CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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MAJOR EFFORT TO OVERTURN RULING ALLOWING HOMELESS CAMPS

The Criminal Justice Legal Foundation (CJLF) has joined the city of Grants Pass, Oregon, to seek the U. S. Supreme Court review of a 2019 Ninth Circuit Court of Appeals ruling (**Martin v. City of Boise**) which had 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: Alaska, Washington, Montana, Idaho, Oregon, Nevada, California, Arizona, and Hawaii. In 2019, the U. S. Supreme Court declined a petition by the City of Boise, supported with a brief by CJLF, to review and overturn that ruling.

This year, the city of Grants Pass is appealing a federal judge's ruling, citing **Martin** as a requirement to strike down local ordinances prohibiting camping on public property. Last July, a divided panel of the Ninth Circuit upheld the judge's order. The case is **City of Grants Pass v. Johnson**.

In addition to CJLF, dozens of other organizations have submitted *amicus curiae* (friend of the court) briefs in support of the City of Grants Pass. Among them are: the Speaker of the Arizona House and the President of the Arizona Senate, the League of Oregon Cities, the California State Association of Counties, the League of California Cities, the Association of Idaho Cities, and the states of Idaho, Montana, Missouri, West Virginia, Mississippi, Virginia, Utah, Louisiana, Texas, Kansas, South Dakota, Indiana, South Carolina, Florida, Oklahoma, Arkansas, North Dakota, Alaska, Nebraska, and Alabama.

The CJLF brief, authored by Legal Director Kent Scheidegger, notes 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. He also points out that the Ninth Circuit's **Martin** ruling is in direct conflict with the California Supreme Court's 1995 decision in **Tobe v. Santa Ana** (won by CJLF). The **Tobe** court rejected the same Eighth Amendment theory that the Ninth Circuit adopted. This is precisely the kind of conflict that the U. S. Supreme Court was established to settle.

While acknowledging the serious negative impact the current level of homelessness is causing in virtually every American city, the CJLF brief concedes extensive argument on this impact to the 22 other briefs representing the cities, counties, states, and nonprofit organizations.

"The decisions in **Martin** and **Johnson** are causing severe damage to communities and inhibiting efforts to deal with addiction and mental illness problems at the root of homelessness. Nothing in the Eighth Amendment even remotely justifies this judicial intrusion into local government," said Scheidegger.

MURDERER CLAIMS RIGHT TO EARLY RELEASE

The California Supreme Court has agreed to review an appeals court ruling accepting 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). The Criminal Justice Legal Foundation (CJLF) has joined the case of **People v. Hardin** to argue that the appeals court ruling improperly amended state law to give the murderer and others like him the opportunity for release.

The case involves the 1990 conviction of Tony Hardin for the brutal murder of his elderly neighbor Norma Barber. Hardin, who was 25, worked as an evening security guard at the Los Angeles apartment complex where both he and Mrs. Barber were neighbors. They were friendly, and Mrs. Barber would occasionally have him over for dinner. April 4, 1989, was the last day that Norma Barber was heard from. On April 5, Hardin, a drug addict, tried to trade Mrs. Barber's necklace for some cocaine. He later pawned three pieces of her jewelry and was seen driving her car. Concerned that Mrs. 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 her 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

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VIEWPOINT

CA VIOLENT CRIME INCREASES AS ARRESTS DECLINE

Fresh FBI data for 2022 indicate that nationally the rate of violent crime dropped slightly. In California violent crime increased by 5.7% with aggravated assault accounting for 67% of the increase. Nationally property crime increased by 7.1%, while California's increase was 5.9%. Matt Delaney of The Washington Times reports that motor vehicle theft continued to increase nationally; and in California, thefts increased by 31.6% since 2019. A report by the Public Policy Institute of California (PPIC) found that the California counties with the sharpest increases in violent crimes were the bay area counties of Contra Costa, San Mateo, and San Francisco. Sacramento, Riverside, Alameda, and Orange counties also saw significant increases. Major property crime increases were seen in Fresno, Alameda, Santa Clara, Orange, and San Bernardino counties. One positive note, homicides were down nationally by 6.1% after significant increases in 2020 and 2021.

Given the higher levels of both violent and property crime in California, one would logically conclude that police departments would be arresting more suspects. Unfortunately this is not the case. In the California Political Review, Stephen Frank reported that between 2019 and 2022 there have been 288,000 fewer arrests, a drop of 27% statewide. The drop was 28% in Los Angeles and 29% in San Francisco.

