



# Advisory

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## HIGH COURT OVERTURNS RULING BLOCKING EXPEDITED DEPORTATIONS

*Ninth Circuit Ruling Rejected in DHS v. Thuraissigiam*

In a 7-2 decision announced on June 25, the U. S. Supreme Court rejected an alien's claim that a federal law prohibiting his court challenge to the denial of his asylum claim was unconstitutional. The decision overturned a March 7, 2019, Ninth Circuit Court of Appeals ruling that had announced that the federal law in question violated the Constitution's Suspension Clause.

The Criminal Justice Legal Foundation joined the case to argue that the Ninth Circuit's ruling was improper because the Constitution gives Congress the authority to limit access to habeas corpus by noncitizens who have no substantial connection with this country.

In the high court's majority opinion, Associate Justice Samuel Alito wrote that the alien's "Suspension Clause argument fails because it would extend the writ of habeas corpus far beyond its scope 'when the Constitution was drafted and ratified.'"

The case involves the February 17, 2017, arrest of a Sri Lankan national named Vijayakumar Thuraissigiam 25 yards inside the California/Mexico border moments after he illegally entered the U. S. Thuraissigiam claimed that he was a persecuted minority in his home country who had been detained and beaten because of his political beliefs. A review of this claim by the U. S.

Department of Homeland Security concluded that it was not credible and he was ordered deported. In January 2018, Thuraissigiam filed a petition for habeas corpus in federal district court, arguing that the deportation order violated his constitutional rights. The district court rejected the petition, finding that federal law limited access of illegal aliens to judicial review of claims asserting U. S. constitutional rights.

Thuraissigiam appealed that ruling to the Ninth Circuit Court of Appeals, which on March 3, 2019, reversed the lower court ruling and ordered review of his asylum claim. While agreeing that

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## HABITUAL FELON CHALLENGES SENTENCING LAW

The U. S. Supreme Court has agreed to review a habitual criminal's claim that his sentence under the federal Armed Career Criminal Act (ACCA) is invalid. At issue in **Borden v. United States** is his claim that one of the prior convictions used to qualify him for a 115-month sentence under the ACCA was incorrectly identified as a violent felony.

The Criminal Justice Legal Foundation has joined the case to encourage a decision rejecting that claim.

The case involves the conviction of Charles Borden for the federal crime of a felon in possession of a firearm. In April 2017, Borden was caught with a pistol during a traffic stop in Tennessee. Under the ACCA, a criminal with three prior convictions of violent crimes caught with a gun faces 15 years in prison. Borden had 3 prior convictions for aggravated assault, and he pleaded guilty to possession of the gun. He challenged the designation of one of his prior convictions as a violent crime because it was for reckless aggravated assault rather than intentional or knowing aggravated assault like his two other priors. The trial judge applied a Sixth Circuit decision (**United States v. Verwiebe**), which held

that reckless aggravated assault qualifies as a violent crime under federal law, and sentenced Borden to 9 years and 7 months in prison.

Borden appealed, continuing to argue that reckless aggravated assault should not be counted as a violent crime. After the Sixth Circuit rejected that claim, the U. S. Supreme Court agreed to hear his appeal this fall.

CJLF has joined the case to argue that Tennessee law's distinction between intentional or knowing aggravated assault and reckless aggravated assault does not transform the latter into a nonviolent crime. Assault, whether intentional or reckless, is considered a violent crime under federal law. A decision upholding Borden's claim would seriously weaken the ACCA. It would make every habitual felon convicted under it, who had a prior for a crime that included recklessness as a factor, eligible to challenge his sentence.

"The ACCA allows federal prosecutors to take dangerous career criminals off the streets for a long time. Weakening it would cost many innocent lives," said CJLF Legal Director Kent Scheidegger.

