CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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HIGH COURT DELIVERS MIXED BAG IN INTERNET STALKING CASE

In a June 27, 2023 ruling, the U. S. Supreme Court decided the stalking/threats case of **Counterman v. Colorado**. The ruling is a mixed bag for the ability of government to protect people from threats and stalking via social media. To punish speech on the basis that it is a threat, the Court held that, at a minimum, "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove that the defendant had the subjective intent to threaten another." The Court left unclear when stalking by speech (or other communication) needs to satisfy the "true threats" test to be punished by the State.

The case involves a Facebook friend request from Billy Raymond Counterman to a singer/songwriter in Colorado identified as C.W. She and Counterman had never met or communicated before, but as an aspiring musician trying to grow her following, she accepted his friend request. Over the next two years, Counterman sent her scores of messages she thought were "weird" and "creepy." She never responded and blocked him from her account multiple times, but Counterman created new Facebook accounts and continued sending her messages. Some of the messages indicated that Counterman was watching C.W. "Was that you in the white Jeep," read one. "A fine display with your partner," read another.

As time passed, Counterman's messages became more angry and threatening, "Die. Don't need you," and "F*** off permanently." C.W. became quite fearful, believing that Counterman might hurt her. She even cancelled scheduled concerts fearing that he might confront her. After she learned that Counterman was on probation for two prior threat convictions, she called the police. On May 12, 2016, Counterman was arrested and charged with stalking and harassment. Although he argued that his messages were not true threats, the jury convicted him of stalking (serious emotional distress) and he was sentenced to 4½ years in prison.

On appeal, Counterman argued that the Colorado law unconstitutionally violated his First Amendment rights because he did not intend to frighten her and that his messages to C.W. were protected speech. The Court of Appeals rejected that claim and upheld his conviction. The Colorado Supreme Court declined to review his appeal. Last January, the U. S. Supreme Court agreed to hear the case.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Associate Attorney Kymberlee Stapleton argued that the Colorado law does not require subjective intent because stalkers are often mentally unstable. A person detached from reality may not be aware that their behavior is threatening. After multiple attempts by C.W. to block his messages, Counterman posted, "How can I take your interest in me seriously if you keep going back to my rejected existence."

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FRESNO DA SMITTCAMP ADDRESSES 41ST ANNUAL MEETING

The CJLF Board of Trustees held the foundation's 41st annual meeting at The California Club in downtown Los Angeles on June 14. Several board members were re-elected to successive terms, as were the President and Secretary/Treasurer.

The luncheon featured an address by Fresno District Attorney Lisa Smittcamp. Her remarks focused on the difficulty California prosecutors face due to the soft-on-crime laws adopted by the Legislature, the Soros- and ACLU-funded ballot measures that flood communities with habitual and violent criminals, and the Governor's policy of allowing the early release of the state's most violent prison inmates.

Smittcamp insisted that to restore law and order California voters must elect representatives in the Assembly and Senate who care more about protecting the law-abiding public from criminals than protecting criminals from the consequences of their behavior. She also noted that Governor Newsom has ignored requests by the majority of elected district attorneys to compromise on much-needed measures to help improve public safety.

Fresno District Attorney Lisa Smittcamp

VIEWPOINT

Slaughter Over the Juneteenth Weekend

As many Americans celebrated the end of slavery over the weekend leading up to June 19, called "Juneteenth," dozens of people were wounded or murdered in violent attacks across the country. The Associated Press reported on over 103 shootings in mostly major urban centers causing 12 deaths. An exception was the apparently targeted murders of four people in an apartment in the small town of Kellogg, Idaho. A 31-year-old suspect is in police custody. There were over 60 shootings in Chicago alone, with four fatalities. Twenty-three of the victims were shot at a Sunday morning Juneteenth celebration. And, in St. Louis, 12 teenagers were shot, with one fatality, at a party Saturday night. Another Saturday night shooting at a Washington state campground left two people injured and two dead.