While the policies of District Attorneys and Mayors can influence arrest rates, the statewide decline suggests that systemic changes are responsible for this dramatic decline. It is beyond dispute that state laws have been changed to reduce penalties and discourage arrests. This began in 2000, when 60% of California voters adopted Proposition 36, the "Substance Abuse and Crime Prevention Act." That law required that persons convicted of using or transporting illegal drugs be put on probation and diverted to rehabilitation programs. It did not matter how many times a person had been convicted, and it did not matter if the offender failed to attend or complete the programs. Three years after Proposition 36 took effect, a 2005 report by the anti-incarceration Justice Policy Institute noted that state prisons had shed 34% of convicted drug offenders (read drug dealers). The same report found that 41% of drug users diverted by Proposition 36 had completed their programs or made satisfactory progress. There is no information on whether this completion rate was reported by program operators or an independent review, or what constituted "satisfactory progress." What is known is that at least 59% of drug offenders did not complete the programs and were back on the streets.

By the time the AB109 Public Safety Realignment Act was signed by Governor Jerry Brown in 2011, California drug users had not been going to jail or state prison for ten years. Realignment prohibited sending thieves, including car thieves, commercial burglars, and those convicted of assault, domestic violence, and strong armed robbery to state prison, no matter how many times an offender committed these crimes. They could only be sentenced to county jail with a requirement to be diverted to a rehabilitation program. While the bill promised to sharply reduce the state's prison expenditures and provide adequate funding to counties to pay for this, neither promise was kept. State prison outlays have increased every year since Realignment passed although the system has roughly 25,000 fewer inmates and counties have only received a fraction of what they are spending to maintain their overcrowded jails and required programs.

In 2016, when progressive billionaire George Soros and the American Civil Liberties Union pooled $10 million to fool California voters into adopting Proposition 47, The Safe Neighborhoods and Schools

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Advisory layout design by Irma H. Abella

CHRONIC REOFFENDER SEEKS RULING REQUIRING AFFORDABLE BAIL

The California Supreme Court has agreed to review a criminal defendant's claim that the Constitution requires that he receive a bail amount that he can afford. The Criminal Justice Legal Foundation (CJLF) has joined the case of **In re Kowalczyk** to argue in opposition, noting that the primary consideration regarding the amount of bail should be the safety of the public.

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. His latest arrest occurred in January 2021 when Kowalczyk attempted to use six different credit cards to pay for a hamburger at Five Guys in Burlingame. When one card would not work, he would throw it on the floor and try another. Police later determined that three of the cards were stolen. Weeks later, as he was confronted by officers while shoplifting at a grocery store, they found the driver's license of one of the credit card theft victims in Kowalczyk's backpack.

While in jail awaiting trial, his attorney filed a motion with the court to release Kowalczyk on his own recognizance with an ankle monitor. The judge denied the motion, noting that he was a "chronic reoffender" who had failed to obey the conditions of probation for five years, and ordered that he be held without bail.

Kowalczyk appealed, arguing that his detention was unlawful. The Court of Appeal disagreed, holding 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.

When the state Supreme Court agreed to hear Kowalczyk's appeal of that decision CJLF joined the case.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Associate Attorney Kymberlee Stapleton argues that in 1982 California voters adopted two ballot measures (Proposition 4 and Proposition 8), which expanded a judge's discretion to allow or deny bail. Both measures required judges to make public safety the primary consideration when determining whether or not to grant bail and the amount of bail to set. Neither measure mentioned that the bail amount should be affordable to the defendant. In 2008, California voters adopted Proposition 9, "Marsy's Law," which amended the bail provision in Proposition 8 and strengthened the judicial discretion to set or deny bail.

Specifically, Proposition 9 stated, "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."

In 2021, the California Supreme Court ruled in **In re Humphrey** that judges also had the discretion to take a defendant's ability to pay into account when considering bail, but only after considering the safety of the public and probability that the arrestee would appear for trial.

In Kowalczyk's case, his prior criminal record (which included crimes committed in several states) and the likelihood that he would not show up for his trial were the basis of the judge's decision to set a high bail, and later deny bail entirely.

"Three years ago California voters repealed a state law eliminating cash bail. If the Supreme Court accepts Kowalczyk's claim, cash bail will be eliminated for all but the most violent and the wealthiest offenders," said Stapleton. "Letting habitual criminals like this one walk away guarantees additional crime," she added.