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**VIEWPOINT**

**GOVERNOR GAVIN**

In August, it will be 20 months since Gavin Newsom was sworn in as the 40th Governor of California. Since that time, the new Governor has demonstrated an almost uncanny ability to ignore the interests of large segments of Californians, including many who voted for him. Like his predecessor Jerry Brown, Governor Newsom seems to operate on the presumption that most of the people he represents are stupid. He demonstrated this just three months after his election. On March 13, 2019, Newsom issued an executive order granting a reprieve to every murderer on California’s death row, citing his personal opposition to the death penalty. “If someone kills, we do not kill. We’re better than that,” he told reporters. Yet in a 2016 interview with the Modesto Bee editorial board, Newsom said he would “be accountable to the will of the voters” if elected governor. “I would not get my personal opinions in the way of the public’s right to make a determination of where they want to take us.” That same year, California voters rejected a ballot measure abolishing the death penalty and voted to pass an initiative to speed up its enforcement. During his 2018 campaign for Governor, Newsom reiterated his respect for the wishes of state voters saying he didn’t, “want to get ahead of the will of the voters.” He was obviously lying.

In May 2019, Newsom answered the request of a political friend in Oakland to announce seven pardons, including one to a gang member for soliciting murder and another convicted of robbery. Both of these offenders were Cambodians whom, due to the pardons, avoided deportation for their crimes. In September 2019, the Governor signed AB 5 into law. It forced companies, including Uber, Lyft, and DoorDash, who employ part-time gig workers as independent contractors to make them employees, requiring employer taxes and paid benefits. The bill put thousands of retirees, students, artists, and others who prefer managing their own schedules out of work. It is likely that most of these people, if they voted, voted for Newsom. A ballot measure (Proposition 22) has qualified for California’s November 3 ballot, which would repeal AB 5, with regard to app-based drivers.

On September 13, 2019, Governor Newsom commuted the sentences of 21 prison inmates, most of whom were convicted of murder or attempted murder and 7 of whom had been serving life terms with no chance of parole. A month later, Newsom signed several bills benefitting criminals. One bill, AB 136 by San Francisco Democrat Scott Wiener, removes the one-year sentence increase for each prior conviction of a habitual felon. Another bill prevents a prosecutor or a judge from striking a potential juror with prior felony convictions from serving on a jury in a criminal case. Newsom also signed AB 1076, which tasks the state Department of Justice to automatically erase the criminal records of offenders who have completed their sentences, rather than have the offenders petition to have them expunged. The bill was supported by Californians for Safety and Justice, one of several pro-criminal groups funded by George Soros.

On March 19, 2020, Governor Newsom began his schizophrenic governance of the state during the COVID-19 pandemic, ordering the strictest lockdown in the U. S., lumping businesses, parks, and schools in over two dozen counties that had no virus cases with population centers, such as Los Angeles, Alameda, and San Diego Counties which had hundreds. A week later, the Governor authorized the Judicial Council to announce new rules for local courts due to the pandemic. One of the new rules was to require the release without bail of all people arrested for nonviolent and property crimes. Within weeks, as thousands of offenders were released, car thefts, commercial burglary, and shootings began to increase sharply.

On April 13, 2020, the Governor announced the early release of 3,500 criminals from state prisons to protect them and other inmates from the virus. In May, the Governor’s Department of Social Services offered nursing homes \$1,000 per day for each COVID-

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# “GOVERNOR GAVIN”

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19 patient they took in. A spokesperson for nursing homes called it a “recipe for disaster.”

On Monday, May 25, a week after Governor Newsom announced some relaxing of California’s coronavirus lockdown, a black repeat offender named George Floyd was killed by a white police officer in Minneapolis. Within two days, thousands of protesters simultaneously took to the streets in an estimated 120 U. S. cities, including Los Angeles, Oakland, and San Francisco. The protests were accompanied by attacks on police, violence, arson, and looting of businesses. Law enforcement in these cities was almost nonexistent, as local officials restricted police from confronting the rioters. By Friday March 29, virtually every city in the state was dealing with swarms of organized protesters streaming through downtown and into the suburbs. State offices and the Legislature were closed, freeways were blocked, and several law enforcement officers were killed or injured. At noon that day, the Governor used part of his daily televised pandemic update to tell the protesters, “I pray that all of us that want to express ourselves do so thoughtfully and gently, but forcefully, in terms of expressing themselves as they should and as they must.”

After riots escalated over the weekend, and the President threatened to take federal action to protect cities if mayors and governors failed to act, Governor Newsom released National Guard troops to cities where mayors were requesting help to restore order. By June 1, curfews were established in Los Angeles, San Francisco, Oakland, Sacramento, and other cities, and while they were not strictly enforced, in most communities the protests subsided. Throughout the week of often-violent protests, Newsom’s statements echoed those of the state’s most liberal mayors, which blamed systemic racism as justification for the carnage. In a televised statement, Newsom said, “The black community is not responsible for what’s happening in this country—we are.” The governor continued with, “People have lost patience for a reason.”