In Pennsylvania, one police officer died and another was wounded by a suspect that attacked a state police barracks. In Philadelphia, five people were shot Saturday night, apparently by the same suspect. One of the victims is in critical condition. Violence in the Los Angeles suburb of Carson resulted in eight people shot at a Saturday evening pool party. Two are in critical condition. In Baltimore, six people were shot Friday night. All are expected to survive. In San Francisco, six people were injured in a high speed car-to-car shootout in streets around Fisherman's Wharf. The victims included two girls, aged 10 and 16, who were knocked off bicycles by one of the speeding cars.

The AP story notes that researchers disagree over the cause of the increased violence, with some blaming the availability of firearms, while others suggest a backing off by police and fewer prosecutions. Those last two suggestions are probably the most likely contributors.

With the exception of Idaho, all of the states covered in this story are governed by progressive democrats who have labeled police as racists and supported policies that have reduced or eliminated consequences for many crimes. Democrat-controlled cities in Republican-run states such as Nashville, Houston, and Austin are also suffering from increased violent crime. Reduced policing, prosecutions, and punishment are major factors in these cities.

But another major contributor has been the persistent assault on the cultural norms associated with America. For decades, socialists who now call themselves progressives have relentlessly attacked religion, the nuclear family, masculinity, femininity, meritocracy, science, white people, law enforcement, mathematics, classical music, and literature. With the full cooperation of the dominant media, progressives have pulled the Democratic party into advocating for abolishment of parts of the Constitution, sexualizing children, and celebrating perversion. As a result, large segments of the U. S. population believe things that are absolutely false.

Free speech and the open exchange of ideas are dead in our universities, in the popular culture, and in much of public discourse. Perhaps a quarter of the last two generations of Americans are faithless, suffer from depression, believe that they are oppressed, and have little or no hope for the future. Charles Manson's dream of sparking a race war appears to be the goal of progressives, who insist that everyone's identity be defined by their race, to which they have recently added sexual preference and gender dysphoria. As Congresswoman Maxine Waters so eloquently put it during the Trump Presidency, "if you see anybody from that Cabinet in a restaurant, in a department store, at a gasoline station, you get out, and you create a crowd. And you push back on them. And you tell them they're not welcome anymore, anywhere." If you are not in her tribe you should be attacked.

This is the recipe for anarchy, and with anarchy comes violence.

Advisory layout design by Irma H. Abella

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.

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**

Peterson v. California Board of Parole Hearings: 6/3/22. Sacramento Superior Court decision blocking the release on parole of murderer Lawrence Cottle and holding as unconstitutional the state law that had allowed his parole. Cottle, a street gang member, shot and killed Alan Peterson in 1996 during a five-day crime spree. Because of his age, California Proposition 115 (passed in 1990) gave the judge the discretion to sentence Cottle to either life without parole (LWOP) or 25 years to life. The judge sentenced him to LWOP. In 2017 Jerry Brown signed SB 394 into law, which made juvenile murderers serving LWOP eligible for parole during their 25th year of incarceration. But, the Legislature passed SB 394, amending Prop. 115, without meeting the required two-thirds vote of both houses. In 2021, after learning that her father's murderer was eligible for parole under SB 394, Laura Peterson asked CJLF to take legal action to block Cottle's release. In the lawsuit on her behalf, CJLF argued that SB 394 is unconstitutional. The judge rejected the state's claims that the law did not amend Prop. 115 and that recent U. S. Supreme Court decisions required the state to reduce the sentences of juvenile murderers. **WIN**

Nazir v. Superior Court: 6/2/22. Unanimous California Court of Appeal decision upholding a Los Angeles trial judge's refusal to follow LA District Attorney George Gascón's request to drop sentencing enhancements for a criminal facing 35 felony counts. In May 2020, LA District Attorney Jackie Lacey charged Rehan Nazir with multiple felonies, including use of firearms, false imprisonment, extortion, and burglary involving several victims. In November, LA County voters replaced Lacey with George Gascón, who immediately announced that he would drop sentencing enhancements for any defendant facing trial. When Nazir's case came before a judge, the deputy prosecuting him asked him to dismiss several sentencing enhancements that would increase his sentence upon conviction. The judge refused, noting that doing so was not in the interest of justice. Nazir appealed. Because Gascón's office would not defend the judge's decision, the Court of Appeal invited CJLF and the California District Attorneys Association to defend it. Among those joining on the criminal's side were California Attorney General Rob Bonta and Berkeley Law School Dean Erwin Chemerinsky. CJLF argued that the state law vests wide discretion with judges to dismiss or preserve charges in criminal cases and a local district attorney's policy alone does not override it. The Court of Appeal agreed, *utilizing CJLF arguments in its decision*. **WIN**

