
Case reports

Julian Killingley of the University of Central England discusses recent significant decisions from the US courts in capital cases

The 2001/2002 term has seen the US Supreme Court grant certiorari in more cases of real substance than it has done for many years. The court is essentially divided into three camps on capital penalty issues. The conservative wing comprises Chief Justice Rehnquist and Justices Scalia and Thomas. They can usually be counted on to uphold capital penalties and procedures. The liberal wing comprises of Justices Stevens, Souter, Ginsburg and Breyer. They can usually be counted on to vote against the states on capital penalty issues.

Justices O'Connor and Kennedy hold the middle ground. Historically these judges have allied themselves with the conservative wing with the result that many capital cases have been decided in favour of the states on a 5-4 division in the court. However, recently these two judges have shown that their votes can be won in suitable cases – this is particularly noticeable in the case of Justice O'Connor. The result is that the Supreme Court's capital penalty jurisprudence is again fluid. In this issue of *Amicus Journal I* look at the some of the capital cases before the court this term.

McCarver v North Carolina

Supreme Court of the United States

Docket No. 00-8727

I reported on this case in the last edition of the *Journal*. The case has now been dismissed as certiorari was improvidently granted – North Carolina amended its laws so as to prohibit the execution of the mentally retarded. The court subsequently granted cert in *Atkins v Virginia* so as to preserve the issue for its consideration.

Atkins v Virginia

Supreme Court of the United States

_ U.S. _, 122 S.Ct. 2242 (2002)

The sole issue for the court in this case was whether the execution of mentally retarded defendants is proscribed by the Eighth Amendment as a cruel and unusual punishment. The case attracted a lot of attention and amicus briefs previously filed in *McCarver v North Carolina* were considered in support of the petitioner.

The court gave its decision on 20 June 2002.

The court's opinion is a strong one – it is a 6-3 majority with those in the majority signing up to Justice Stevens' opinion for the court without concurrences. The majority comprised Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer.

The opinion for the Court was given by Justice Stevens.

Held: Executions of mentally retarded criminals are "cruel and unusual punishments" prohibited by the Eighth Amendment.

(a) A punishment is "excessive," and therefore prohibited by the Amendment, if it is not graduated and proportioned to the offense. E.g., *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, L.Ed. 793. An excessiveness claim is judged by currently prevailing standards of decency. *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed. 2d 630. Proportionality review under such evolving standards should be informed by objective factors to the maximum possible extent, see, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1000, 111 S.Ct. 2680, 115 L.Ed.2d 836, the clearest and most reliable of which is the legislation enacted by the country's legislatures, *Penry v. Lynaugh* 492 U.S., at 331, 109 S.Ct. 2934. In addition to objective evidence, the Constitution contemplates that this Court will bring its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators, e.g., *Coker v. Georgia* 433 U.S. 584, 597, 97 S.Ct. 2861, 53 L.Ed.2d.

(b) Much has changed since Penry's conclusion that the two state statutes then existing that prohibited such executions, even when added to the 14 States that had rejected capital punishment completely, did not provide sufficient evidence of a consensus. 492 U.S., at 334, 109 S.Ct. 2934 Subsequently, a significant number of States have concluded that death is not a suitable punishment for a mentally retarded criminal, and similar bills have passed at least one house in other States. It is not so much the number of these States that is significant, but the consistency of the direction of change. Given that anticrime legislation is far more popular than legislation protecting violent criminals, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of legislation reinstating such executions) provides powerful evidence that

today society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures addressing the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in States allowing the execution of mentally retarded offenders, the practice is uncommon.

(c) An independent evaluation of the issue reveals no reason for the Court to disagree with the legislative consensus. Clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, but, by definition, they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability. In light of these deficiencies, the Court's death penalty jurisprudence provides two reasons to agree with the legislative consensus. First, there is a serious question whether either justification underpinning the death penalty--retribution and deterrence of capital crimes--applies to mentally retarded offenders. As to retribution, the severity of the appropriate punishment necessarily depends on the offender's culpability. If the culpability of the average murderer is insufficient to justify imposition of death, see *Godfrey v. Georgia*, 466 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. As to deterrence, the same cognitive and behavioral impairments that make mentally retarded defendants less morally culpable also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the death penalty's deterrent effect with respect to offenders who are not mentally retarded. Second, mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Dissents were filed by Chief Justice Rehnquist in which Justice Scalia and Thomas joined and by Justice Scalia in which Chief Justice

Rehnquist and Justice Thomas joined.

