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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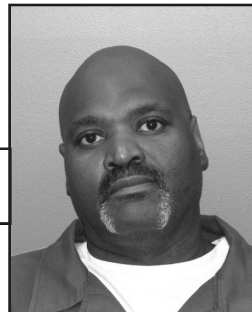
SUPREME COURT REINSTATES CONVICTION OF MICHIGAN MURDERER

*Shackling of defendant was harmless error in **Brown v. Davenport** decision*

In a 6-3 decision announced on April 21, 2022, the U. S. Supreme Court reinstated a Michigan murderer's conviction. The high court reversed a 2020 ruling by the Sixth Circuit Court of Appeals, which had overturned the conviction because the defendant was partially shackled during his trial.

At issue in the case of **Brown v. Davenport** was whether the shackling prejudiced the jury and whether the Sixth Circuit used the proper standard to overturn the state courts that had held the shackling was harmless error.

The Criminal Justice Legal Foundation (CJLF) had joined the case to argue that the Sixth Circuit's ruling had used the wrong standard to evaluate the error and that the murderer's conviction should be reinstated.


Ervine Lee Davenport

In the Court's majority opinion, Associate Justice Neil Gorsuch wrote, "we cannot see how the Michigan Court of Appeals acted contrary to or unreasonably applied clearly established federal law. The Michigan court found the shackling in Mr. Davenport's case harmless for two reasons—both because of the 'overwhelmin[g]' evidence against him, and because jurors testified that his shackling did not affect their verdict."

The case involves Ervine Davenport's conviction for murdering Annette White. On January 13, 2007, White's partially-clothed body was found in a Kalamazoo, Michigan, field. The previous evening, Davenport, a habitual felon, had agreed to drive White home from a friend's house where they had been smoking crack cocaine. An autopsy concluded that White had been strangled to death.

Following his arrest, Davenport, who is 6'5" and weighs 300 lbs., admitted strangling White, 5'2" and 103 lbs., but claimed he did so in self-defense. At trial, experts testified that it would have taken roughly 5 minutes to strangle the victim to death, but that she would

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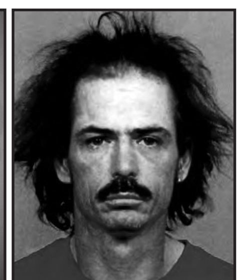
NINTH CIRCUIT RULINGS OVERTURNED IN TWO MURDER CASES

In a 6-3 decision announced on May 23, 2022, the U. S. Supreme Court overturned Ninth Circuit rulings in two murder cases. The lower court rulings had announced new delays in the death sentence of an Arizona double murderer and had 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.

The Criminal Justice Legal Foundation (CJLF) joined these cases to encourage a decision to overturn the Ninth Circuit's rulings, arguing that the lower court had misinterpreted federal law and Supreme Court precedent.

The high court's majority opinion by Justice Clarence Thomas noted that Congress had prohibited new hearings in federal court in these circumstances, with only narrow exceptions, and the courts had no authority to create their own exceptions. The defendants' proposed exception "lacks any principled limit." In addition, Justice Thomas wrote, "Serial relitigation of final convictions undermines the finality that 'is essential to both the retributive and deterrent functions of criminal law.' "

David Ramirez


Barry Jones

A jury convicted David Ramirez, a parolee with two violent prior felonies, on strong evidence of the 1989 stabbing murders of his girlfriend and her 15-year-old daughter. On the day of the

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VIEWPOINT

CONFRONTING CRIME

On April 12, New York Governor Kathy Hochul told reporters that she was "sick and tired of reading headlines about crime," in the wake of that day's Brooklyn subway shootings and bombing that injured at least 16 commuters. A week earlier, after 18 people were shot and 6 were killed at a shooting in downtown Sacramento, California, Governor Gavin Newsom told reporters, "Sadly, we once again mourn the lives lost and for those injured in yet another horrendous act of gun violence." On April 11, President Biden announced that his administration's effort to combat the nation's unprecedented spike in violent crime was going to be a crack down on gun kits assembled at home called "ghost guns." At a press conference, the President told reporters, "These guns are weapons of choice for many criminals, we're going to do everything we can to deprive them of that choice." These politicians either don't know or don't care about the real reason crime and violence has increased in New York, California, and dozens of other states across the country. It is not the availability of firearms, as most of those used in crime are stolen. It is the criminals shooting the firearms who are left free on the streets by so-called compassionate sentencing reforms. Those "reforms" have been adopted by progressive district attorneys, Congress, state legislatures, and state voters who were misled through ballot measures.