Shinn v. Ramirez & Jones: 5/23/22. A U. S. Supreme Court 6-3 decision overturning two Ninth Circuit rulings that announced new delays in the death sentence of an Arizona double murderer and overturned the conviction of a man found guilty of killing a 4-year-old girl. At issue in **Shinn v. David Ramirez & Barry Jones** was whether the attorneys for the murderers could introduce new evidence on federal habeas corpus that they failed to present during years of state court review, which is prohibited under federal law. A jury convicted habitual felon David Ramirez on strong evidence of the 1989 stabbing murders of his girlfriend and her 15-year-old daughter. He raped the daughter before killing her. Barry Jones was convicted of the 1994 sexual assault and murder of his girlfriend's 4-year-old daughter. Both defendants tried **WIN**

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"BOXSCORE"

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to introduce new evidence on federal habeas corpus years after their convictions and sentences were upheld. The Ninth Circuit ruled in favor of both murderers on appeal, announcing that the U. S. Supreme Court's 2012 ruling in **Martinez v. Ryan** allowed the new evidence. CJLF joined the U. S. Supreme Court review to argue that federal law clearly restricts the introduction of new claims and evidence that could have been presented during the state court review of the convictions and sentences. To the extent that the **Martinez** decision might be interpreted to conflict with that restriction, the federal statute prevails. The Supreme Court agreed.

TOTAL	4 Wins	0 Loss	1 Draw

SUPREME COURT UPHOLDS LIMITS ON CHALLENGES TO FEDERAL CONVICTIONS

On June 22, 2023, CJLF won a 6-3 U. S. Supreme Court decision which clarified the limits on federal challenges to criminal convictions. At issue in the case of **Jones v. Hendrix** was how the Court interprets a 1996 Act of Congress adopted to strictly limit federal court review of post-conviction claims of state and federal criminals. That law, the Antiterrorism and Effective Death Penalty Act (AEDPA), restricts the federal courts from considering *more than one* post-conviction petition from almost all convicted criminals. The exceptions are if the defendant is demonstrably innocent based on newly discovered evidence, or there is a constitutional change in the law which must be applied retroactively. The defendant in this case argued that Congress intended that the courts be allowed to interpret AEDPA to allow additional exceptions.

CJLF had joined the case to encourage a decision rejecting the claim that Congress left a loophole in its crackdown on successive petitions. Writing for the majority, Associate Justice Clarence Thomas stated that the clause invoked by the petitioner "does not authorize such an end-run around AEPDA."

The case involves the November 2000 federal court conviction of Marcus DeAngelo Jones for unlawful possession of a firearm by a felon. 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. In October, Jones was arrested after firing the gun during a shootout. He was charged with two counts of illegal firearm possession and lying to acquire a firearm. He was convicted on all counts and sentenced to 32 years in prison. Jones was separately convicted of drug trafficking and ordered to serve the sentence for that crime concurrently with the firearm sentence.

After his conviction and sentence were upheld on appeal, Jones filed at least 35 unsuccessful challenges over the next 17 years, claiming that his rights had been violated. In 2019, the Supreme Court, in **Rehaif v. United States**, announced that in cases in which a felon is charged with violating the Armed Career Criminal Act, the government must not only prove that the defendant knew he possessed a firearm, but also that he knew that his criminal record or immigration status made it illegal for him to possess a firearm. This added a new right that Jones could claim invalidated his conviction, so he filed another petition. Jones argued that he believed that his criminal record had been expunged when he purchased the gun in 1999. This contradicts the statements he made to the undercover agent prior to his arrest.

In 1948, Congress created a new procedure for federal prisoners seeking to attack their convictions or sentences outside of the appeal process. The then-new procedure, called a "motion to vacate," replaced the traditional habeas corpus procedure in almost all cases. But Congress left a safety valve saying that federal prisoners could use the old habeas corpus procedure in cases where the new procedure was "inadequate or ineffective." In the years that followed, patently guilty criminals abused this procedure with multiple petitions attacking their convictions and sentences requiring decades of additional court review.

