CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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CHALLENGE TO FORENSIC EVIDENCE BEFORE SUPREME COURT

The U. S. Supreme Court will decide if an Arizona drug dealer's conviction was unconstitutional due to a violation of the Confrontation Clause. Jason Smith was arrested in December of 2019 in a shed on his father's Yuma County, Arizona, property. Also in the shed were six pounds of fresh marijuana on a drying rack and a marketable quantity of methamphetamine. Smith was charged with possession of drugs for sale. Prior to trial, a state forensic scientist tested the confiscated drugs to confirm that they were indeed marijuana and methamphetamine. By the time the trial was held, the scientist who had tested the drugs was no longer working for the state, so another scientist from the same lab took the stand to present the findings. This happens frequently in criminal cases.

Smith's defense was that he was just visiting his elderly father and had nothing to do with the drugs. The jury found him guilty, and he was sentenced to four years in prison. Smith appealed, arguing, among other things, that by allowing another scientist to present the testing results on the drugs, the state had denied him the right to confront the original scientist who conducted the tests.

On July 14, 2022, a unanimous panel of the Arizona Court of Appeals rejected Smith's claim, finding that the scientist who testified regarding the lab's findings was presenting evidence from the actual documented test results which he was qualified to interpret. Smith's attorney had the opportunity to confront that scientist and the test results he presented, so there was no Confrontation Clause violation. The Arizona Supreme Court later denied his petition for further review. Smith appealed to the U. S. Supreme Court, which agreed to review his claims last fall.

The Criminal Justice Legal Foundation (CJLF) has joined **Smith v. Arizona** to encourage a decision rejecting Smith's claim. In a scholarly *amicus*

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JUDGE CURBS NEWSOM'S EARLY INMATE RELEASE SCHEME

A Sacramento Superior Court judge has held that the Newsom Administration's effort to grant early release to tens of thousands of prison inmates is invalid when it comes to offenders sentenced to indeterminate sentences, most of whom are violent. The December 13, 2023 decision came in a lawsuit brought by the Criminal Justice Legal Foundation (CJLF) on behalf of the families of crime victims. CJLF argued that the administrative regulations authorizing the inmate releases adopted in 2021 by the California Department of Corrections and Rehabilitation (CDCR) violate numerous state laws and ballot measures which specify when and how a prison inmate qualifies for credits to gain early release.

The Attorney General argued that Proposition 57 gave the CDCR authority to accelerate the release schedule of roughly 70,000 inmates in state prison for good behavior or participation in rehabilitation programs. In 2017, the year after the ballot measure was adopted, the CDCR adopted new regulations increasing sentence reduction credits for inmates who behaved well and participated in rehabilitation programs. These are called "good time" credits. In 2021, CDCR further increased the number of credits awarded to expedite early releases. While these regulations were officially made by CDCR, there can be little doubt that governors Brown and Newsom were behind them.

Superior Court Judge Jennifer Rockwell held that Proposition 57 did not authorize these new regulations to apply to offenders serving indeterminate sentences such as 25 or 15 years to life for first- or second-degree murder. Under the judge's decision, a convicted murderer must serve the full 15- or 25-year minimum term before becoming eligible for parole.

The court also issued a writ of mandate ordering the CDCR and the Board of Parole Hearings to halt the releases. CDCR has responded by announcing that because it has filed a notice of appeal it does not have to comply with the writ. This is incorrect, and CJLF is currently petitioning the judge to order immediate enforcement of the writ.

"The CDCR has been releasing violent criminals, including murderers, years earlier than the law allows," said CJLF Legal Director Kent Scheidegger. "Some of these released criminals have committed new violent crimes, and this has to stop," he added.

The Criminal Justice Legal Foundation is a nonprofit, public interest law foundation representing the interests of law-abiding citizens in court. CJLF is an independent corporation supported by tax-deductible contributions from the general public and is qualified under IRC 501(c)(3). CJLF does not engage in any form of political or lobbying activity. The Advisory is published by the Criminal Justice Legal Foundation, Michael Rushford, Editor, 2131 L Street, Sacramento, California 95816, (916) 446-0345.

MURDERER'S BID FOR EARLY RELEASE REJECTED

In a 5-2 decision released on March 4, 2024, the California Supreme Court denied a murderer's claim that he has a constitutional right to eligibility for release from prison even though he was sentenced to life without the possibility of parole (LWOP). CJLF joined the case of **People v. Hardin** to argue that an earlier appeals court ruling improperly amended state law to give the murderer and others like him the opportunity for release.