For once he was right. Most Californians had lost patience with the weak response to the violent protests organized by Black Lives Matter and other radical groups. Even George Floyd’s family decried the rioting. As the Governor, it was Newsom’s responsibility to take action to protect the law-abiding public when it became obvious that the protests would be violent. Instead he sympathized with the rioters and sat on his hands for almost

a week, as criminals roamed the streets looking for targets. During that time, the Los Angeles Police Department reported that the number of murders had skyrocketed by 250% between May 31 and June 6, while the number of shooting victims surged by 56%. This does not take into account the toll of the property destruction, fires, and looting that law-abiding Californians suffered that week.

Remarkably, there was no concern expressed by the Governor about the spread of the coronavirus as thousands of protesters packed city streets across the state. As widely reported by the Centers for Disease Control, the incubation period for the virus is 14 days. On July 11, just over a month after the protests, Newsom has reinstated a statewide lockdown on California’s economy due to a spike in infections since mid-June, which the state attributes to “family gatherings.” This new lockdown came one day after Newsom announced his plan to release another 8,000 criminals from state prisons to protect them from the virus.

And, to think, some people still believe that electing Governor Gavin was a good idea.

*Michael Rushford  
President*



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## CRIME & CONSEQUENCES



# SUPREME COURT SELECTS MISSISSIPPI CASE CHALLENGING JUVENILE LWOP

Brett Jones argues that the specific finding that he is “permanently incorrigible” should have been found by the judge in order to have received an LWOP sentence.

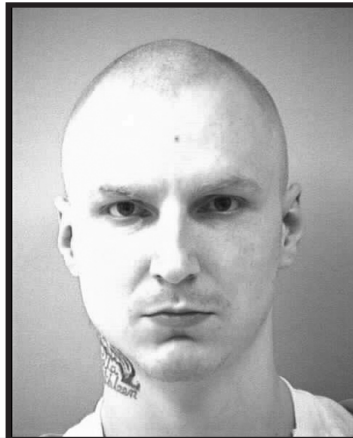
Earlier this year the U. S. Supreme Court dismissed **Mathena v. Malvo**, a case in which the younger of the two infamous DC snipers challenged his life-without-parole (LWOP) sentence. Malvo had argued that a high court ruling announced several years after his conviction should have been applied to overturn his sentence. That ruling, **Montgomery v. Louisiana**, prohibited (with rare exceptions) giving an LWOP sentence to murderers who were under 18 years old at the time of the crime. CJLF had joined the **Malvo** case to argue that the **Montgomery** ruling was bad law because it misinterpreted earlier precedent governing juvenile LWOP. Last February the state of Virginia, where Malvo was convicted, changed its law to require that every murderer under the age of 18 be eligible for parole, no matter how many people he killed. This made the case moot, but the Court remained interested in clarifying the requirements of **Montgomery** and its earlier ruling in **Miller v. Alabama**, which allowed LWOP for juvenile murderers as long as the sentence was not mandatory.

On March 9, the Court accepted the case of **Jones v. Mississippi** to address the issue. The case involves the LWOP sentence given to Brett Jones for the 2004 murder of his paternal grandfather. Jones was 15 at the time of the murder.

According to the trial record, in the Summer of 2004, while Jones was living with his mother and stepfather in Florida, he injured his stepfather during a fight and was arrested for domestic violence. In late July, Jones left Florida and moved into the home of his grandparents in Mississippi. In early August, Michelle Austin ran away from her parents' home and became Jones' girlfriend, sneaking into Jones' bedroom at night, and spending most days in a nearby abandoned restaurant. On August 9, the grandfather, 67-year-old Bertis Jones, caught the girl in his grandson's bedroom and ordered

her out of the house. The couple fled to the abandoned restaurant where Jones told Austin and his cousin that he was going to “hurt his granddaddy.”