In 1996, Congress responded to these flagrant abuses with a new law—AEDPA—cracking down hard on prisoners filing repeated petitions. It limited both habeas corpus petitions by state prisoners and motions to vacate by federal prisoners to a single petition in all but the rare cases of newly discovered evidence clearly demonstrating innocence or new, retroactive constitutional rules.

Jones does not qualify for either exception. His latest claim was that in the case of federal prisoners the AEDPA reform does not limit prisoners to a single petition for claims such as his but merely require that the prisoner use the old pre-1948 procedure instead. He further claimed that the reform might violate the Constitution's Suspension Clause if it cut off these claims altogether, despite the Supreme Court's rejection of a similar argument in **Felker v. Turpin** (won by CJLF) just months after AEDPA was enacted. Although both the Federal District Court and the Eighth Circuit Court of Appeals rejected Jones' claim, in May 2022, the Supreme Court agreed to hear his appeal.

The Solicitor General of the United States, although defending the conviction on other grounds, filed briefs agreeing with Jones on the main point. Also filing argument in support of Jones was a group calling itself Habeas Scholars (made up of law professors) and two defense lawyer associations. Because the government had effectively switched sides, the Court appointed Washington

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CJLF OPPOSES EFFORT TO OVERTURN MURDERER'S CONVICTION

On behalf of the family members of the murder victim and the Oklahoma District Attorney's Association, the Criminal Justice Legal Foundation has joined with University of Utah law professor Paul Cassell to encourage the Supreme Court to deny any further review of claims made by patently guilty murderer Richard Glossip.

The case involves the 1997 murder-for-hire of Barry Van Treese, owner of the Best Budget Inn in Oklahoma City, by Glossip, the inn's manager. Evidence introduced at trial indicates that Glossip, who feared he would be fired for skimming money, hired maintenance worker Justin Sneed to kill Van Treese. Glossip promised Sneed $10,000 for the killing. Both Sneed and Glossip lived at the motel. In the early hours of January 7, Van Treese, who made bi-monthly visits to review receipts and make payroll, arrived at the motel and took room 102 so he could get some sleep. Later that morning, Sneed entered the room and beat Van Treese to death with a baseball bat. A window was broken during the attack. Glossip had Sneed move Van Treese's car to a nearby parking lot and take an envelope from under the seat which contained $4,000 in cash for payroll and expenses. Glossip split the money with Sneed, covered the broken window, and told the housekeeper that he and Sneed would clean the downstairs rooms, including room 102 where Van Treese lay dead. Testimony at trial revealed that Glossip kept the motel staff away from that room.

Later that day, Van Treese's car was found in a nearby credit union parking lot. A short time later police searched room 102 and found Van Treese's body. Glossip was questioned and released. The next day Glossip was selling his possessions and preparing to leave town when police took him into custody. Subsequent searches uncovered the stolen money and statements from motel employees that conflicted with those Glossip had made. When Sneed was later arrested and had confessed, Glossip was charged with murder.

Glossip was tried twice for the murder, and both times different juries found him guilty and sentenced him to death. In 2007, Glossip's conviction and sentence were upheld by the Oklahoma Court of Criminal Appeals (OCCA). In 2015, Glossip lost a U. S. Supreme Court challenge to Oklahoma's lethal injection execution protocol in the case of **Glossip v. Gross** (a CJLF victory). Glossip was finally set to be executed in early 2023.

In January 2023, Oklahoma's newly elected Attorney General Gentner Drummond was sworn in. A short time later, Drummond, who had claimed to support capital punishment, announced a slowdown to Oklahoma's execution schedule, citing the stress the schedule caused Oklahoma Department of Correction's staff. In March, he announced his office would seek to stay Glossip's execution until 2024 to allow an independent counsel time to review the case.