In the court's majority opinion, Associate Justice Leondra Kruger wrote, "we conclude that Hardin has not demonstrated that Penal Code section 3051's exclusion of young adult offenders sentenced to life without parole is constitutionally invalid under a rational basis standard, either on its face or as applied to Hardin and other individuals who are serving life without parole sentences for special circumstance murder."

The case involves the 1990 conviction of Tony Hardin for the brutal murder of his elderly neighbor Norma Barber. Hardin, who was 25 at the time of the murder, worked as an evening security guard at the Los Angeles apartment complex where both he and Barber were neighbors. They were friendly, and Barber would occasionally have him over for dinner. April 4, 1989, was the last day that anyone heard from Barber. On April 5, Hardin, a drug addict, tried to trade Barber's necklace for some cocaine. He later pawned three pieces of her jewelry and was seen driving her car. Concerned that Barber was not answering her phone, on April 8, her son visited her apartment and found her body underneath a bed. The coroner later determined that she was strangled to death.

Hardin was arrested a few days later after police found his fingerprints in Barber's car, which was parked a few blocks from the apartment. At trial, jurors heard evidence indicating that Hardin had stolen numerous other items and had actually returned to the murder scene a day later to steal her microwave oven and VCR. The jury convicted Hardin of first-degree murder with the special circumstance of robbery, in addition to inflicting great bodily injury and grand theft auto. While Hardin's crimes qualified him for the death penalty, the jury unanimously recommended a sentence of LWOP.

After Hardin's conviction, the California Legislature passed laws providing parole eligibility for convicted murderers sentenced to LWOP who were under 18 years old at the time of the killing. The Legislature also passed a law giving early parole eligibility to murderers under the age of 26 who were sentenced to 25 years to life.

In 2021, Hardin petitioned the Superior Court of Los Angeles County to grant him a hearing to consider his claim that, because he was 25 when he murdered Mrs. Barber, under the Constitution's Equal Protection Clause he should be eligible for parole. After the judge rejected the claim, Hardin appealed. In 2022, a three-judge panel of the Second District Court of Appeal upheld his claim, announcing that although state law specifically excluded 25-year-old murderers sentenced to LWOP from parole eligibility, the Constitution required that he be included. The court held that there was no rational basis for the state Legislature to distinguish Hardin from murderers 25 years old or younger sentenced to 25 years to life.

When the California Supreme Court agreed to hear the state's appeal, CJLF joined the case. The foundation's *amicus curiae* (friend of the court) brief argued that there was a rational basis for the Legislature to exclude murderers like Hardin from parole eligibility. In 1978, 71% of California voters adopted Proposition 7 to restore the state's death penalty. The initiative specified that criminals over the age of 18 convicted of first-degree murder with special circumstances could only be sentenced to death or LWOP. The initiative did not authorize the Legislature to adopt amendments, which leaves the power to amend with the voters through adoption of another initiative. This is why the Legislature has not passed a law giving parole eligibility to murderers over the age of 18 sentenced to LWOP. CJLF also notes that

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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 that have left the issue unsettled are DRAWS.

People v. Hardin: 3/4/24. California Supreme Court decision rejecting a murderer's claim that he had a constitutional right to early release from his life without the possibility of parole (LWOP) sentence. The high court utilized CJLF arguments in its decision which held that while several recently enacted state laws do make convicted murderers eligible for parole years earlier than their sentences prescribe, murderers over the age of 18 who are sentenced to LWOP are specifically excluded. The crime of conviction and adult v. juvenile status are sufficient grounds to treat criminals differently. Hardin was convicted in 1990 of the brutal robbery and murder of an elderly woman who had befriended him. Thanks to this decision he and others like him will never see the outside of prison. **WIN**

CJLF v. CDCR: 12/13/23. Sacramento Superior Court decision barring early release of criminals sentenced to indeterminate sentences. The decision came in a CJLF lawsuit on behalf of crime victims to block Governor Newsom's effort to award early release to violent criminals and murderers. In 2017 and again in 2021, the California Department of Corrections and Rehabilitation (CDCR) adopted regulations to award good behavior and program participation credits (called "good time credits") to violent criminals reducing their sentences. CJLF responded by suing CDCR, arguing that the new administrative regulations unlawfully override numerous state laws which specify when and how a prison inmate qualifies for parole or credits. The judge held that, at least with regard to murderers and other criminals serving sentences of 15 or 25 years to life, they must serve the 15 to 25 years before they can be eligible for parole. The Newsom administration has appealed this decision. **WIN**