The narrative behind compassionate sentencing, including former President Trump's First Step Act, is that the criminal justice system is fundamentally racist, intentionally targeting minorities for arrest and incarceration. Reform advocates insist that the government can separate "low level" offenders and get them to stop committing crimes with government-funded programs that help them become productive members of society. Believing that this is true, politicians like Newsom, Hochul, and Biden must find something else to blame when their narrative is proven false: It's guns causing the increase in crime, not our policies.

An exhaustive study released on June 21, 2022, by the U.S. Sentencing Commission, tracking 23,000 federal criminals released from prison, found that offenders who served longer sentences were far less likely to commit new crimes after release. The offenders who served sentences of between 5-10 years had 18% decreased odds to be re-arrested within 8 years of release from prison. Offenders who served more than 10 years had 29% decreased odds to be rearrested. This is significant evidence that tougher sentencing reduces crime.

Mountains of government data prove that minorities disproportionately commit crimes, resulting in the disproportionate arrest and incarceration of minorities. The data also shows that most victims are the same race as the perpetrator. Any effort to restrict the arrest, prosecution, and incarceration of minority offenders guarantees that more law-abiding minorities are going to be robbed, beaten, raped, and murdered. Such policies are absolutely racist.

Thirty-five years ago America learned that the government cannot distinguish between an offender who will only steal bicycles or televisions from a bank robber or a serial murderer. In the late 1960s, the nation accepted the "low level" offender narrative and allowed the adoption of policies that left tens of thousands of thieves, scammers, and wife beaters on the streets for "treatment." By the late 1980s, violent crime had tripled, while criminal gangs marketed drugs like crack cocaine across the country and thousands of so-called "low level" offenders became serial rapists and murderers.

Sorry Mr. President, but ghost guns are not the preferred weapon of criminals. Stolen guns are. All of the guns recovered in the Sacramento shootings on April 3 were stolen. The criminals who fired the guns in the Brooklyn shootings did not buy them legally at a gun shop, a gun show, or online as a kit. A knife was the weapon of choice for the criminals who stabbed the

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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.

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. While the judge's decision is being appealed, Cottle will remain in prison and continue to serve his sentence. **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 a Ninth Circuit ruling that announced new delays in the death sentence of an Arizona double murderer and had 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 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. **WIN**

Brown v. Davenport: 4/21/22. A U. S. Supreme Court 6-3 decision to reinstate the conviction and life sentence of Michigan killer Ervine Davenport. Davenport, who is 6' 5" and weighs 300 lbs., admitted to strangling Annette White, 5' 2" and 103 lbs., in 2007, but he claimed he did so in self-defense. White's seminude body was found in a field the morning after her death. Overwhelming evidence convinced a jury to convict Davenport in 2008. During the trial, Davenport was partially shackled, which is unconstitutional, but after the trial every juror stated that the shackles did not influence their unanimous decision. On appeal and habeas corpus, Davenport claimed that the shackles prejudiced the jury, but the state courts and federal district court all found this to be harmless error. The federal Sixth Circuit Court of Appeals disagreed, holding that all the lower courts used the wrong standard to find the error harmless. CJLF joined the case to argue that federal law and Supreme Court precedent requires that the federal courts give great deference to state court findings of harmless error, and that a clear violation of existing law and precedent must be found in order to overturn a state court decision. The Sixth Circuit failed to do this and improperly applied the wrong standard. The Supreme Court agreed *utilizing CJLF arguments in its decision*. **WIN**

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"BOXSCORE"

continued from page 3

Ramirez v. Collier: 3/24/22. U. S. Supreme Court ruling upholding a Texas murderer's claim that the state is violating his rights by refusing to allow a minister to touch him and pray aloud in the execution chamber while he receives a lethal injection. The federal District Court and the Fifth Circuit Court of Appeals rejected the claim. Ramirez was convicted of the 2004 stabbing murder of a man and the robbery of a woman at knifepoint. At issue was whether there is a limit to religious accommodations for condemned murderers required by the Constitution and federal statutes. CJLF argued that there should be a limit, and the Court should settle on what that should be. CJLF also noted that raising this type of claim at the last minute after decades of review on direct appeal and habeas corpus is an abuse of the legal process. The absence of clergy holding hands with a murderer did not meet this standard when the methods of execution were hanging, electrocution, or the gas chamber, and it should not apply today when the method of execution is painless euthanasia. The Court disagreed, staying the execution until Texas amends its policy to accommodate the murderer's request. **LOSS**