Later that day, Jones returned to his grandparents' house and stabbed his



*Brett Jones, at age 15, within a month of having moved in with his grandparents, stabbed his grandfather to death.*

grandfather to death. When the steak knife he used bent during the assault, Jones grabbed a filet knife to continue. The victim was stabbed eight times and there were defensive wounds on his hands. Jones dragged his grandfather's body into the laundry room, cleaned up the blood, and went outside. A handyman working next door, who had heard the victim screaming, saw Jones covered in blood and holding a knife and ran inside to call 911. The homeowner returned to find the handyman in hysterics, and when he looked outside, he saw Jones hiding in the bushes. He asked Jones where his grandfather was, and Jones replied, “he's gone.” A short time later, Jones and his girlfriend were arrested. During a pat-down, an officer found a pocket knife and asked Jones if it was the knife he used in the murder. Jones replied, “No, I already got rid of it.”

At trial in 2006, Jones testified that he was in the kitchen making a sandwich

when his grandfather attacked him, and he accidentally stabbed him. Then when his grandfather continued the attack, Jones stabbed him again because he “was afraid.” He claimed that he tried to administer CPR, but he had stopped breathing. He admitted putting the body in the laundry room and trying to clean up the blood.

The unanimous jury returned a verdict of deliberate-design murder. Had Jones been over 18 he could have been sentenced to death. The judge sentenced him to LWOP, noting that there was no evidence that the grandfather had attacked Jones, that the murder was particularly brutal, that Jones attempted to cover up the crime, and that the grandfather had provided Jones with a home away from his troubled family environment in Florida.

Following the Supreme Court's 2012 ruling in **Miller v. Alabama**, Jones won a Mississippi Supreme Court decision ordering that he be resentenced under the new requirements announced by the high court. In April 2015, having reconsidered the sentence in light of the requirements under **Miller**, including multiple witnesses testifying to Jones' troubled childhood, the new sentencing court again gave him LWOP. Nine months later, in its **Montgomery v. Louisiana** ruling, the U. S. Supreme Court held that **Miller** applied to cases long since final as well as those presently pending on appeal. The Court reached this result by saying that **Miller** established rule of substantive law, not just procedure, that “juvenile offenders whose crimes reflect the transient immaturity of youth” cannot be sentenced to LWOP, limiting that sentence to juveniles who are “permanently incorrigible.”

Jones appealed, arguing that **Montgomery** requires a specific finding that a juvenile murderer is “permanently incorrigible” and that because the judge

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# B O X S C O R E

An accounting of the state and federal court decisions handed down over the past year on cases in which CJLF was a participant. Rulings favoring CJLF positions are listed as WINS, unfavorable rulings are LOSSES, and rulings which have left the issue unsettled are DRAWS.

**DHS v. Thuraissigiam:** 6/25/20. U. S. Supreme Court decision overturning a March 2019 Ninth Circuit ruling granting constitutional rights to an illegal alien caught walking across the U. S. border. The case involves an illegal from Sri Lanka arrested 25 yards inside the California/Mexico border. The alien asked for asylum, claiming that he was a persecuted minority in his home country who had been beaten for his political beliefs. After the claim was determined not credible, he was ordered deported. Represented by the ACLU, the alien appealed to the federal district court in San Francisco. That court rejected the claim that he was entitled to sue the government because federal law sharply limits judicial review of the deportation of certain recent arrivals, including those in Thuraissigiam's situation. The Ninth Circuit reversed the lower court announcing that the federal law limiting habeas corpus review was unconstitutional. CJLF has joined the case to argue that the Ninth Circuit was flat wrong. Congress, not the courts, holds the power to determine if an illegal alien who steps across the border and seeks asylum is entitled to the constitutional rights afforded to U. S. citizens and persons who have established residence here. The high court upheld the statute as applied to this case, although on different reasoning. **DRAW**