This is a significant judgment not just because it takes a whole class of people out of the reach of the death penalty but because it offers precedent for where we can look to find evidence of the "evolving standards" that allow us to re-interpret existing precedent. Before this decision the states were able to point to Justice Scalia's opinion in *Stanford v Kentucky* (1989) where he suggested that the only evidence acceptable to the court was the actions of state legislatures and the behaviour of juries.

In footnote 21 to Justice Stevens' opinion in *Atkins*, he suggests whole new categories of evidence may also be relevant:

"Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. See *Brief for American Psychological Association et al. as Amici Curiae*; *Brief for AAMR et al. as Amici Curiae*. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an amicus curiae brief explaining that even though their views about the death penalty differ, they all "share a conviction that the execution of persons with mental retardation cannot be morally justified." See *Brief for United States Catholic Conference et al. as Amici Curiae in McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 2. Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. *Brief for The European Union as Amicus Curiae in McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. R. Bonner & S. Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. Times, Aug. 7, 2000, p. A1; App. B to *Brief for AAMR as Amicus Curiae in McCarver v. North Carolina*, O.T.2001, No. 00-8727 (appending approximately 20 state and national polls on the issue)."

From our point of view we welcome Justice Stevens' mention of the views of the "world community". However, this broader base for seeking consensus infuriated both Chief Justice Rehnquist and Justice Scalia. In his dissent, Rehnquist C.J. said, "I agree with Justice Scalia that the court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a post hoc rationalization for the majority's subjectively

preferred result rather than any objective effort to ascertain the content of an evolving standard of decency. I write separately, however, to call attention to the defects in the court's decision to place weight on foreign laws, the views of professional and religious organizations and opinion polls in reaching its conclusion. The court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must be apparent in the operative acts (laws and the application of laws) that the people have approved." The court's uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us."

He was particularly disapproving of the idea that the practices of other countries were of any relevance as to whether something was not permissible with the United States: "[I]t adverts to the fact that other countries have disapproved imposition of the death penalty for crimes committed by mentally retarded offenders. I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the court's ultimate determination. [. . .] For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant."

Chief Justice Rehnquist is rarely rude in his dissents but in this case he concluded by saying, "Believing this view to be seriously mistaken, I dissent." It is customary to say "I respectfully dissent" – the omission of the qualifying adverb was immediately noticed by the press and widely commented upon.

Justice Scalia was even more scathing in his dissent – although he did conclude his with the words "I respectfully dissent". His views of foreign opinion were trenchant: "But the prize for the court's most feeble effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community" and respondents to opinion polls. I agree with the chief justice, (dissenting opinion), that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. We

must never forget that it is a Constitution for the United States of America that we are expounding. [. . .] Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the justices of this court may think them to be, cannot be imposed upon Americans through the Constitution."

It should be noted that the fact that Justice Stevens' view of the relevance of wider sources appears in a footnote does not (despite Justice Scalia's wisecrack) detract from its value – one of the most important doctrines of modern constitutional jurisprudence appeared as footnote 4 in *United States v. Carolene Products*.

This is an encouraging win but only the first shot in many battles ahead. We can expect much litigation as to what constitutes "mental retardation" and the propriety of methods of assessing it.

Mickens v. Taylor

Supreme Court of the United States

122 S.Ct. 1237 (2002)

This was a Virginia case appealed from the 4th Circuit US Court of Appeals. The question presented was whether the appeals court erred in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known.

In this case Mickens' lawyer had previously represented his victim – he had met him to discuss the case but the victim had been killed before his first court appearance. Mickens did not know his lawyer had represented his victim. The judge who appointed Mickens' lawyer had also appointed the same lawyer previously to represent his victim. The judge did not ask Mickens' lawyer whether he felt there was a conflict of interest and the lawyer never told his co-counsel or Mickens about the potential conflict.

Lawyers later representing Mickens in federal habeas proceedings claimed Mickens had been denied effective assistance of counsel.

The US Supreme Court decided in favour of Virginia on a 5-4 majority (Scalia, Rehnquist, O'Connor, Kennedy and Thomas). In order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance.

When a defendant alleges ineffective assis-