United States v. Tsarnaev: 3/4/22. U. S. Supreme Court decision reinstating the death sentence of one of the Boston Marathon bombers. Muslim terrorist Dzhokhar Tsarnaev, along with his brother, set off two pressure-cooker bombs at the 2013 Boston Marathon, killing three people and maiming hundreds of others. Tsarnaev also killed a young MIT police officer while attempting his escape. On appeal, Tsarnaev claimed that the trial judge's questioning of potential jurors regarding pretrial publicity violated his rights. The First Circuit Court of Appeals *agreed and overturned his sentence*. CJLF had joined the case to argue that the trial judge followed a 1991 Supreme Court decision specifying the requirements for questioning potential jurors and noted that the appeals court did not have the authority to add new requirements. Tsarnaev also claimed that the trial judge erred in excluding marginally relevant evidence that his brother might have been involved in an earlier unrelated murder. CJLF argued that the judge properly rejected that evidence. The high court adopted these arguments in its 6-3 decision, which will help prevent other criminals in high profile cases from second-guessing a trial judge who did a good job. **WIN**

In re Mohammad Mohammad: 1/3/22. Unanimous California Supreme Court decision announcing that, contrary to a state appeals court ruling, California's 2016 Proposition 57 does not allow early parole for criminals convicted of violent felonies. The case involved a criminal convicted in 2012 of nine violent crimes and six nonviolent crimes. While the initiative was advertised as permitting early parole eligibility for state prisoners "convicted of a nonviolent felony offense" after completing the full term of their primary offense, a state appeals court held that, because Mohammad had a non-violent crime among his convictions, Proposition 57 requires that he be eligible for early release. CJLF had joined the case to argue that the ballot measure's language was ambiguous on this point and that the lower court had misinterpreted the initiative to create this absurd result. CJLF urged the Supreme Court to look at the proponents' arguments supporting the initiative and the ballot materials to determine the intent of the voters. The court agreed, overturning the lower court ruling and holding that the voters' intent was that only nonviolent criminals would be eligible for early parole. **WIN**

In re Alexander: 9/16/21. Federal Ninth Circuit review of a CJLF petition on behalf of the families of five murder victims asking the court to vacate 24 invalid stays of execution, prohibit the district court from granting any additional stays, and lift restrictions on California's preparations for executions. For 15 years, a federal district court in San Francisco has blocked the executions of every death-sentenced murderer in California who has exhausted his appeals and become eligible for execution. The original 2006 order stayed the execution of Michael Morales—sentenced to death for the 1981 kidnapping, rape, and brutal murder of a high school cheerleader on the claim that the state's three-drug protocol amounted to cruel and unusual punishment in violation of the Eighth Amendment. Since 2006, two precedent-setting U. S. Supreme Court decisions provided the state with opportunities to challenge the stays, but the state has failed to take action. CJLF filed its petition in the Ninth Circuit in January 2019 after the district court rejected a similar petition filed by district attorneys and refused to consider the Foundation's *amicus curiae* (friend of the court) brief. After Governor Newsom issued his moratorium and repealed the state's execution protocol, the federal case was dismissed, and the court stay was removed. This left nothing to be decided in the Ninth Circuit, and the petition was dismissed. **DRAW**

People v. McDaniel: 8/26/21. Unanimous California Supreme Court decision rejecting a Los Angeles gang enforcer's claim that his death sentence was unconstitutional. One of Donte McDaniel's victims was shot so many times in the face that his head collapsed. He also killed a 52-year-old woman, and attempted to kill two younger women who were left permanently disabled. On direct appeal, McDaniel argued that his death sentence was invalid because the jury did not use the *beyond a reasonable doubt* standard to find the aggravating circumstances or to select the death sentence. The *beyond a reasonable doubt* standard is required in the law for a finding of guilt. CJLF joined the case to argue that nothing in California law or state legal history requires jurors meet that standard for finding aggravating circumstances or sentencing. Nobody can explain how a jury would even go about sentencing a murderer to death *beyond a reasonable doubt*. The Supreme Court agreed, citing CJLF and utilizing our arguments in the majority opinion. A decision to uphold the murderer's claim in this case would have overturned every death sentence given to the state's worst murderers over the last 43 years. **WIN**

TOTAL	**7 Wins**	**1 Loss**	**1 Draw**

STATE PAROLE LAW UNCONSTITUTIONAL

CJLF lawsuit on victim's behalf blocks murderer's parole

"The Court concludes that SB 394 was not lawful ...."