**Mathena v. Malvo:** 2/26/20. U. S. Supreme Court case reviewing a 2018 ruling by the Fourth Circuit Court of Appeals that voided the four life sentences given to Lee Boyd Malvo, one of the notorious DC snipers. In that ruling, the Fourth Circuit held that Supreme Court decisions announced after Malvo's conviction prohibited the trial court from sentencing him to life without parole (LWOP) under the law in effect in Virginia at the time. In 2002, 17-year-old Malvo and John Muhammad terrorized the Washington metropolitan area, indiscriminately murdering 12 people and critically injuring 6 others over a 6-week period. Malvo personally killed 3 of the victims. He robbed several other victims after they were killed by Muhammad. The Supreme Court's 2012 ruling in **Miller v. Alabama** prohibited a *mandatory* LWOP decision for murderers under the age of 18 years old. Later in **Montgomery v. Louisiana**, the Court held that an LWOP sentence would be permitted for the "rare juvenile offender whose crime reflects irreparable corruption." CJLF joined the case to argue that in Malvo's case the LWOP sentence was not mandatory and that the murders he helped commit easily met the "irreparable corruption" exception. In February, the Court dismissed the case after Virginia passed a law prohibiting LWOP for juvenile murderers. **DRAW**

**Hernández v. Mesa:** 2/25/20. U. S. Supreme Court decision to reject a lawsuit seeking to hold a U. S. Border Patrol agent personally liable for the shooting of a Mexican juvenile on the Mexican side of the border. The case stems from a border patrol agent's attempt to arrest a Mexican national trying to sneak across the border in El Paso, Texas. As the agent detained the suspect, a group of juveniles on the Mexican side began pelting him with rocks. The agent responded by firing at the juveniles, killing Sergio Adrian Hernández Guereca, a known smuggler of aliens across the U. S. border. Sergio's parents, who are also Mexican citizens, filed a federal lawsuit claiming that their son's U. S. constitutional rights were violated by the border patrol agent and that they are entitled to hold him personally liable for the excessive force he used. CJLF joined the case to argue that Mexican citizens killed or injured in Mexico by the actions of a U. S. agent, have no U. S. constitutional rights unless Congress passes a law giving rights to them. The Court's 5-4 decision adopted that argument to dismiss the lawsuit. **WIN**

**McKinney v. Arizona:** 2/25/20. U. S. Supreme Court decision which *utilized CJLF arguments* to reject a condemned double-murderer's claim that he was entitled to a new sentencing hearing. James McKinney was sentenced to death after he and an accomplice intentionally killed two people during a 1991 spree of residential burglaries. In 1993, a jury found him guilty, and the judge identified and weighed the aggravating and mitigating factors and sentenced McKinney to death. In 2002, the U. S. Supreme Court changed the rules, announcing in **Ring v. Arizona** that a jury, rather than a judge, must make the finding of at least one aggravating factor that makes a case eligible for capital punishment, but did not apply this change retroactively. In 2015, the Ninth Circuit overturned McKinney's sentence, ruling that the sentencing judge did not properly weigh the aggravating and mitigating factors in reaching the final sentencing decision. After the Arizona Supreme Court reweighed the sentencing factors and reaffirmed the death sentence, the U. S. Supreme Court accepted McKinney's appeal for review. CJLF joined the case to argue that the Arizona Supreme Court's reweighing procedure was valid. **Ring** requires a jury only for the finding that makes a case eligible to be considered for the death penalty. Whether the weighing of the factors and final decision of the sentence is done by judges or juries is a matter of state law. Expanding **Ring** as McKinney requests, would invite hundreds of challenges of lawful sentences in settled cases. The Court's 5-4 decision *utilized arguments* made only by CJLF in this case. **WIN**

**Ellis v. Harrison:** 1/15/20. Ninth Circuit Court of Appeals case involving a murderer's claim that racial prejudice rendered his attorney incompetent. After a district court rejected the claim, the appeals court invited CJLF to file argument in the case because California's Attorney General Xavier Becerra decided not to defend the conviction. In 1989, habitual **DRAW**

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## BOXSCORE *continued from page 5*

felon Ezzard Ellis shot two young men waiting in a crowded McDonald's drive-thru, in order to steal their car. One of the victims died. Years after his conviction, Ellis claimed that the racial prejudice of his defense attorney, *which he did not know about during his trial or sentencing*, tainted his case requiring that his conviction be overturned. CJLF argued that in order for a defendant to sustain such a claim he must show that some defect in the performance of his trial attorney injured his defense. The murderer had not done this. The court's January 2020, two-paragraph order disposed of the case without resolving the legal issue presented. The court held that the Attorney General's change of position alone was sufficient to reverse the decision of the district court. Although this decision is contrary to long-established practice, only the Attorney General can appeal to the U. S. Supreme Court, which he has not done.

