C R I M I N A L J U S T I C E L E G A L F O U N D A T I O N

Advisory

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COURT BLOCKS DA FROM PROSECUTING BLM RIOTERS

In a unanimous ruling on September 28, California's Second District Court of Appeal announced that the San Luis Obispo District Attorney's Office cannot prosecute seven Black Lives Matter (BLM) protesters because of District Attorney Dan Dow's "well publicized association with critics of the Black Lives Matter Movement."

In July 2020, Tianna Arata allegedly led roughly 300 BLM demonstrators onto Highway 101, blocking all lanes for an hour. Some of the demonstrators attacked cars, smashing the window of one car with a skateboard, shattering glass on a four-year-old child in the back seat. Arata was charged with 13 misdemeanors. Six other BLM protesters were also charged. But, later that year, Superior Court Judge Matthew Guerrero disqualified Dow and every prosecutor in his office, citing a campaign email from Dow and his wife which stated that the District Attorney was leading the fight against the "wacky defund the police movement and anarchist groups that are trying to undermine the rule of law and public safety in our community." Nowhere in the email was BLM even mentioned.

When Dow appealed that ruling, the court of appeal rejected his arguments and upheld the order, citing Dow's appearance on a popular radio talk show with a host who had criticized BLM. The attorney representing BLM told reporters, "We got exactly what we wanted out of this," and noted that all four of the judges involved were white men and three had "reputations as conservatives."

The lawyer's statement about the judges is partially correct. They are white men. But Matthew Guerrero was a public defender before Governor Jerry Brown appointed him to the Superior Court in 2018. Appeals court Justice Arthur Gilbert was appointed to the court by Governor Jerry Brown in 1982. Justice Steven Perren was also appointed to the Superior Court by Governor Jerry Brown in 1982 and elevated to the court of appeal by Governor Gray Davis in 1999. Former public defender Kenneth Yegan was appointed to the municipal court by Governor Jerry Brown on January 3, 1983. He was elevated to the court of appeal by Governor George

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SUPREME COURT REVIEWS LAW LIMITING ATTACKS ON FEDERAL CONVICTIONS

A little-publicized U. S. Supreme Court case may result in a major decision supporting restrictions on how many times the federal courts can consider claims against the convictions and sentences of criminals.

At issue in the case of **Jones v. Hendrix** is 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 that 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 argues that Congress intended that the courts be allowed to interpret AEDPA to allow additional exceptions.

The case involves the November 2000 federal court conviction of Marcus Deangelo Jones of being a felon in possession of a firearm. Jones had eleven prior felony convictions and had served prison sentences for at least five 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 under the federal Armed Career Criminal Act (ACCA). 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 when a felon is charged with violating the ACCA, the govern-

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VIEWPOINT

THE MARIJUANA SCAM

In early October, California Attorney General Rob Bonta announced a multi-agency crackdown on illegal marijuana grows and marketing in the state. A week earlier, President Biden told reporters that he will pardon all people convicted under federal law of possession of marijuana. While these announcements are unrelated, they highlight the lies told to the public about marijuana. The first lie is that marijuana is relatively safe.

In an August 4 piece in the Deseret News, Daryl Austin discussed research from major universities and journals that detail the harmful effects of regular marijuana use.

> "Negative outcomes include research that suggests a connection between smoking marijuana and respiratory symptoms like chronic bronchitis. The drug also tends to impact school performance. 'Since marijuana use impairs critical cognitive functions … many students could be functioning at a cognitive level that is below their natural capability for considerable periods of time,' one review from the New England Journal of Medicine notes.
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> "The number of casual users has also increased. In 2019, 48 million Americans reported using the drug at least once that year — accounting for nearly 18% of the country or 1 in 5 Americans. That year the U.S. Surgeon General sounded a national alarm on the drug's harmful effects, including on the developing brain and its link to psychotic disorders.
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> "On that front, a study in The Lancet found that 'the odds of psychotic disorder among daily cannabis users were 3.2 times higher than for never users.' And of course, marijuana can also be addictive. 'Marijuana addiction is much more common than most people realize,' said Dr. Samuel Wilkinson, the associate director of the Yale Depression Research Program at Yale School of Medicine. 'Large and reliable epidemiological studies suggest that about 1 in 3 marijuana users have some form of addiction.' "

With regard to "medical marijuana," Dr. Wilkinson also asked, "how many other medicines do you know of that are smoked?" Smoking marijuana can cause respiratory issues which is why the American Lung Association warns, "We caution the public against smoking marijuana because of the risk it poses to the lungs." Marijuana intoxication has also been tied to increases in fatal traffic accidents. ABC Washington reported that "a handful of local and national agencies, including the Governors Highway Safety Association and the National Alliance to Stop Impaired Driving, have teamed up to produce a new report showing that 33% of drivers involved in fatal crashes had THC in their system — up from 21% before the pandemic. Overall, crashes leading to injury rose by 6% after legalization but fell slightly once marijuana sales began in shops. Fatal crash rates rose by around 2% after cannabis became legal and by the same amount again when shops started selling the drug."