In a decision announced on June 3, a Sacramento Superior Court judge blocked the parole of murderer Lawrence Cottle, finding a 2017 state law that made him eligible for parole unconstitutional.

The decision in the case of **Peterson v. Board of Parole Hearings**, was in response to a lawsuit by Laura Peterson, whose father, Alan Peterson, was murdered by Cottle in 1996 during a five-day crime spree. Cottle could have received a death sentence were he an adult at the time of the murder, but because he was 16 he was sentenced to life in prison without parole (LWOP). Under California's 1990 Proposition 115, state judges were given the discretion to sentence aggravated murderers under age 18 to either 25 years to life or LWOP. The initiative specified that it could only be amended by a two-thirds vote of both houses of the California Legislature.

In 2017, the Legislature passed, and Governor Jerry Brown signed, SB 394 into law. Subject to few exceptions, that law authorizes parole eligibility during a prisoner's 25th year of incarceration to inmates who were convicted of aggravated murder prior to turning 18 years old and sentenced to LWOP. The bill passed in the California State Assembly with 44 votes, 9 votes shy of two-thirds, which is 53. In May 2021, Laura Peterson learned that Cottle was scheduled for a parole hearing under this law. At a June hearing, a panel of the Board of Parole Hearings (BPH) found Cottle suitable for parole. In September, the BPH vacated Cottle's parole, but later scheduled a new hearing for February 25, 2022.

On January 7, 2022, the Criminal Justice Legal Foundation (CJLF) filed a lawsuit on behalf of Laura Peterson to block Cottle's parole hearing, arguing that SB 394 was invalid because it was not passed by a two-thirds vote of the State Assembly as required by Proposition 115.

On February 4, 2022, CJLF filed an application with the Superior Court of Sacramento County to stop Cottle's upcoming parole hearing. Judge Stacy

Boulware Eurie scheduled a hearing on the matter for the morning of February 25. At that hearing, CJLF Associate Attorney Kymberlee Stapleton argued that the law allowing the parole hearing to proceed as scheduled was unconstitutional. Because the BPH had scheduled Cottle's parole hearing prior to Peterson initiating the case, the judge allowed the parole hearing to proceed as scheduled. At that hearing, Cottle was granted parole.

The judge noted that because the BPH decision would not become final for 120 days, she would consider Peterson's legal challenge to the law. On March 10, CJLF filed a petition to block Cottle's release on parole.

That petition was argued on Friday, June 3. A decision was posted on the court's website on Monday afternoon, June 6. The BPH, Cottle's attorney, and the California Department of Corrections and Rehabilitation claimed that because SB 394 did not actually amend Proposition 115, the Legislature was not required to pass it by a two-third's vote. The court rejected that claim. The BPH and Cottle also argued that adoption of SB 394 was required to comply with recent U. S. Supreme Court decisions placing limits on LWOP for juvenile murderers. CJLF argued that they misinterpreted those decisions. The court agreed, and noted, "[t]he Court concludes that SB 394 was not lawful because it amends Proposition 115 without the required two-thirds majority ...."

The murder occurred on November 14, 1996. Peterson, a Laguna Hills contractor, was just leaving a Jack in the Box with his lunch when Cottle shot him in the chest during an attempted carjacking. Peterson died in a hospital 30 minutes later. The next day Cottle robbed a man at gunpoint in Culver City. An hour later he robbed a young mother at an Inglewood check cashing store, pointing his gun at her 4-year-old daughter's head as the woman emptied her purse. The next day Cottle robbed a man and stole his car in Gardena and was caught when he crashed the stolen vehicle into a police car. For his crimes, Cottle was tried as an adult and convicted on 13 counts, including aggravated first-degree murder.

"A sentence of LWOP exists for good reason, and legal finality for the murder victim's family is one of them. The Legislature's transformation of LWOP sentences into 25-years-to-life sentences for juvenile murderers, without the required legislative majority, sentences victims' families to a lifetime of frequent and difficult parole hearings. This decision is likely to be appealed. We intend to continue representing Laura Peterson to assure that this misguided law is not enforced," said Stapleton.

Note: Under this court's tentative ruling system, the judge issues a tentative ruling before the hearing. That ruling, issued on June 2, is available at https://cjlf.org/cloud/PetersonTentativeRuling.pdf. The final ruling was issued June 3. It is available at https://cjlf.org/cloud/PetersonFinalRuling.pdf. The final ruling incorporates the tentative ruling with additional comments, so both are needed to constitute the full ruling of the court.