**Johnson v. City of Ferguson:** 6/17/19. Federal Eighth Circuit Court of Appeals ruling dismissing a lawsuit by Dorian Johnson against the City of Ferguson, Missouri, and Officer Darren Wilson for violating his rights. In August 2014, Officer Wilson shot and killed Michael Brown as Brown was attacking him. Brown had just robbed a convenience store, after which Officer Wilson saw the pair walking down the middle of a street in Ferguson. Johnson claimed that when Officer Wilson stopped his patrol car and ordered them to the sidewalk, he had unlawfully seized him in violation of the Fourth Amendment. Although the Obama Justice Department and a federal grand jury found that Johnson had lied about what transpired before and after the shooting, motions to dismiss the lawsuit were rejected by the federal district court and a divided Eighth Circuit panel. When the circuit agreed to reconsider the panel's ruling en banc, CJLF filed an *amicus curiae* brief on behalf of the National Police Association arguing that by Johnson's own admission he was not ordered to stop and was not prevented from leaving. Citing its 1991 U. S. Supreme Court victory in **California v. Hodari D.**, CJLF argued that the facts Johnson described of his encounter in the middle of the street with Officer Wilson do not constitute a seizure. The Court agreed. WIN

**People v. Arredondo:** 12/16/19. California Supreme Court case involving a challenge to the conviction of a Los Angeles sex offender found guilty of molesting his girlfriend's three young daughters for eight years. When Jason Arredondo began the assaults, the girls were eight, six, and five. He was arrested in 2013 after he molested one of the girls' friends during a sleepover who then reported it to a school counselor. At trial, the oldest sister was afraid to testify with Arredondo staring at her so the judge had a computer monitor, which was already attached to the witness stand, elevated a few inches so that she could not see his face. He was convicted of all charges and sentenced to life in prison. After the court of appeal upheld his conviction, the state Supreme Court agreed to hear his claim that the trial judge had violated his right to confront his accusers because of the raised computer monitor. CJLF joined this case to argue that trial courts have the flexibility to make minor accommodations to allow traumatized victims to testify. The high court agreed, but held that the trial court had not adequately explained the need for raising the monitor, striking three convictions regarding the oldest victim and upholding the others. DRAW

**Nielsen v. Preap:** 3/19/19. A 5-4 U. S. Supreme Court decision overturning a 2016 Ninth Circuit ruling that restricted the Department of Homeland Security's ability to detain criminal aliens for deportation after they have been released from local police custody or state prison. The lower court held that following their release, if the criminal aliens are not promptly arrested by federal agents, the government loses its authority to arrest and detain them later. CJLF argued that Congress did not place a time limit on the arrest of criminal aliens and the Supreme Court agreed, noting that the government's detention authority does not "vanish at the stroke of midnight after an alien's release." WIN

TOTAL

4 Wins

0 Losses

4 Draws

## Case Report

### *A Summary of Foundation Cases Currently Before the Courts*

**Jones v. Mississippi:** U. S. Supreme Court case to review a juvenile murderer's claim that his life-without-parole (LWOP) sentence is a violation of his constitutional rights. In 2004, less than one month after his grandparents took him in, 15-year-old Brett Jones stabbed his 67-year-old grandfather 8 times, killing him. After hiding his body and cleaning up the blood, he was arrested while trying to leave town. At trial, Jones claimed that he killed his grandfather in self-defense. The jury found him guilty of deliberate murder and he was sentenced to LWOP. Six years later, the Supreme Court held in **Miller v. Alabama** that a mandatory LWOP sentence for a juvenile murderer was unconstitutional. Jones was resentenced under the new rules and again received LWOP. The following year the Supreme Court handed down a new juvenile sentencing requirement in **Montgomery v. Louisiana**, which the Court claimed was actually included

in the **Miller** decision. Jones argues that he is now entitled to another resentencing. CJLF is joining the case to argue that the Court clearly misinterpreted **Miller** to impose a new rule not required by the Constitution.

