commonwealth v. Terry*, 501 Pa. 626, 462 A. 2d 676 (1983). He was retried and sentenced to death again, and this time the Pennsylvania Supreme Court affirmed. See *Commonwealth v. Terry*, 513 Pa. 381, 521 A. 2d 398 (1987).

The federal District Court also denied relief, and Terry appealed to the Third Circuit. The sole issue was whether the trial judge violated the federal Constitution by not instructing on the lesser included offense of third-degree murder, based on the Supreme Court precedent of *Beck v. Alabama*, 447 U. S. 625 (1980). The unanimous opinion by Judge Alito rejected the *Beck* argument, as the unanimous Pennsylvania Supreme Court and the federal District Court had before him.

## CONCLUSION

Looking at the full ten cases and considering the views of the district and state courts, we see a very different picture than the one painted by Liu and Skiba. Out of ten cases, Judge Alito ruled for the defendant on four: *Bronshstein*, *Crews*, *Carpenter*, and *Riley I*. In each of these cases, the decision was either contrary to a decision of the Pennsylvania Supreme Court or the Federal District Court or, in *Bronshstein*, had the effect of nullifying the state court's procedural decision. To say that Judge Alito only rules for the defendants in straightforward cases where judges do not disagree is not correct. His decisions on capital punishment reflect a balanced approach and are well within the judicial mainstream.