ALLIANCE FOR JUSTICE

TO: Editors, Editorial Boards, Reporters and Columnists

FROM: Nan Aron

DATE: December 9, 2005

RE: *Pirolli v. World Flavors, Inc* : Unpublished Opinion Reveals Judge Alito's Conservative Legal Agenda

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Recently, Knight-Ridder completed a comprehensive review of the published opinions authored by Supreme Court nominee Samuel Alito. They concluded:

> Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws … [His] record reveals decisions so consistent that it appears results do matter to him … [H]e rarely supports individual rights claims … [and] often goes out of his way to narrow the scope of individual rights.

An unpublished opinion, previously unavailable but released last week as an attachment to Judge Alito's Judiciary Committee questionnaire, illustrates precisely what *Knight Ridder* found.

In *Pirolli v. World Flavors, Inc.*, No. 99-2043 (3d Cir. March 12, 2001), Judge Alito dissented from the Third Circuit's decision to allow a claim of sexually-motivated, physically abusive workplace harassment to go to trial.

Kenneth Pirolli is mentally disabled, with an IQ of 75. Right out of high school, the Bucks County Association for Retarded Citizens Productions Services referred him for a job at World Flavors, where he worked from 1994-1996. The undisputed evidence before the district court showed that Pirolli endured consistent on-the-job harassment. Among other things:

- he feared he was going to be raped when, in the plant's changing room, his co-workers turned off the lights and restrained him from behind "while he and his co-workers were in various stages of undress";

- on another occasion, while Pirolli was clothed, a co-worker "attempted to push a broom pole into [Pirolli's] behind as other staff watched";

- another co-worker had a history, recounted in a psychologist's report, of "rub[bing] his penis against Pirolli's behind when Pirolli bent over."

The trial court dismissed the case, finding that the harassment was "macho horseplay and adolescent rough-housing" that did not constitute discrimination. Pirolli appealed, joined by the

Equal Employment Opportunity Commission, which filed an amicus brief siding with him. The Third Circuit reversed the trial court, finding that what Pirolli experienced went beyond ordinary horseplay and constituted "persistent conduct that a reasonable jury could view as having occurred because of his sex and as severe and pervasive enough to create an abusive work environment."

Judge Alito, however, would have affirmed the trial court's ruling, not because it was legally correct, but rather, according to him, because "Pirolli's brief never asserts that his work environment was one that a reasonable, non-retarded person would find hostile or abusive." In other words, Judge Alito would have thrown out the case because of sloppy brief writing – despite the fact that the district court's short opinion (much less the full trial court record) contained the facts necessary to conclude whether or not the case should go to a jury.

The majority acknowledged that the presentation of Pirolli's argument was "perhaps less than pellucid," but, relying on precedent allowing consideration of such an argument, held: "Given the fact that no prejudice would result to [World Flavors] by our entertaining appellate jurisdiction, that the briefs are adequate to present the critical issues, that the case potentially involves issues important in the administration of [job discrimination law], and that 'the error is so 'plain' that manifest injustice would otherwise result,' we shall exercise jurisdiction … ." (*emphasis added*)

Judge Alito's refusal to entertain an argument he claims wasn't clearly presented is especially curious given what he sought to do in another case, *Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997). In *Smith*, two Reagan-appointed judges on the Third Circuit reversed a death sentence and conviction because of an unconstitutionally confusing jury instruction on a central issue. Judge Alito dissented.

Despite the fact that the government of Pennsylvania never argued, as it almost always does in habeas corpus proceedings, that the defendant's claim should be procedurally barred from being considered on its merits, Judge Alito raised the argument on his own and voted to send the case back to the trial court to consider it.

The majority responded: "Where the state has never raised the issue at all, in any court, raising the issue [ourselves] 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."

Why, on the one hand, would Judge Alito refuse to look at Kenneth Pirolli's case because of sloppy brief writing, even though the appellate record contained more than enough evidence to rule, but on the other hand, reach out – entirely on his own – to give the government in *Smith* an opportunity to make arguments it never even tried to make?

Perhaps, as *Knight Ridder* concluded, because "results do matter to him."