**O.G. v. Superior Court:** California Supreme Court case involving a legal challenge to a law signed by Jerry Brown, SB 1391, which prohibits *any* juvenile murderer, even the very worst, under the age of 16 from being tried in adult court. Any criminal, including murderers, who are convicted in juvenile court can only be imprisoned *until age 25*. In this case, O.G., a 15-year-old street gang member, murdered two people, one with a gun and another with a knife, to gain respect from his fellow gang members. When the Ventura County District Attorney requested

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# Case Report *continued from page 6*

that the killer be tried in adult court, the presiding judge agreed, questioning the validity of SB 1391. The murderer appealed, and last September a unanimous panel of the Second District Court of Appeal held that SB 1391 violated Jerry Brown's 2016 Proposition 57, which allows the prosecution of juveniles in adult court. Proposition 57 specified that it could not be amended by the Legislature unless the amendment furthers the intent of the initiative. When the Supreme Court agreed to hear the murderer's appeal, CJLF filed arguments stressing that the intent of Proposition 57 was to give judges the discretion to order the prosecution of a violent juvenile in adult court. SB 1391 ignores that intent by taking away that discretion.

**Borden v. United States:** U. S. Supreme Court case to review a habitual criminal's claim that one of his prior assault convictions should not be considered a violent crime. In 2017, habitual felon Charles Borden was caught with a handgun during a traffic stop in Tennessee. Because Borden had three prior convictions for aggravated assault, he qualified for a ten-year prison sentence under the federal Armed Career Criminal Act (ACCA). Borden pleaded guilty to having the gun, but claimed that because one of his priors was for "reckless" aggravated assault, it should not count as a violent felony. CJLF is joining the case to argue that aggravated assault, be it reckless or intentional, qualifies as a violent crime under federal law. If the high court upheld Borden's claim, it would open the door to sentencing challenges for thousands of career felons with prior convictions for crimes that included recklessness as a factor.

**In re Alexander:** Federal Ninth Circuit review of a CJLF petition on behalf of families of 5 murder victims asking the court to vacate 24 invalid stays of execution, prohibit the district court from granting any additional stays, and lift restrictions on California's preparations for executions. For 13 years, a federal district court in San Francisco has blocked the executions of every death-sentenced murderer in California who has exhausted his appeals and become eligible for execution. The original 2006 order stayed the execution of Michael Morales—sentenced to death for the 1981 kidnap, rape, and brutal murder of a high school cheerleader on the claim that the state's three-drug protocol amounted to cruel and unusual punishment in violation of the Eighth Amendment. Since 2006, two precedent-setting U. S. Supreme Court decisions provided the state with opportunities to challenge the stays, but the state has failed to

take action. CJLF filed its petition in the Ninth Circuit in January 2019 after the district court rejected a similar petition filed by district attorneys and refused to consider the Foundation's *amicus curiae* (friend of the court) brief.

**In re Humphrey:** California Supreme Court review of an appeals court ruling announcing that the decision to set bail for a habitual felon must be based on his ability to pay it, not public safety. The case involves a repeat felon charged with robbery after he followed an elderly man into his San Francisco apartment and robbed him. At the bail hearing, Humphrey asked to be released without bail because of his ties to the community. The judge refused, setting bail at \$350,000. On appeal, Humphrey won a ruling ordering the trial judge to base the decision regarding bail on his ability to pay. When the Supreme Court agreed to review that ruling, CJLF joined the case. After Governor Brown signed SB 10, a bill eliminating cash bail in California, the court asked if that new law impacts Humphrey's case. CJLF argues that SB 10 won't go into effect until October 2019 and does not apply. CJLF also argues that SB 10 is invalid because it amends the Public Safety Bail provisions of at least two previously adopted ballot measures. In this case, neither Proposition 4 (1982) nor Proposition 9 (2008) allowed amendments by the Legislature. Public safety remains the first priority of any bail decision, not ability to pay.

**Deck v. Jennings:** Eighth Circuit Court of Appeals case to review a District Judge's ruling overturning the death sentence of a double murderer. Undisputed evidence proved that Carman Deck robbed and executed an elderly couple in their Missouri home in 1996. On appeal, Deck's attorneys raised claims twice successfully challenging his sentencing hearings until, in 2008, a third jury resented him to death for the third time. Deck then petitioned the federal district court on habeas corpus, winning a ruling announcing that the length of time spent on his three resentencing trials violated his rights and that his attorney for the third sentencing trial was incompetent because he failed to raise that claim. When the Eighth Circuit agreed to review that ruling, CJLF submitted argument on behalf of the family of the victims, noting that the district court invented a new constitutional right for Deck with no legal precedent to support it. The U. S. Supreme Court's 1989 decision in **Teague v. Lane** (won by CJLF), prohibits the lower federal courts from announcing new rules of law on habeas corpus. We also argue that a lawyer who does not present a claim never raised before and unsupported by precedent is not incompetent.

