Interview: Clinton Roberson

Power, not reason, governing high court

Clinton Roberson, of Louisville, Kentucky, is a criminal attorney and the President of the African American Lawyers Association. The interview was conducted by Debra Freeman on Aug. 28.

EIR: During 1991, there have been some pretty major developments in the field of criminal law. The Senate has approved a new crime bill, we've seen some landmark decisions handed down by the Supreme Court, Thurgood Marshall is stepping down, and Clarence Thomas has been nominated to replace him. How do these developments change the practice of criminal law?

Roberson: Well, that's a grand question! I'd like to address it first in general and then, perhaps, more specifically. The general effect is to take the Constitution—most particularly the Bill of Rights and the Great Writ of Habeas Corpus—rip it up and throw it in the garbage can. In his final dissenting opinion, Thurgood Marshall said that "power, not reason, is the new currency of this Court's decision-making." And that is precisely the point.

We are witnessing a systematic assault on every major amendment that protects the rights of the accused. We are in danger of losing every gain we made during the civil rights era. And, I'd like to add one important point here: The nightmare may start with the Supreme Court, but it doesn't end there. It's a trend. Take a look at the crime bill. The number of federal crimes carrying the death sentence jumps to 50! It encourages juries to ignore alternative sentences and it virtually prohibits federal courts from *habeas corpus* review of faulty state prosecutions and erroneously imposed death sentences.

Now what's this all about? You know, in the old days, especially in the South where I practice, black folks and poor folks, well they weren't going to find much justice in the state courts. But, if you could hold out, if you could get yourself into federal court, well then, you'd have a shot. You know, even before the death penalty was outlawed in 1972, the majority of death sentences were overturned by federal courts. Well, that's all gone now. What did Moynihan say about the mentality of the crime bill? "Throw the switch and watch them twitch."

The mentality governing this brand of jurisprudence has nothing to do with justice—it's about vengeance pure and simple. And that just isn't the way it was meant to be. Now I know you've got some angry people out there. The people are angry about the drugs that infest the community. There's massive popular support for the death penalty. The people are angry. Most of them would be just as happy to dispense with the technicality of the trial entirely. But, the high court is supposed to guarantee that popular passions are not the metric in the administration of justice. This Court is moving in the opposite direction. Take the *Payne* case. In *Payne*, the majority upheld the use of victim impact testimony during the sentencing phase of capital trials. Now that just flies in the face of this principle. Any decision to impose the death penalty is supposed to be based solely on evidence that informs the jury about the character of the offense and the character of the defendant. Now what is the victim impact testimony going to do? All murders involve tragic and gruesome facts. Victim impact statements serve no purpose except to appeal to the sympathies and inflame the passions of the jurors. The reason it's been inadmissible in the past is because passions are *not* supposed to be the metric. It is a basic and fundamental principle. We've all learned it. We've recited it. Even the most despised among us is supposed to enjoy the guarantee of justice.

EIR: You're something of an expert on the death penalty. Can you to talk about it in a little more detail?

Roberson: Let me start by saying that the issue is not whether you are for or against the death penalty. The system of imposing the death sentence that was approved by the Supreme Court in 1976 *does not work*. The sentencing schemes approved in 1976 are not sorting out the few for whom the death sentence may be appropriate, the worst offenders who have committed the most heinous crimes—the mass murderers and serial killers. The overwhelming majority of the people on death row are distinguished not by their crimes, but by their abject poverty, debilitating mental impairments, and minimal intelligence.

Now, here come these boys in Washington and they're going to put restrictions on *habeas corpus* appeals, they're virtually ruling out federal review of state trials, no matter how wrong the final result, so long as the trial was "full and fair." What's "full and fair?" Over 50 years ago, in the case of the Scottsboro boys in Alabama, the Supreme Court said that as a matter of constitutional law, we would no longer sentence poor people to death without first providing them competent legal representation. Well, we have not fulfilled that promise.

Last year, in a capital case in the same state where the trial of the Scottsboro boys occurred [Alabama], the trial had to be delayed for a day in mid-trial because the court-appointed defense lawyer was drunk. He was held in contempt and sent to jail. The next morning, he and his client were both produced from the jail, trial resumed, and the death penalty was imposed a few days later.

