

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

expansion of prosecutorial powers in recent Supreme Court rulings. The rights of the accused are being systematically stripped away, most frequently with the excuse of "administrative convenience." It's becoming increasingly difficult to mount a vigorous defense. . . . You'd be surprised at the number of attorneys who are just getting out of criminal law, going on to accept teaching positions or getting into more lucrative fields. We have some of our best criminal lawyers going into bankruptcy law, divorce law, stuff like that. . . .

**EIR:** Why is it more difficult to mount a vigorous defense?

**Franché:** Look at the decisions being handed down! *Miranda* has been overturned, they've virtually overturned the Fourth Amendment—*Bostick* authorizes the issuance of general warrants. . . .

**EIR:** The argument is that this is necessary in the "war on drugs."

**Franché:** If you're asking if these are effective techniques, the answer is, yes; you know, Hitler, Mussolini, and Stalin could probably brag about low crime rates. That's the nature of tyranny. A lot of people will go along with this stuff because they think its part of "getting tough on crime" but they're not going to be so happy when they see what they've created.

Look at what you've got *in practice*. Under these new rulings, its okay to randomly stop, question, and search the belongings of interstate travelers. No warrant. No probable cause. They can search your car. Same thing. Now on top of that you can be arrested and held without being told why, they can arrest you on one charge and question [you] about something else, *even if* you demand a lawyer! And all of this occurs during the *pre-trial* period when the accused is most vulnerable because it's here that the power of the state is most arbitrary.

This stuff is crazy. You give the state limitless power like this, you're not going to stop crime. I would argue that you're creating a *lawless* society. Look, I hope I'm wrong about this, but I think the result of all of this is going to be seen in terms of things like massive increases in cop killings. . . .

Let me give you an example. We've seen a real trend in sentences of "life without parole." I'm not talking about murderers here, but drug charges, repeat offenders, this sort of thing. They [the Supreme Court] just handed down a decision in a Michigan *upholding* the constitutionality of a life sentence with no parole for drug possession! The guy had a couple of ounces. . . .

Look, I'm not condoning drug possession. I'm a defense attorney today, but I used to be a prosecutor. The administration would like to convince people that all defense attorneys are soft on crime, pro-dope, whatever. It's garbage. I'm an officer of the court. [Thurgood] Marshall pointed out that it's only in an inquisitorial system that the defense lawyer is seen as an impediment rather than a servant to the cause of justice.

But getting back to the point on sentencing procedure. . . . There's a question of proportionality that has to exist between a crime and the punishment prescribed; that's what the Eighth Amendment is.

Under these rulings, I'll tell you what's going to happen. You get some hophead who gets pulled over by a trooper and he's holding [drugs]; if this guy thinks he's looking at life without parole, why not blow the cop away? What's he got to lose? This is the direction we are heading in. We are not going to stop crime with this, we're going to cause the commission of larger crimes. The prisons in this country are already busting at the seams. Do you see any decrease in crime?

**EIR:** We have a higher rate of incarceration per capita than any other country.

**Franché:** Well, it's pretty bad and it will get worse. An Ohio prisoner sued because of unbearable conditions. He charged cruel and unusual punishment. Now the rule in this country is that, no matter what burden the cost of incarceration imposes on the state, there are basic conditions that have to be met. But the Supreme Court says no, not anymore, not if the miserable conditions are a result of budget problems, as opposed to what they called "deliberate indifference." Do you have any idea how many facilities had to go to "lock down" when that occurred? Now, I know that some people say that prison is punishment, that it's supposed to be unpleasant, uncomfortable. Well, you know, presumably it's *not* supposed to be punishment in that sense, it supposed to be rehabilitative. The aim isn't to torture but to bring someone to the point that they can be returned to society. In any case, you're dealing with human beings, and we can't forget that.

**EIR:** Do you have anything you want to say in conclusion?

**Franché:** I'm surprised you didn't ask me about the Thomas nomination. I do have something to say about that. First, let me go on record as saying that I do oppose the nomination of Clarence Thomas. I don't think he's qualified for the high court and I think the appointment is strictly a political one. Now, a great many people say that Bush is trying to cement a conservative majority with this nomination. Well, with or without Thomas, he's got his majority. All the rulings we've discussed were handed down with Thurgood Marshall *on* the bench. So, no matter who Bush nominates, it's not going to change the majority. . . .

Right now, we are moving in an extremely dangerous direction. There's only one kind of nominee who would make a difference. He or she would have to be the kind of jurist who would not only dissent, but who would go to the people, who would sound the alarm. That is not the traditional role a member of the Supreme Court is supposed to play, as a matter of fact, it violates a longstanding tradition, but that's what we need right now. If Paul Revere was available I'd support him. . . .