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# **EXECUTING A NEW PLAN – ROBERTS AND ALITO MAY CHANGE THE SUPREME COURT’S APPROACH TO THE DEATH PENALTY**

*by* **TIM KERRIGAN**

Some are appalled, and others are optimistic, that Chief Justice John Roberts and Justice Samuel Alito may influence the Court to shorten the appeals process available to those sentenced for execution.<sup>1</sup>

Two recent decisions suggest the Court’s newest members will join Justices Antonin Scalia and Clarence Thomas in support of the death penalty.<sup>2</sup> Critics

of the death penalty fear that this would mean this faction needs only one more vote to refuse to hear appeals of death penalty convictions.<sup>3</sup> Such a view, were the Court to adopt it, would be inconsistent with the opinion, held by majority of U.S. citizens, that capital punishment should be limited.<sup>4</sup> This view is cognizable by virtue of the fact that 25 states currently either prevent executions, or are considering doing so<sup>5</sup>, and two of these states, including Illinois, imposed formal moratoria on the death penalty.<sup>6</sup> Illustrative of the changing public opinion, the *Chicago Tribune*, a publication that has historically supported capital punishment, recently reversed its position.<sup>7</sup>

But still, in *House v. Bell* and *Rompilla v. Horn*, Chief Justice Roberts and Justice Alito favored the denial of capital punishment appeals.<sup>8</sup> Experts' opinions differ regarding whether this would be a favorable stance.

Steve Stewart, a prosecuting attorney in Clark County, Indiana, said that the Court should "absolutely" shorten the appellate process required before executions.<sup>9</sup> "No rational thinking person can honestly believe that 10, 15, 20, 25 years worth of appeals is right," Stewart said. "Shortening the appeals process would give countless victims' families' years less worth of heartbreak and sorrow."<sup>10</sup>

Opponents disagree.

"It would be a disaster to limit appeals in capital cases," said Rob Warden who, as Executive Director of the Center for Wrongful Convictions at Northwestern University, has helped overturn the death sentences of convicted Illinois residents Verneal Jimerson, Dennis Williams, and Darby Tillis. "We've undoubtedly executed a number of innocent persons under the present system. If we limit appeals further, it will result in more such executions."<sup>11</sup>

Although the Court's decisions still favor Warden's approach, the *Bell* and *Beard* opinions suggest Chief Justice Roberts and Justice Alito endorse Stewart's view.<sup>12</sup>

In *Bell*, the Court analyzed new evidence brought forth following a murder conviction, which called into question the guilt of the convicted party.<sup>13</sup> The Court, led by Justice Anthony Kennedy, reversed the conviction because new evidence "cast considerable doubt" on the convicted party's guilt.<sup>14</sup> But Chief Justice Roberts' dissent, in which Justices Thomas and Scalia joined,

stated he would have affirmed the conviction because he did “not find it probable that no reasonable juror would vote to convict.”<sup>15</sup>

Justice Alito’s appellate work suggests that he would also deny death penalty appeals. In *Rompilla v. Beard*, then-Third Circuit Judge Alito’s decision in *Rompilla v. Horn* was reversed by a majority of the Court which included Alito’s predecessor, Justice Sandra Day O’Connor.<sup>16</sup> Rompilla was convicted of murder, and a major point of controversy was whether his counsel had been ineffective when it failed to examine his past records, including a felony conviction for rape that the prosecution used to prove an aggravating factor, or to raise his troublesome youth as a mitigating circumstance.<sup>17</sup> In the Third Circuit, Alito ruled Rompilla’s counsel had not been ineffective because they had interviewed Rompilla’s family members “in a detailed manner,” and they relied on expert opinions.<sup>18</sup>

The Supreme Court, with Justice Souter authoring the majority opinion and Justice O’Connor concurring, reversed Alito’s ruling, citing that trial counsel had not conducted an adequate search into Rompilla’s past, or obtained records the prosecution divulged it would use to prove Rompilla’s prior felony conviction.<sup>19</sup> Justice Kennedy’s dissent, joined by Chief Justice Rehnquist, Scalia and Thomas, voiced his regret in the Court’s decision to “impose on defense counsel a rigid requirement to review all documents . . . of any prior conviction that the prosecution may rely on at trial.”<sup>20</sup>

Had the Court ruled with Chief Justice Roberts and Justice Alito in these cases, America’s death row would currently house two additional inhabitants.<sup>21</sup> Rejecting appeals of death penalty convictions, as Chief Justice Roberts and Justice Alito hoped to, could potentially increase the deterrent effect of the death penalty.<sup>22</sup> As Stewart stated: “the shorter the time between the criminal act and punishment, the greater the deterrent effect would be.”<sup>23</sup>