This kind of thing is typical. Inadequate representation is pervasive in the death belt states. A study was recently printed in *The Advocate* [a publication of the Kentucky Department of Public Advocacy] that showed that 25% of the death row inmates in Kentucky, 13% of Louisiana's, and 10% of Alabama's were represented at their trials by lawyers who have since been disbarred, suspended or imprisoned. The *National Law Journal* conducted a six-month study last year that found the same kind of thing. Trial lawyers representing death row inmates in the six states they studied had been disbarred, suspended or disciplined at rates ranging from 3 to 46 times the overall rates for those states. More than half of the dozens of capital defense lawyers they interviewed said they were handling their first capital murder case when their client was convicted. Capital murder trials in those states often took one or two days—compared with two weeks to two months in states with sophisticated indigent defense systems. And the penalty stage—this is where the question of life or death is really decided—in many cases took no more than 15 minutes and almost never more than three hours, most of the time with little or no defense lawyer effort to present mitigating evidence. . . .

There are several reasons. Racism is certainly a factor. But the primary reason is money. Alabama limits compensation for out-of-court preparation to $20 an hour up to a limit of $1,000. Mississippi and Arkansas limit the total compensation of defense counsel in a capital case to $1,000. South Carolina pays $10 an hour up to a limit of $1,500. In Georgia, outside the city of Atlanta, capital cases are awarded to the lowest bidder. It's got to take 800-1,000 hours to do an adequate job in a capital case. In these states, if a poor man's lawyer does that, he's going to get less than the minimum wage. Factor in overhead, the attorney is going to be losing money. Now, what kind of lawyer can you get for that kind of money? Believe me, you do not draw applicants from the top ranks of the legal profession. Most people wouldn't hire these guys to represent them in traffic court. These states don't have Legal Aid, they don't have Public Defenders. The lawyers are appointed by the local judges—most of the time they are either young and inexperienced or old, broken down, or incompetent.

On the prosecution side it's totally different. There are district attorneys' offices that employ lawyers who specialize in the prosecution of capital cases. They're paid well. They get investigative and expert assistance from state and local law enforcement agencies, they have crime laboratories. And you know, nothing helps advance a DA's career faster than a few good death penalty cases.

EIR: What you're describing is pretty awful but obviously this didn't start with the crime bill or the recent Supreme Court decisions.

Roberson: No, of course not. But with this kind of system, the prosecution has greater expertise, resources and political momentum. They are likely to obtain the death penalty at the trial. Now, this Supreme Court has imposed very strict procedural rules on defense lawyers in criminal cases. Most of what happens at the trial is going to be insulated from post-conviction review because the defense lawyer will end up "waiving" the rights of the defendant, by failing to recognize and preserve violations of the Constitution. The poorer the level of representation, the less scrutiny the case will get in post-conviction proceedings. So, vindication of a fundamental constitutional right can be barred because of an incompetent defense. Again, the recent rulings say no federal review as long as the trial was "full and fair." But look at what we accept as "full and fair." We're going to be executing an awful lot of people under this system. . . .

When we first started, I said the issue was not whether you were for or against the death penalty. I hope your readers can now see what I mean. The death penalty debate encompasses compelling legal, philosophical, and moral questions. But that's not what I'm talking about here. I'm talking about how it really works in the small-town courthouse. You take away the Supreme Court's role as the nation's conscience under these circumstances and you can kiss justice goodbye. Of course, it's most dramatic when the death penalty is involved. But ultimately it affects all of us. The trend of this Court is to abdicate its most fundamental responsibility. It affects all of us.

Interview: Bruce C. Franche

U.S. law moving in dangerous direction

Bruce C. Franche of Phoenix, Arizona is the past president of the Arizona Trial Lawyers Association—Criminal Law Section, former chair of Arizona Attorneys for Criminal Justice, and is currently on the national executive board of the National Association of Criminal Defense Lawyers. He was interviewed by Debra Freeman on Aug 29.

EIR: There is growing concern, inside and outside the United States, at the degeneration overtaking American constitutional law under the Bush administration and the Rehnquist Court. A recent editorial in the *Legal Times* said the Supreme Court was dominated by a "Police State of Mind." Are we moving toward a police state?

Franche: Well, we're certainly experiencing a massive