The second lie is that legalizing marijuana would drive out illegal traffickers and fill government coffers with tax revenue. Matt Delaney of the Washington Times reports that after legalization in California, illegal trafficking has actually increased, generating roughly $8 billion in sales this year, which is twice the sales from the legal market. Cartels financing illegal growers in the state traffic aliens across the southern border to work the fields in remote areas. They have become so brazen that they operate illegal pot shops in plain sight. State and federal agencies also report significant environmental damage related to illegal grows while tax revenue from the legal market must be spent on mitigation, regulation, and law enforcement. While it is certainly true that since legalization more people are buying and using marijuana, most, and particularly young buyers, are paying far less for it from illegal sellers.

The third lie has been advanced to support the progressive narrative that American law enforcement is racist. It includes the fiction that thousands of people, mostly of color,

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Advisory layout design by Irma H. Abella

"VIEWPOINT"

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are languishing in jail or prison for possessing or smoking pot. President Biden told the country that he was pardoning all individuals federally convicted of marijuana possession to "right" the racial "wrongs" of the criminal justice system. "[W]hile white and Black and brown people use marijuana at similar rates, Black and brown people have been arrested, prosecuted, and convicted at disproportionate rates," said the President.

Manhattan Institute scholar Heather Mac Donald debunks this in a her recent piece, *The Marijuana Myth*, in *The American Mind*.

"This claim—equal marijuana use, unequal criminal justice treatment—has been a cornerstone of the Left's war on cops for decades. It is routinely trotted out as Exhibit A in the Left's narrative about racist policing; it got an added boost from Michele Alexander's disastrously influential book, The New Jim Crow.

"Predictably, the *New York Times* regurgitated the equal-use claim in its coverage of the Biden marijuana pardons: 'While studies show white and Black people use marijuana at similar rates, a Black person is more than three times as likely to be arrested for possession than a white person, according to a report from the ACLU that analyzed marijuana arrest data from 2010 to 2018.'

"The significance of the equal use claim extends beyond the war on cops, however. It is part of a larger narrative that denies both the existence of significant racial differences in culture and behavior and the role played by those differences in explaining socioeconomic disparities. It is worth assessing the equal use claim against the data, therefore, since a worldview hangs upon it.

"Historically, marijuana use and culture has been more embedded in black communities than in white, as twentieth-century chronicles of urban black life by Claude Brown, Richard Wright, W.E.B. Du Bois, and others make clear. That disparity continues today, despite the flower power revolution that created generations of Grateful Dead potheads. Blacks comprise one-third of all treatment admissions nationally for marijuana abuse, though they represent only about 13 percent of the nation's population. Among cannabis users, blacks have a nearly 70 percent higher rate of cannabis dependence than whites (16.82 percent v. 10.01 percent).

"Cannabis is the illicit drug for which black drug abusers are most frequently treated (29 percent of all drug treatments), according to a 2013 U. S. Treatment Episode Data Set compiled by the Substance Abuse and Mental Health Services Administration. By contrast, 12 percent of whites in drug treatment were there for cannabis abuse.

"A 2016 study by Washington, D.C.'s Department of Health found that there were 38 times more blacks than whites in treatment for marijuana disorder. The rate of marijuana use in D.C. was 62 percent higher for blacks than for whites.

"The journal *Drug and Alcohol Dependence* has called for research into the cultural norms that lead to such higher rates of cannabis abuse disorders among blacks.

"As for drug use more generally, from 2017 to 2019, the rate of treatment admissions for substance abuse disorder was nearly 58 percent higher for blacks than for whites (85.5 per 10,000 population, compared to 54.2 per 100,000)."

As MacDonald notes, in 2013 over 91% of all federal marijuana possession convictions were the result of arrests at the border, where the average quantity offenders were carrying was over 48 pounds. Probably not for personal use.

Years ago, most states abandoned convicting anyone for personal use, and a quick drive in downtown Los Angeles, San Francisco, Seattle, Chicago, or New York is evidence that people possessing far more potent drugs than pot are not in jail. They are lying on sidewalks and in parks.

"In 2017, only 92 people were sentenced on federal marijuana possession charges, out of nearly 20,000 drug convictions," reports the *New York Times*.

Under federalism, the states are free to legalize any drug. The legalization of marijuana provides lessons on the social cost of making that decision, even for a relatively mild drug.

Michael Rushford
President & CEO

"COURT BLOCKS DA"

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Deukmejian. All of these judges were appointed to the bench by the most anti-law enforcement Governor in California history, Jerry Brown. Two were elevated to the appellate court by Brown, one by his former Chief of Staff Gray Davis, and one by pro-law enforcement Governor George Deukmejian.