During the coronavirus lockdown and widespread rioting, we at CJLF have continued our work, joining cases to defend the rights of victims and uphold the rule of law. After the pandemic subsides and the rioting ends, laws eliminating bail; decriminalizing burglary, theft, and destruction of property; and reducing sentences for habitual criminals will remain in force until they are abolished or overturned. We are focused on accomplishing this mission. Your support has never been more important to us. Make your 2020 tax-deductible contribution today by returning the card on the right with your check, giving at our website [www.cjlf.org](http://www.cjlf.org), or calling us at (916) 446-0345 to contribute with your credit card. Thank you for your help.

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Spring/Summer 2020

## “EXPEDITED DEPORTATIONS”

*continued from front page*

the federal law restricted judicial consideration of his claims, the Ninth Circuit held that such a restriction violates the Constitution’s Suspension Clause.

In October 2019, the U. S. Supreme Court agreed to consider the government’s appeal of the Ninth Circuit ruling. Thuraissigiam was represented by the American Civil Liberties Union, with briefs in support from ten other organizations, including the American Bar Association. The American people were represented by the U. S. Solicitor General, with supporting briefs filed by two groups of state attorneys general and the Criminal Justice Legal Foundation. In a scholarly *amicus curiae* (friend of the court) brief, CJLF argued that the Constitution gives Congress the authority to limit the right of federal habeas corpus for noncitizens. The Ninth Circuit’s

ruling to the contrary violates the separation of powers and is invalid. Thuraissigiam’s attorneys relied on a 2008 Supreme Court ruling in **Boumediene v. Bush**, where a one-vote majority of the Court extended some constitutional rights to aliens detained at Guantanamo Bay to challenge their detention. In its brief, the Foundation argued that this “deeply flawed” ruling gave rights to aliens “living in the United States,” or at least in territory under its control, not aliens who just stepped across a U. S. border. Extending that ruling to include Thuraissigiam would have compounded an already improper intrusion into congressional authority.

The majority upheld the statute on a different ground, that the alien was not actually challenging detention as such and therefore his claim did not come

within the core of habeas corpus protected from modification by Congress. However, the majority acknowledged that the argument raised by CJLF remained open, citing our brief. In a concurring opinion, Justice Stephen Breyer cited the just-arrived alien’s lack of connections with the country as an important factor in determining what constitutional rights, if any, he had to habeas corpus review.

“The constitutional privilege of habeas corpus is for people challenging the government’s right to hold them in custody, not its right to remove an alien to his own country. Whether border jumpers will be allowed to sue the government in our courts to avoid removal is for Congress, not the courts, to decide,” said CJLF Legal Director Kent Scheidegger.

## “CHALLENGING JUVENILE LWOP”

*continued from page 4*

made no such finding he is entitled to a new sentencing hearing. Both the Mississippi Court of Appeals and the state Supreme Court rejected that claim, finding that Jones was properly sentenced. When the U. S. Supreme Court agreed to hear Jones’ appeal, CJLF joined the case.

In an *amicus curiae* (friend of the court) brief presently being prepared, CJLF will argue that the **Montgomery** ruling misstates what **Miller** required.

In **Miller** the court stated, “Our deci-

sion does *not* categorically bar a penalty for a class of offenders or type of crime.... Instead, it mandates *only* that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”

In the later ruling in **Montgomery**, Justice Kennedy wrote, “**Miller**, then, did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole.... [I]t rendered life without parole an unconstitu-

tional penalty for ‘a class of defendants because of their status’—that is, juvenile offenders whose crimes reflect the transient immaturity of youth.”

Groups submitting arguments supporting the murderer in this case include the American Bar Association, the NAACP, the ACLU, a group calling themselves Scholars of Criminal Law, and the Dean of UC Berkeley School of Law, Erwin Chemerinsky.

**Jones v. Mississippi** will be argued in the Supreme Court this fall.

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