The Death Penalty

Supreme Court Reverses Itself

by Edward Spannaus

As it nears the end of its current term, the U.S. Supreme Court has issued two major decisions scaling back the use of the death penalty, which continue its trend of reversing the atrocious death-penalty rulings which were dictated a decade ago, when Chief Justice Williamm Rehnquist and Associate Justice Antonin Scalia commanded a solid majority on the nation's highest court.

The first of these two rulings, issued on June 20, prohibited the execution of mentally retarded inmates. The second, issued on June 24, held that a defendant is entitled to a jury determination of any factual issue which would result in an increase of the severity of a sentence; in other words, a judge cannot issue a harsher sentence (i.e., a death sentence) than a jury would have, if the death sentence is based on evidence heard by the judge, but which the jury did not consider during trial.

The court also issued a third ruling in the same vein, on June 27, which also marks a reversal of its 1990s rulings; that case involved abuse of prison inmates, specifically the chaining of prisoners in Alabama prisons to a "hitching post," which the court declared to be "cruel and unusual punishment." This ruling ends a long series of Supreme Court rulings which have protected prison officials from lawsuits by inmates.

The 1992 Low Point

To understand the significance of these decisions, it is crucial to recall the state of affairs ten years ago. After many rulings over previous years, narrowing the ability of prisoners on death row in state prisons to obtain review of their sentences in the Federal courts, things got to the point that a number of pro-death-penalty Supreme Court justices attacked the reasoning of the Rehnquist-Scalia majority (see *EIR,* July 17, 1992). This came as the result of a string of rulings in which procedure was exalted over substance, and a constitutional violation was considered of no significance, if the court regarded the prisoner to be guilty anyway. Executing a prisoner, whose conviction had been obtained in violation of a constitutional right, was no problem for the bloodthirsty Rehnquist-Scalia duo, slavishly joined by Clarence Thomas, and generally some other justices.

In a concurring opinion in the June 1992 case *Sawyer v. Whitley,* Associate Justice Harry Blackmun said, that although he had always reluctantly supported the death penalty, he now doubted that it could be applied fairly, because of the Supreme Court's destruction of the procedural safeguards that were supposed to ensure fairness. He pointed to the court's restrictions on "the Federal judiciary's power to reach and correct claims of constitutional error on Federal *habeas* review," and he charged that the court's recent rulings—that the court would not act upon constitutional violations unless a prisoner could prove "actual innocence" to the court's satisfaction—as a doctrine that "undermines the very legitimacy of capital punishment itself."

Another concurring opinion in the *Sawyer* case came from Justice John Paul Stevens, another supporter of the death penalty, who said that Rehnquist's reasoning "creates a perverse double standard," which requires a more stringent standard of proof in a capital case (i.e., by putting the burden of proof on the prisoner to prove his innocence), than in a non-capital case.

Reversing the Trend

The court's recent ruling barring the execution of the mentally retarded, reversed a 1989 ruling. As is generally the case in rulings involving the Eighth Amendment's prohibition of "cruel and unusual punishment," the court attempts to determine what the current "national consensus" is on such matters—a practice which verges on deferring to the *vox populi,* which Scalia is particularly inclined to do, especially where he sees popular (mob) opinion favoring the death penalty.

But in this case, *Atkins v. Virginia,* the court's majority led by Justice Stevens, reviewed the practice and legislation of the states, and found that, of those states that permit capital punishment, 18 had passed legislation barring execution of the mentally retarded in the time period since the court's 1989 decision; Congress has also written such a prohibition into the Federal death-penalty law.

The majority opinion also took into account international practice and opinion, as well as the views of church leaders. The latter point drew a scornful reaction from nominally Catholic Scalia, who fumed in his dissent, that the views of the U.S. Catholic Bishops "are so far from being representive" of the views of Catholics (omitting to mention Pope John Paul II, who has passionately spoken out against the death penalty).

In the case pertaining to jury-versus-judge sentencing, *Ring v. Arizona,* the Supreme Court said that it is a violation of the Sixth Amendment right to a jury trial, to have a judge impose a harsher sentence than a jury would have, when the judge determines the presence of aggravating factors based on evidence which the jury did not consider. The ruling has been widely misreported in the news media, which mischaracterized it as saying that only a jury, not a judge, could impose a death sentence.

Both rulings could affect hundreds of inmates. The Death Penalty Information Center estimates that there are 200-300 retarded inmates on death rows, and that nearly 800 of the nation's 3,700 death-row inmates were sentenced without the protections specified in the *Ring* case.