"TWO MURDER CASES"

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murders, police were summoned to the victims' apartment by neighbors who heard screaming. Ramirez was found covered in blood inside the apartment alone with the victims' bodies. Both died of multiple stab wounds, and the young girl was found nude. Ramirez later admitted having sex with the young girl on the night of the murders as well as on four prior occasions. At trial, Ramirez did not deny his guilt, but claimed that his difficult childhood and mental disabilities disqualified him from a death sentence. The judge disagreed and, based upon the aggravating circumstances, sentenced him to death. After several years of review on appeal and state habeas corpus, Ramirez claimed for the first time on federal habeas corpus that his trial attorney was incompetent because he failed to introduce evidence of his "mental retardation, brain damage, impaired intellectual functioning, childhood poverty, childhood neglect and abuse, *in utero* exposure to pesticides and alcohol, and the fact that he was the product of the rape of his 15-year-old mother by his uncle. He also contends that Siegel [his attorney] performed ineffectively in failing to provide [appointed expert] Dr. McMahon with additional information concerning Ramirez's low IQ scores and poor grades."

Barry Jones was convicted of the 1994 sexual assault and murder of his girlfriend's 4-year-old daughter. Neighbors testified to seeing Jones hit the child the day before she died. Friends testified that while visiting Jones that evening they saw the little girl lying on a couch bleeding and crying in pain. Jones lied, saying that a paramedic had examined her. Early the next morning, after the little girl died, Jones dropped her and her mother off at a hospital and drove away. The Pima County medical examiner determined that the child died from an infection caused by blunt force trauma to the abdomen and that she had also been sexually assaulted. For these crimes, Jones received a death sentence. After his conviction and sentence were upheld by Arizona courts on direct review and state habeas corpus, Jones claimed for the first time on federal habeas corpus that his trial attorney had been incompetent for failing to sufficiently challenge the medical evidence by introducing experts to question the timeline for the child's injuries. The claim does not challenge the evidence that Jones failed to take the badly injured girl for medical attention and falsely told concerned people that she had already been seen by paramedics.

In Ramirez's case, the federal district court denied the murderer's claims, finding that based upon the trial record, the defense attorney was not incompetent. In Jones's case, the district court initially denied the claims but granted them after the Ninth Circuit sent the case back. 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.

When the U. S. Supreme Court agreed to hear Arizona's appeal, CJLF joined the case. In a scholarly *amicus curiae* (friend of the court) brief, CJLF Legal Director Kent Scheidegger argued that the Antiterrorism and Effective Death Penalty Act of 1996 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 Court's opinion follows similar reasoning.

"Both murderers had the opportunity to make their cases in state court," said Scheidegger. "In 1996, Congress cracked down on the misuse of habeas corpus to second-guess judgments that have already been fully and fairly decided in state courts. Today's decision affirms that federal courts cannot make up their own exceptions to evade that law," he added.

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CRIME &
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GASCÓN LOSES BID TO FORCE JUDGES TO CUT CRIMINALS' SENTENCES

On June 2, 2022, California's Second District Court of Appeal decided **Nazir v. Superior Court**, a case in which Los Angeles District Attorney George Gascón sought to prevent a trial judge from keeping the sentencing enhancements charged against a habitual felon. The court unanimously rejected Gascón's position on the main issue: whether the judge was required to dismiss charges allowed under state law at the request of the district attorney (Gascón).

The defendant in the case, Rehan Nazir, was charged in May 2020 with 35 felony counts, including use of a firearm, false imprisonment, extortion, and burglary. Later that year, LA County voters replaced DA Jackie 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 the judge to dismiss several counts that would increase the sentence upon conviction. The judge refused, noting that doing so was not in the interest of justice. Nazir took the case to the Court of Appeal. Because Gascón's office would not defend the judge's decision, the appeals court invited the Criminal Justice Legal Foundation (CJLF) and the California District Attorneys Association to defend it. Among those joining on the criminal's side were Gascón, California Attorney General Rob Bonta, and Berkeley Law School Dean Erwin Chemerinsky.

> **Gascón's position that he has sole discretion to decide what to charge or not to charge was rejected in this case, the court saying, "we disagree with the People that the trial court lacked discretion to deny a motion by the People to dismiss enhancements pursuant to [Gascón's] policy."**

In a scholarly brief, CJLF Associate Attorney Kymberlee Stapleton argued that state law and court precedent vests wide discretion with judges to dismiss or preserve charges in criminal cases, and a local district attorney's policy does not override it.