The things BLM demonstrators did in many of the big cities where George Floyd protests were held included arson, assault, vandalism, and looting, leaving 18 dead in the wake of incidents stemming from the protests. Progressive district attorneys and mayors in "woke" cities, including Los Angeles, New York, Minneapolis, and Seattle, chose not to enforce the law and arrest the rioters. In many smaller communities like San Luis Obispo, district attorneys and mayors did crack down on demonstrators, protecting residents and businesses.

Progressives are unlawfully attempting to make an example out of the San Luis Obispo DA for doing this.

In **People v. Lastra**, CJLF is joining the San Luis Obispo District Attorney to seek review of the appellate court ruling in the California Supreme Court. The Foundation argues that there was no justification for courts to prohibit the district attorney from prosecuting demonstrators breaking the law. Allowing courts to exercise "viewpoint discrimination" to protect favored political causes would create a dangerous precedent, undermining both justice and freedom of expression.

CJLF JOINS SOUTH CAROLINA AG TO APPEAL RULING SPARING MURDERER

On July 26, a divided panel of the Fourth Circuit U. S. Court of Appeals overturned the death sentence of a South Carolina man who murdered four people in two states. In its ruling, the appeals court concluded that the judge in Quincy Allen's 2005 sentencing hearing had excluded, ignored, or overlooked the murderer's "serious mental illness and history of childhood abuse," which the court believed had "no substantial and injurious effect or influence on the outcome of the sentencing proceeding."

CJLF is preparing to file argument in support of South Carolina's petition for the U.S. Supreme Court to take up the case for review. The case of **Chestnut v. Allen** turns on the Supreme Court's 1978 decision in **Lockett v. Ohio**. In that decision, the high court held that the sentencer in a capital case must consider any aspect of the defendant's character or record that he claims as mitigating. South Carolina argues that the Fourth Circuit misapplied **Lockett** in a case where a fair reading of the record shows that the judge did consider these circumstances. CJLF agrees, but further argues that **Lockett** was wrongly decided. Consideration of marginal mitigating evidence should be a matter of state law to be decided by state courts, not a federal constitutional question to be second-guessed by federal courts.

According to a March 25, 2020 federal district court decision, Allen's crimes began on July 7, 2002, when he found a 51-one-year-old homeless man in a park in Columbia. Allen ordered the man to stand up, then shot him in the shoulder with a shotgun. Allen ordered the man to stand up again, then shot him again. Allen later told police that he used the homeless man to try out his new shotgun. The Court continued:

> "A few days later, on July 10, 2002, Allen met a prostitute named Dale Hall on Two Notch Road in Columbia; he took her to an isolated dead end cul-de-sac near I-77 where he shot her three times with a 12 gauge shotgun, placing the shotgun in her mouth as she pleaded for her life. After shooting her, Allen left to purchase a can of gasoline, and came back to douse Hall's body and set her on fire. He then went back to work at his job at the Texas Roadhouse Grill restaurant on Two Notch Road.
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> "Several weeks later, on August 8, 2002, while working at the restaurant, Allen got into an argument with two sisters, Taneal and Tiffany Todd; he threatened Tiffany, who was then 12 weeks pregnant, that he was going to slap her so hard her baby would have a mark on it. Tiffany's boyfriend Brian Marquis came to the restaurant, accompanied by his friend Jedediah Harr. After a confrontation, Allen fired his shotgun into Harr's car, attempting to shoot Marquis; however, Allen missed Marquis and instead hit Harr in the right side of the head. As the car rolled downhill, Marquis jumped out and ran into a nearby convenience store, where he was hidden in the cooler by an employee. Allen left the convenience store, and went and set fire to the front porch of Marquis' home. A few hours later Allen set fire to the car of Sarah Barnes, another Texas Roadhouse employee. Harr died of the shotgun blast to his head.
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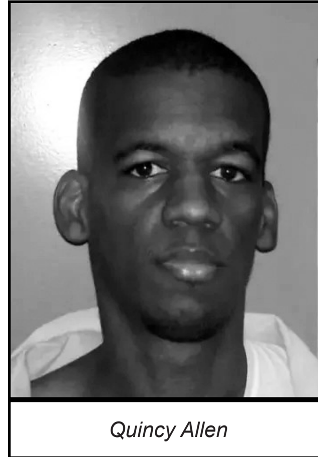
> "The following day, Allen set fire to the car of another man, Don Bundrick, whom he apparently did not know. Later that evening, August 9, 2002, Allen went to a strip club, Platinum Plus, in Columbia, where he pointed his shotgun at a patron. Allen left South Carolina and proceeded to New York City. On his way back, while in North Carolina, Allen shot and killed two men at a convenience store in Surrey County. [Fn. 2] Allen then went to Texas, where he was apprehended by law enforcement on August 14th.
>
> "Allen gave statements to police outlining the details of his crimes. He told police he began killing people because an inmate in federal prison, where Allen spent time for stealing a vehicle, had told him he could get a job as a mafia hit man. Allen got tired of waiting and embarked on his own killing spree. Allen told police he would have killed more people if he had had a handgun, but his prior record prohibited him from obtaining a handgun."