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And, check out our blog, *Crime & Consequences*, offering a fresh perspective on crime and law. For news and commentary on major criminal justice issues, go to:

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CRIME & CONSEQUENCES

LAW REDUCING GANG-MURDER SENTENCES CHALLENGED

AB 333 failed to get the two-thirds vote required to pass and should be void

The California Supreme Court has agreed to review a murderer's claim that a 2021 law shortening sentences for gang-related killings applies to his 2018 conviction. The Criminal Justice Legal Foundation (CJLF) has joined **People v. Rojas** to argue that the law in question (AB 333) is unconstitutional.

The case involves the 2018 conviction and life-without-parole (LWOP) sentence of Fernando Rojas for the intentional murder of a man in Bakersfield. In the early morning hours of February 3, Rojas and Brandon Ellington were engaged in a fight outside of a local casino. When Ellington ran off, Rojas and Victor Nunez jumped into their car and chased him down. Surveillance video showed Nunez exit the car and shoot Ellington in the chest, killing him. Both Rojas and Nunez were later arrested. As an accomplice in the killing, Rojas was convicted of first-degree murder with gang membership, gang participation, and firearm enhancements, which qualified him for an LWOP sentence.

In 2021, Governor Gavin Newsom signed AB 333 into law. That law redefined the requirements for proving that a defendant was the member of a criminal street gang engaged in a pattern of criminal gang activity. The law makes it more difficult for prosecutors to prove that a defendant is a gang member participating in gang-related crimes.

On appeal, Rojas argued that the law should be applied retroactively to his case and invalidate his gang and firearm enhancements and his LWOP sentence. Before the state Court of Appeal, California's Attorney General conceded that the new law applied to Rojas' case but argued to uphold the murder conviction. The court accepted that concession and overturned Rojas' gang participation and firearm enhancements but upheld his gang-related murder conviction, finding that AB 333 unconstitutionally amended Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, adopted by state voters in 2000.

When the state's highest court agreed to hear Rojas' appeal, CJLF Associate Attorney Kymberlee Stapleton filed a scholarly amicus curiae (friend of the court) brief in opposition. She argues that the requirements to prove gang membership and participation in Proposition 21 can only be amended by a two-thirds vote by both houses of the state Legislature. The vote to pass AB 333 in the 40-member state Senate was 25-10, one vote short of two-thirds. The vote to pass the bill in the 80-member Assembly was 41-30, twelve votes short of two-thirds. The shortfall in both houses makes AB 333 and all of its amendments to Proposition 21 unconstitutional. Because of this, the Court of Appeal cannot accept the Attorney General's concession on the enhancements in Rojas' case, or any other gang-related case.

"While it is clear that the Legislature and Governor intended to shorten the sentences of gang criminals like Rojas, they failed to get the two-thirds vote required to do so. The Supreme Court's duty is to protect the people's power of initiative from unconstitutional encroachment by the Legislature and strike down AB 333," said Stapleton.

"VIOLENT CRIME INCREASES"

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Act, the state's homeless problem was already critical, with 115,000 drug addicted, mentally ill, vagrants living on the streets. The initiative turned small-time drug dealing and thefts of $950 or less from felonies to misdemeanors—a cite and release offense. With county jails filled with commercial burglars, major drug traffickers, car thieves, and wife beaters there is no room for anybody else.

In the state's most populous counties, police are unable to investigate the crimes that Proposition 47 decriminalized and many, if not most, are not even reported. This explains why earlier reports from the PPIC could claim that overall crime in California was down—fewer crimes reported, fewer criminals arrested, conclusion: Crime is down. Since Proposition 47 passed the homeless population has increased every year. Today California's homeless population exceeds 171,000, fatal drug overdoses have eclipsed those of the 1960s while both violent and property crime are steadily rising.

Governors Brown and Newsom, and the progressives packing the state Legislature, have gotten what they wanted. In the name of "racial justice" they have sharply reduced the consequences for crime, even violent crime. Today, some of the state's greatest cities are in a death spiral as our streets have become crime-ridden, vagrant-filled, open sewers, and our taxpaying businesses and residents leave in record numbers. Unfortunately, every year as life in California gets progressively worse, a majority of voters who have not yet left the state continue to re-elect the same progressive politicians that have caused these problems.