The court's decision cited existing state precedent, noting: "The imposition of sentence and the exercise of sentencing discretion are fundamentally and inherently judicial functions."

The Court of Appeal did require the trial court to conduct a new hearing and consider a subsequent amendment to the statute and the district attorney's policies. But the court made it clear that the judge retains the discretion to keep the enhancements in Nazir's case.

"This decision is a victory for Nazir's victims and for judicial discretion. But the case itself is a disturbing example of where the Los Angeles District Attorney and California's Attorney General stand when it comes to holding criminals accountable and protecting the public," said Stapleton.

Currently Before the Courts

CJLF v. CDCR: CJLF lawsuit filed in Sacramento Superior Court representing two crime victims' families to block enforcement of California Department of Corrections and Rehabilitation regulations, announced last May. The new regulations would allow the early release of up to 76,000 criminals convicted of both violent and nonviolent crimes, including murderers and sex offenders. Violent inmates that prison officials determine have behaved well may be eligible for a one-third reduction in their sentences, more than double the maximum provided by state law. They may receive further reductions for participation in programs, despite an express prohibition of such credit in state law. In the lawsuit, CJLF argues that the new 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 October 7 of this year.

The victories reported in this *Advisory* prove that CJLF is making headway in the battle for a safer America. In recent elections, voters have rejected pro-criminal politicians. Our work to draw attention to soft-on-crime district attorneys is paying off! But much more needs to be done to restore the rule of law and real consequences for crime. Your annual tax-deductible contributions make it possible for us to do this important work. 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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Spring/Summer 2022

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"MICHIGAN MURDERER"

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have blacked out in less than a minute. Evidence indicated that after Davenport killed the woman and disposed of her body, he went to her home and ate some food, then stole some of her belongings, including a stereo. Other evidence included Davenport's own words that he "offed her" and testimony from witnesses of him bragging that if he had a problem with someone he would choke them. The combined evidence convinced the jury to convict Davenport of first-degree murder. He received a sentence of life in prison without the possibility of parole.

During the trial, Davenport was partially shackled, which is unconstitutional without showing specific need for shackling. After the trial, the jurors were interviewed and each one stated that the shackles did not influence their unanimous decision. On both direct appeal and federal habeas corpus, Davenport claimed that the shackles prejudiced the jury, but the state courts and federal district court disagreed and found it to be harmless error. On June 30, 2020, a divided panel of the federal Sixth Circuit Court of Appeals disagreed, holding that the state courts and the federal district court used the wrong standard to find the error harmless.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Associate Attorney Kymberlee Stapleton argued that it was the Sixth Circuit that used the wrong standard to overturn Davenport's conviction. Federal law requires that the habeas court respect the findings of the state courts which, as guided by U. S. Supreme Court precedent, held that the shackling, while an error, had no effect on the jury or the outcome of the trial and was therefore harmless.

"The Sixth Circuit in this case misapplied law and precedent to overturn the conviction of an admitted killer. The Michigan state courts thoroughly evaluated and rejected Davenport's claim that his partial shackling at trial affected the jury's verdict. With today's decision, the Supreme Court confirmed that federal habeas courts must give great deference to a state court's determination of harmless error," said Stapleton.

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24-year-old UCLA grad student to death, raped and murdered the 20-year-old Sacramento woman while she took a walk, and killed the 35-year-old Asian woman in her New York apartment in January and February of this year. There were no guns involved in the rash of incidents where criminals pushed men and women in front of New York subways. Guns were also not involved when Darrell Brooks, Jr. ran down 40 people at a Waukesha, Wisconsin Christmas Parade last November, leaving 6 dead.

All of these killers had one thing in common: they were habitual criminals left on the street due to compassionate "reforms" that reduced or eliminated their bail for a recent crime and gave them little or no jail or prison time for their previous crimes.

The empty words of remorse and/or anger from politicians and progressive prosecutors who support these policies are the worst kind of hypocrisy. The law-abiding public seems to be figuring this out.

The recent recall of San Francisco DA Chesa Boudin and the impending qualification of the recall of LA DA George Gascón are proof of this. But Americans must also look to the views on crime and law enforcement held by their state legislators, the people they send to Congress, and to the Governors and Attorneys General they elect as well. Many innocent lives depend on this.

Michael Rushford
President & CEO