But many feel that under the current appeals system, the death penalty fails to deter crime at all.<sup>24</sup> Allan Johnson an attorney at O’Melveny & Myers, LLP who published in the 2001 *Hastings Law Journal* regarding the death penalty<sup>25</sup>, suggested that because of the lengthy appeals process, citing “detering crime” as a justification for the death penalty cannot be done without “a wink and a nod.”<sup>26</sup> He said that to provide all defendants with process destroys the death penalty’s deterrent effect, but to deny them that process would render our society tyrannical.<sup>27</sup>

Process could be denied in capital punishment cases, Johnson suggested, only “if we got to the point where we convict people and sentence them to death very infrequently.” This might occur in “exceptional cases where there is certainty of guilt and egregious actions – like in the case of a serial killer.”<sup>28</sup>

This confidence of guilt, Johnson continued, could only be established if DNA testing were improved to establish 100 percent certainty, or in the rare instance when a defendant did not fight the charges levied against him.<sup>29</sup>

Like Stewart, Warden and Johnson, the Supreme Court remains divided on the issue of capital punishment.<sup>30</sup> But if Chief Justice Roberts and Justice Alito prevail and the Court takes a stance limiting appeals for death penalty convictions, it doesn’t necessarily mean more executions.<sup>31</sup> Individual states may still choose, like Illinois, to impose moratoriums<sup>32</sup>.

Others hope that, were the Court to take such a position, it would prompt anti-death penalty legislation in the states.<sup>33</sup> Karen McDaniel, a senior staff attorney at the Center for Wrongful Convictions, hopes that “the fair citizens of Illinois would be outraged enough by limitation on death penalty appeals” that could result from the accession of the new Justices “that they would vote to turn our current moratorium into an outright repeal of the death penalty.”<sup>34</sup>

Given the recent rulings, however, she admitted “that may be a bit optimistic.”<sup>35</sup>

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#### NOTES

1 Dahlia Lithwick, *Sudden Death: America's Support For The Death Penalty is Diminishing, Except on the Supreme Court*, SLATE, Feb. 10, 2007, available at <http://www.slate.com/id/2159373> (last accessed March 28, 2007).

2 See *House v. Bell*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2064, 2087 (2006); *Rompilla v. Horn*, 355 F.3d 233, 233 (3rd Cir. 2004).

3 Lithwick, *supra* note 1.

4 *Id.*

5 *Id.*

6 See State by State Death Penalty Information, available at <http://deadlinethemovie.com/state/IL/index.php> (last accessed March 28, 2007)

- 7 Editorial, *Abolish the death penalty*, Chicago Tribune, March 25, 2007, Section 2, Page 6.
- 8 See Bell, 126 S. Ct. at 2087; Horn, 355 F.3d at 233.
- 9 Email from Steve Stewart, Prosecuting Attorney, Clark County, Indiana (Feb. 25, 2007).
- 10 *Id.*
- 11 Email from Rob Warden, Executive Director, Center for Wrongful Convictions (Feb. 23, 2007).
- 12 Bell, 126 S. Ct. at 2087; Horn, 355 F.3d at 233.
- 13 Bell, 126 S. Ct. at 2078-79 (2006).
- 14 *Id.* at 2087.
- 15 *Id.* at 2088 (Roberts, J., dissenting).
- 16 *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Rompilla v. Horn*, 355 F.3d 233, 245 (2004).
- 17 *Beard*, 545 U.S. at 374.
- 18 *Horn*, 355 F.3d 233, 245 (2004).
- 19 *Beard*, 545 U.S. at 383.
- 20 *Id.* at 396 (Kennedy, A., concurring).
- 21 *Lithwick*, *supra* note 1.
- 22 Email from Steve Stewart, *supra* note 9.
- 23 *Id.*
- 24 Telephone interview with Allan Johnson, Litigation and Appeals, O'Melveny & Myers LLP (March 13, 2007).
- 25 Allan Johnson, *The Illusory Death Penalty: Why America's Death Penalty Process Fails to Support the Economic Theories of Criminal Sanctions and Deterrence*, 52 *Hastings L.J.* 1101, 1101 (July, 2001).
- 26 Telephone interview with Allan Johnson, *supra* note 24.
- 27 Telephone interview with Allan Johnson, *supra* note 24.
- 28 *Id.*
- 29 *Id.*
- 30 *Lithwick*, *supra* note 1.
- 31 *Id.*
- 32 See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 75 (1978).
- 33 Email from Karen McDaniel, Senior Staff Attorney, Center For Wrongful Convictions (Feb. 26, 2007).
- 34 *Id.*
- 35 *Id.*