People v. Rojas: 12/18/23. California Supreme Court ruling upholding a gang murderer's claim that his life-without-parole (LWOP) sentence should be overturned because of a 2021 state law making it harder to prosecute gang criminals. In 2018, Fernando Rojas was convicted of murder along with enhancements for membership and participation in a criminal gang, which qualified him for LWOP. In 2021, the Legislature passed a new law changing the requirements needed to add gang enhancements, and Rojas appealed claiming the law should apply to him. The appeals court held the new law unconstitutional and upheld his murder conviction. CJLF joined the case arguing that Proposition 21, adopted in 2000, defined what was needed to prove a criminal was a gang member and it could only be amended by a 2/3 vote of the Legislature. The new law redefining gang membership did not get the required 2/3 vote in either house, making it unconstitutional. In its ruling, the Supreme Court held that because the definition of gang membership had been changed several times before Proposition 21 was adopted, the voting public understood that it could be changed later without qualifying as an amendment. **LOSS**

Counterman v. Colorado: 6/27/23. U. S. Supreme Court ruling overturning the conviction of an internet stalker. At issue was whether the defendant's two years of unwanted communication with a young woman who repeatedly tried to block him constitutes a threat which can be punished as a crime. Billy Raymond Counterman was convicted of making "true threats" based upon the content of his communication. CJLF joined the case to argue that Counterman's pattern of behavior was demonstrably threatening and that the content of his communication, which frightened his victim, qualified as a "true threat" not protected by the First Amendment. Counterman argued that he never intended to frighten his victim. The Court overturned his conviction, announcing that the state needed to prove "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." The Court did not address the manner in which the defendant harassed his victim. **DRAW**

Jones v. Hendrix: 6/22/23. U. S. Supreme Court decision which clarified the limits on federal challenges to criminal convictions. At issue was how the Court interprets a 1996 Act of Congress, AEDPA, adopted to strictly limit federal court review of post-conviction claims of state and federal criminals. The Act's only exceptions are proof of actual innocence or a constitutional change in the law. It was adopted to restrict the federal courts from considering *more than one* post-conviction petition from almost all convicted criminals. In 2000, Marcus Jones was convicted of being a felon in possession of a firearm. Jones had 11 prior felony convictions and had served prison sentences for at least 5 of them. In August 1999, Jones lied about his prior felonies in order to purchase a handgun from a Missouri pawnshop. Later that day, he admitted having the gun to an undercover officer during a drug deal. Jones' multiple petitions challenging his conviction were rejected by the federal courts, until last year when the Supreme Court agreed to hear his claim that there should be an exception because he did not know that it was illegal for him to have a firearm. CJLF joined the case to argue that the federal courts were not authorized to create new exceptions to the limits on successive petitions and that Jones did not qualify. The high court agreed. **WIN**

TOTAL	3 Wins	1 Loss	1 Draw

DÉJÀ VU ALL OVER AGAIN

A March 7 article by Paul Demko, Jeremy White, and Jason Beeferman published in POLITICO reports that liberal Democrat politicians in some of the nation's most progressive cities are abandoning the soft-on-crime policies that they vigorously supported a few years ago.

Back in 2020, as the George Floyd riots were tearing up these same cities, politicians running New York; Washington, D.C.; Chicago; Baltimore; Seattle; Portland; Los Angeles; and San Francisco were insisting that sentences for so-called "low level" drug and theft-related crimes be reduced, that cash bail be eliminated, and that criminals, including violent gang members, be released early to rehabilitation programs. The motivator for these policies was the "systemic racism" narrative promoted by progressive academics, nonprofits like Black Lives Matter, race-baiting politicians, and the national media. While this narrative had been pushed since the 1990s, it got major traction after Floyd's death as deep blue cities reflexively cut police budgets, elected pro-defendant prosecutors, and swept away consequences for crime.

Then something happened.

Crime rates skyrocketed. Murder, assault, commercial burglary, vehicle theft, car jacking, drug trafficking, and overdose deaths all went up. Way up. City streets are now unsafe, even during the day. Looting of stores is now so common that many have closed to cut losses and to protect employees and customers. After a couple of years of making excuses for the increased crime, politicians have found themselves out of a job. Democrat New York Mayor Eric Adams was elected on the promise to crack down on crime. San Francisco District Attorney Chesa Boudin was voted out of office because he wouldn't.

Washington, D.C.'s progressive city council, which tried to pass a soft-on-crime measure last year, has just passed a tough-on-crime package that will hold suspects in jail until they are tried. San Francisco voters just passed a law requiring drug screening for welfare recipients. The Progressive Democrat Mayors of San Francisco and San Jose have both endorsed a statewide ballot measure that will sharply increase penalties for theft and drug dealing. The governor of New York, Democrat Kathy Hochul, has just dispatched national guard troops to protect the New York City subways.