Quincy Allen

Allen was then transferred to South Carolina for trial for the murders of Dale Hall and Jedediah Harr. Prior to trial in the face of overwhelming evidence, Allen pleaded guilty to the two murders, planning to argue for a life sentence at the sentencing hearing. At that hearing Allen's attorneys presented hours of testimony regarding his abusive childhood and evaluations from mental health experts who concluded that Allen suffered from numerous mental illnesses. Prosecution experts countered the most serious conclusions with their finding that Allen was faking his schizophrenia. The state did not challenge a lesser diagnosis of rumination disorder, but no one at the trial placed major emphasis on it, probably because it has little relevance to culpability.

Although the appeals court accused the trial judge of ignoring Allen's mental claims, at sentencing, the judge stated:

> "In considering the outcome of this sentencing hearing I have tried to understand the unique forces and events which have put Mr. Allen in the situation in which he finds himself today. I have considered his upbringing so masterfully chronicled by Debra Grey. I've considered his list of mental illness[es] as described by Dr. Pam Crawford.
>
> "I've considered the facts of the various murders that Mr. Allen does not deny. "I've considered the impact to [the victims]. I've also considered the effect of this trial on Quincy Allen's two younger brothers who have sat through the majority of this trial. And I have considered the passionate arguments of counsel on both sides of this case.

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"RULING SPARING MURDERER"

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"I have listened to and read the accounts of all of the psychiatrists and psychologists in this case: Doctors Hilkey, Gupta, Lavin, DeBeck, Hattem, Crawford, Mirza, Tezza, Corvin and Schwartz-Watts."

The judge found "no substantial evidence" that Allen had a "major mental illness," i.e., schizophrenia. He evidently did not consider rumination disorder to be major.

The Fourth Circuit held that the trial court had engaged in an "unreasonable determination of the facts … contrary to clearly established federal law." The first 14 pages of the opinion documented the defense's portrayal of Allen's abusive childhood and his rumination disorder. On direct appeal and post-conviction relief (PCR), Allen made multiple claims, including that his guilty plea was involuntary, the sentencing judge ignored his terrible childhood and rumination disorder, his lawyers were incompetent, and that the judge implied that if he pleaded guilty he'd get a life sentence. His claims were rejected by the state Supreme Court, a state PCR court, and another state court on appeal. On habeas corpus, the federal district court denied all of Allen's claims but issued a certificate of appealability on his claims of ineffective assistance of counsel and involuntary plea agreement.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Legal Director Kent Scheidegger will argue that **Lockett** was wrongly decided and has created an endless stream of legal problems, similar to the abuse of discretion evidenced by the Fourth Circuit's divided ruling. "The trial judge's consideration of a minor mental disorder with no relevance to the crime should not be a constitutional question for the federal courts at all," said Scheidegger. "This case presents an opportunity to correct an error made decades ago that is still used to overturn just sentences," he added.

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CRIME & CONSEQUENCES

Without your support, CJLF would be unable to join the cases reported in this *Advisory*. In spite of the outcome of the last election, many of the current soft-on-crime policies flooding communities with criminals can be challenged in courts. We are bringing those challenges, and as our record over the past year indicates, we are beating the pro-criminal progressives at their own game. Please help us continue by making a tax-deductible contribution today. 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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"REVIEW OF ATTACKS"

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ment 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 argues 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 is called a "motion to vacate," and it 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 1996, in response to flagrant abuses, Congress cracked 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 where newly discovered evidence clearly demonstrated innocence or new, retroactive constitutional rules.

Jones does not qualify for either exception. He now claims 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 requires that the prisoner use the old pre-1948 procedure instead. He further claims 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** in 1996, just months after AEDPA was enacted. The federal district court and the Eighth Circuit Court of Appeals rejected the claim, but in May 2022 the Supreme Court agreed to hear Jones's appeal.

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

CJLF has joined the case to oppose Jones's claim that Congress left a huge loophole in its crackdown on successive petitions.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Legal Director Kent Scheidegger argues that the AEDPA was intended to cut off all successive petitions other than those in its listed exceptions, not merely change to a different procedure in a different court. Both supporters and opponents of the law noted this 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.

"Congress clearly intended to put a stop to repeated petitions, with no exceptions other than those it wrote into the law. There should be no doubt that Congress had the constitutional authority to pass this reform, and it is high time the Supreme Court said so," said Scheidegger.

HAPPY
holidays