Drummond appointed a political supporter with limited capital case experience to conduct the review. In April, the independent counsel reported the discovery of new evidence that undermined the validity of Glossip's conviction. The "new" evidence was that Sneed had a low IQ and mental health problems and that prosecutors allegedly concealed this information. Armed with this new evidence, Glossip filed his fifth habeas corpus petition asking the OCCA to overturn his conviction, and Attorney General Drummond filed a response asking that the OCCA vacate Glossip's conviction and send his case back for a new trial. On April 20, 2023, the OCCA, after fully reviewing Glossip's claim, denied it, again upholding his conviction and sentence. Glossip has appealed that holding to the U. S. Supreme Court, again with argument in support from Attorney General Drummond and the anti-death penalty Innocence Project.

In partnership with Professor Cassell, CJLF Legal Director Kent Scheidegger argues that Sneed's mental disabilities were not withheld by the prosecution. Prior to trial, Sneed was examined by a psychiatrist for competence, and his mental health and his prescribed medication were made available to the defense. This was even presented in *Glossip's own appeal of his conviction in 1998.* It is highly likely that Glossip's defense counsel chose not to focus on Sneed's mental health at trial because it would demonstrate to jurors Sneed's vulnerability to Glossip's manipulation and control.

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CJLF is fighting to end the pro-criminal reforms that have turned many parts of America into crime-infested shooting galleries. We are also arguing to block rogue district attorneys from abusing their authority to keep violent and habitual criminals on the streets rather than behind bars. 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, give at our website: www.cjlf.org, or call us at (916) 446-0345 to contribute with your credit card. **Many thanks.**

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Summer 2023

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Case Report

Cases Currently Before the Courts

ADDA v. Gascon: 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.

CJLF v. CDCR: CJLF lawsuit filed in Sacramento Superior Court representing crime victims and their families to block enforcement of California Department of Corrections and Rehabilitation regulations, announced in May 2021. The regulations allow the early release of up to 76,000 criminals convicted of both violent and nonviolent crimes, including murderers and sex offenders. Violent criminals that prison officials determine have behaved well or participated in rehabilitation programs will be eligible for release after serving two-thirds of their sentence or less. In the lawsuit, CJLF argues that the administrative regulations unlawfully override numerous state laws which specify when and how a prison inmate qualifies for parole or credits. The Newsom administration will be defending this policy at a hearing on August 28 of this year.

"MURDERER'S CONVICTION"

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We further argue that Glossip's decades of petitions groundlessly challenging his conviction and sentence constitute an abuse of process, specifically forbidden under both Oklahoma and federal law. The fact that the state's new Attorney General has joined the anti-death penalty Innocence Project to argue on behalf of this murderer raises questions about his commitment to justice.

"For all of this time the Van Treese family has been made to suffer while waiting for justice to be served. It is time to put an end to their ordeal," said Scheidegger.

"INTERNET STALKING CASE"

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The Court's 7-2 ruling split the baby, holding that the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence, but does not require that the State prove that he intended to threaten the victim.

The case is remanded to the Court of Appeals for further review. That court could rule that the manner by which Counterman engaged in unwanted communication with C.W. supports reinstatement of his conviction. It is likely that the high court will need to review another social media stalking case to clarify when cyberstalking may be prohibited for its repetitiousness or other manner and when it must satisfy the Court's new standard for threats.

"LIMITS ON CHALLENGES"

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lawyer Morgan Ratner to argue the case defending the Court of Appeals' decision.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Legal Director Kent Scheidegger argued that the AEDPA was intended to cut off all successive petitions other than those in its listed exceptions, not merely to change to a different procedure in a different court. This was understood by everyone in the debates leading up to its passage. Further, and of broader importance, there is no doubt that the reform is constitutional. The Suspension Clause was originally understood to protect the writ of habeas corpus as it existed at common law. At the time, the writ was not available to attack a criminal judgment entered by a court of competent jurisdiction. In its decision in **Jones**, the Court squarely endorsed this understanding of the Suspension Clause and the original scope of the writ of habeas corpus. The majority opinion *utilized argument and research introduced in the CJLF brief*.

"Congress clearly intended to put a stop to repeated petitions, with no exceptions other than those it wrote into the law. Today's decision leaves no doubt that Congress had the constitutional authority to pass this reform and the time has come to fully enforce it," said Scheidegger.