Michael Rushford
President & CEO

"RIGHT TO EARLY RELEASE"

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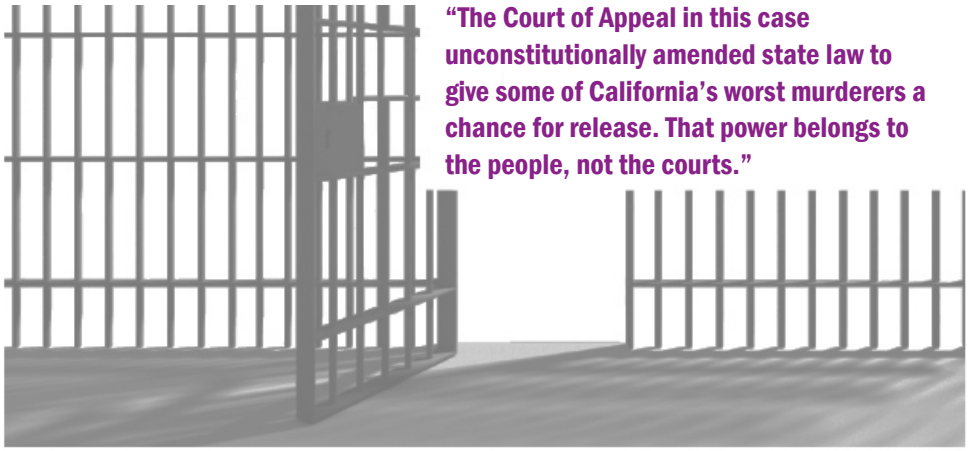
unanimously recommended a sentence of LWOP.

After Hardin's conviction, the California Legislature passed laws providing parole eligibility for convicted murderers sentenced to LWOP who were 18 years old or younger 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. Last year, 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 18 years old or younger sentenced to LWOP or murderers 26 years old or younger sentenced to 25 years to life.

CJLF has joined the California Supreme Court appeal of that ruling. In a scholarly *amicus curiae* (friend of the court) brief, Associate Attorney Kymberlee Stapleton argues 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. Stapleton also notes that the Equal Protection Clause prevents different sentences for defendants who are "similarly situated." Hardin is not similarly situated with murderers 18 years old or younger sentenced to LWOP or 25-year-old murderers sentenced to 25 to life. The U. S. Supreme Court has held that 18-year-old murderers 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 Court of Appeal in this case unconstitutionally amended state law to give some of California's worst murderers a chance for release. That power belongs to the people, not the courts."

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. That power belongs to the people, not the courts," said Stapleton.

People v. Hardin was argued December 5, and the court's decision is pending.

California leads the nation in homelessness and has 4 of the 25 most dangerous cities in the country. CJLF is asking the U. S. Supreme Court to review the Ninth Circuit ruling that prohibits west coast cities from cleaning out homeless camps, and we have joined several cases to block state and local policies that are flooding our communities with habitual 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. **Many thanks for your support!**

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CA BALLOT MEASURE TO RESTORE CONSEQUENCES FOR DRUGS AND THEFT

A ballot measure recently authorized for signature gathering would roll back provisions of California's Proposition 47, which turned drug possession, drug trafficking, and theft into misdemeanors. If adopted by state voters next November, "The Homelessness, Drug Addiction, and Theft Reduction Act" would give prosecutors the discretion to charge hard drug addicts with a "treatment-mandated felony" after two previous drug convictions. Offenders charged with the "treatment-mandated felony" would be given the option to complete a drug and mental health program or serve time in jail. After a fourth conviction, judges would have the option of sentencing the offenders to jail or state prison. The act would also increase penalties for drug dealers and allow judges to sentence dealers who possess firearms to state prison, rather than county jail. It would also categorize non-prescription fentanyl as a hard drug and allow dealers who sell a fatal dose to be prosecuted for second-degree murder.

The act would allow prosecutors to charge thieves with two prior misdemeanor theft convictions with a felony punishable with a possible jail sentence, regardless of value of the stolen property. A thief receiving a fourth conviction may be sentenced to prison. For a thief arrested for multiple thefts, the value of the stolen property can be added together to exceed Proposition 47's $950 limit, allowing the thief to be charged with a felony. The act provides increased penalties for groups of thieves who work together and for thieves who steal or damage property valued at $50,000 or more.

For all of these offenses, judges will retain the discretion to tailor the punishment and/or treatment to individual offenders.

These are modest but much needed reforms to address the current out-of-control drug trafficking, drug addiction, and theft plaguing California cities and towns.

Happy Holidays

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