It should surprise no one that politicians would so radically change their positions to save their jobs. But even after voting for D.C.'s crime package, two liberal members of the D.C. City Council are facing recalls.

The Soros-funded district attorneys across the country are also under fire for their refusal to hold criminals accountable. Baltimore's progressive State's Attorney Marilyn Mosby was voted out in 2022. St. Louis Circuit Attorney Kim Gardner resigned last June as the Attorney General was preparing to remove her from office. Last November, in Virginia, Loudoun County Commonwealth's Attorney Buta Biberaj was voted out of office. Soft-on-crime Chicago State's Attorney Kim Foxx has announced that she will not seek re-election this year, as has Milwaukee County District Attorney John Chisholm. Upstate New York Ulster County District Attorney David Clegg has also declined to run again. The March primary has pitted beleaguered Los Angeles District Attorney George Gascón against former federal prosecutor Nathan Hochman in a November runoff. Recent polling found that 52% of LA residents want Gascón replaced. Alameda County District Attorney Pamela Price, who often refuses to charge black offenders, is also facing a recall. The recall is being led by the Oakland NAACP and a prominent black bishop.

Die hard progressives (read "socialists") are not happy watching Democrats abandon them. Addressing the turnaround by San Francisco Mayor London Breed, progressive former San Joaquin County District Attorney Tori Verber Salazar said, "You've got a mayor that's in big trouble, likely not going to be mayor again, so she's throwing some hail marys out there." The head of the New York chapter of the ACLU was more pointed, "These heavy-handed approaches will, like stop-and-frisk, be used to accost and profile Black and Brown New Yorkers, ripping a page straight out of the Giuliani playbook."

While the movement to restore law and order is real, the policies undermining it began 20 years ago. The road to truly making the nation's cities and towns safe again will be long.

When we at CJLF started speaking out against progressive criminal justice reforms many years ago, the politicians supporting those reforms called us "fearmongers," somehow forgetting that America suffered a similar crime wave due to similar soft-on-crime policies 40 years ago. Now they fear losing their jobs.

"There is nothing new in the world except the history you do not know," President Harry Truman.

Michael Rushford
President

Case Report

A Summary of Foundation Cases Currently Before the Courts

ADDA v. Gascón: California Supreme Court review of a June 2, 2022 appellate court decision which upheld the Association of Deputy District Attorneys for Los Angeles County suit to prohibit District Attorney George Gascón from refusing to enforce the state's Three Strikes sentencing law. CJLF has joined the case to argue that a district attorney's policy decisions regarding which laws to enforce does not override a voter-approved initiative mandating that a criminal's prior convictions shall be presented at trial to increase his sentence. The mandatory nature of the provisions at issue has been recognized by the state Supreme Court and multiple courts of appeal from the first years after enactment.

City of Grants Pass v. Johnson: U. S. Supreme Court case to consider the Oregon City of Grants Pass's challenge to a federal judge's ruling to strike down local ordinances prohibiting camping on public property. In July 2023, a divided panel of the Ninth Circuit upheld the judge's order, citing its 2019 ruling in **Martin v. City of Boise**. That ruling announced that the homeless had an Eighth Amendment right to camp on public property. The ruling covers the nine western states in the Ninth Circuit, which includes Alaska, Washington, Montana, Idaho, Oregon, Nevada, California, Arizona, and Hawaii. On January 12, the high court agreed to hear the Grants Pass appeal. CJLF has joined the case to argue that the Eighth Amendment was adopted to bar the cruel and unusual punishment of convicted criminals, which has nothing to do with cities and counties enforcing municipal ordinances to regulate camping on public land. A decision to overturn the Ninth Circuit would restore local and state authority to remove homeless camps from public property.

Smith v. Arizona: U. S. Supreme Court case to consider a drug dealer's claim that his conviction was unconstitutional. In 2011, Jason Smith was convicted of possession of marijuana and methamphetamine for sale. Prior to trial, testing at the state crime lab confirmed that the drugs in Smith's possession were marijuana and methamphetamine. When the trial began, the lab analyst that did the testing no longer worked at the lab, so, relying on the original lab notes, another analyst testified on the testing process and the findings. Smith claims that this long-established process regarding the introduction of forensic evidence violated his constitutional right to confront the original analyst. CJLF has joined the case to argue that the term "witness" as understood when the Confrontation Clause was adopted does not extend so far as to cover the author of the lab notes. The expert who testified is the witness for the purpose of the Sixth Amendment, and Smith's right to confront him was honored. A decision upholding the criminal's claim would force the dismissal of criminal cases when the original forensic experts are retired or deceased and cannot testify at trial.

In re Kowalczyk: California Supreme Court case to review a criminal's claim that the Constitution requires that he receive a bail amount that he can afford. The case involves the bail set for habitual criminal Gerald Kowalczyk, who was charged with multiple felonies for identity theft and vandalism. Due to his record of 64 prior convictions and 100-page rap sheet, the court set Kowalczyk's bail at $75,000. Kowalczyk appealed, but the appellate court held that the state Constitution gives the trial judge the discretion to deny bail or grant bail based upon the crime, the defendant's record, the threat of the public were he released, and the likelihood he would show up for his trial. Before the Supreme Court, CJLF argues that in 2008 state voters enacted Proposition 9, which spelled out the priorities for setting bail: "In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations." Affordability was not mentioned.

Glossip v. Oklahoma: U. S. Supreme Court review of a convicted murderer's claim that "new evidence" invalidates his conviction. CJLF has joined University of Utah Law Professor Paul Cassell, representing the family of a murder-for-hire victim, to urge the U. S. Supreme Court to reject the murderer's claim and uphold his conviction and death sentence. In 1997, Richard Glossip hired a handyman, at the motel he managed, to kill the owner. He was convicted on a mountain of evidence, including the handyman's confession. Glossip's new evidence is that the handyman has mental issues, something that Glossip's defense attorneys knew, but chose not to introduce because it would have supported the fact that Glossip had manipulated the handyman. This evidence was actually included in Glossip's own appeal in 1998. CJLF argues that the state's highest court has already reviewed and dismissed the new evidence as both irrelevant and procedurally barred. We are asking the Court to hold that Glossip has, once again, abused the appeals process to delay his much-deserved execution.

CJLF is arguing in the U. S. Supreme Court to end the West Coast ban on cleaning up homeless camps. We are fighting and winning cases to block Gavin Newsom's early release of violent criminals from prison. And we are working to expose pro-criminal district attorneys, like LA's George Gascón and Philly's Larry Krasner, who decline to prosecute habitual and violent criminals. Help us to continue our work by making your annual tax-deductible contribution to CJLF today. Please fill out and return the card on the right with your check, or give at our website www.cjlf.org, or call us at (916) 446-0345 to contribute with your credit card. **Thank you so much.**

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"EARLY RELEASE REJECTED"

continued from page 2

the Equal Protection Clause permits different sentences for defendants who are not "similarly situated." Hardin is not similarly situated with murderers under 18 years old sentenced to LWOP or 25-year-old murderers sentenced to 25 to life. The U. S. Supreme Court has held that murderers under 18 cannot receive the death penalty or receive a mandatory sentence of LWOP. This means the judge is required to consider the murderer's age and consider a lesser sentence, but the judge also retains discretion to order LWOP. Murderers given a 25-to-life sentence were convicted of first-degree murder without special circumstances. Hardin was convicted of the more serious crime of first-degree murder *with* special circumstances, which qualifies him for a death sentence.

The U. S. Supreme Court and California voters have both recognized this distinction.

"The Court of Appeal in this case unconstitutionally amended state law to give some of California's worst murderers a chance for release. In today's decision, the California Supreme Court confirmed that such power belongs to the people, not the courts," said CJLF Legal Director Kent Scheidegger.

"FORENSIC EVIDENCE"

continued from page 1

curiae (friend of the court) brief, CJLF Legal Director Kent Scheidegger argues that Smith is trying to expand the Confrontation Clause beyond what the framers intended. The brief takes aim at the U. S. Supreme Court's 2004 ruling in **Crawford v. Washington**, which gave the word "witness" in the Sixth Amendment a definition much more broad than its historical meaning, with a correspondingly overbroad definition of "testimony."

The scientific analysis of confiscated drugs and printouts made and notes taken in the process are not testimony. The statements of a scientist regarding his opinion of the reliability of that analysis and its findings is testimony, which a defendant is entitled to confront. Expanding this right to require the testimony of a deceased or retired forensic scientist, rather than an equally qualified scientist from the same lab, strays a long way from what the Confrontation Clause was adopted to protect. A ruling upholding Smith's claim would only benefit other guilty criminals by adding another obstacle to the introduction of important evidence. It would do little or nothing to address the problems seen in crime labs in recent years, which must be addressed by other means.

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