CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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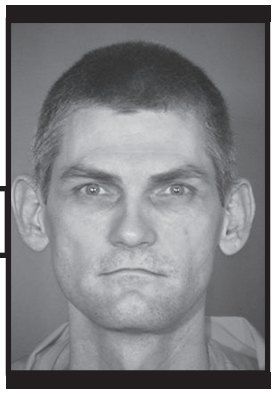
SUPREME COURT UPHOLDS DEATH SENTENCE FOR DOUBLE MURDERER

In a February 25 decision, the U. S. Supreme Court rejected a double murderer's claim that the Arizona Supreme Court should have sent his case back for a new sentencing hearing before a jury, rather than reconsidering the sentence itself. CJLF arguments were *utilized* in the Court's majority opinion.

At issue in **McKinney v. Arizona** was whether the high court's ruling in **Ring v. Arizona**—which requires a jury rather than a judge to find aggravating factors related to a murder that qualify a murderer for a death sentence—also applies to the actual sentencing decision, where a judge or a jury determine if the murderer should be sentenced to death or life without the possibility of parole.

CJLF joined the case to discourage a decision extending the requirement announced in **Ring** to require that a jury make the actual sentencing decision.



James McKinney

In its 5-4 decision, the Supreme Court endorsed the limited scope of the **Ring** rule as briefed by CJLF. Writing for the majority, Associate Justice Brett Kavanaugh noted, "[I]n a capital sentencing proceeding . . . a jury (as opposed to a judge) is not required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."

The case involves the murders of two innocent people by James McKinney and his half-brother Charles Hedlund in March of 1991. The murders occurred during a two-month crime spree involving five burglaries. The burglarized homes were targeted in advance by the pair, based upon information from friends that there was money kept in them.

The fourth burglary in the spree occurred on the night of March 9, 1991, when McKinney and Hedlund broke into

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HIGH COURT REVIEWS RULING EXPANDING RIGHTS OF ILLEGAL ALIENS

In a March 7, 2019, ruling, a panel of the Ninth Circuit Court of Appeals announced that an illegal alien caught crossing the U. S. border is entitled to federal court review of his denial of asylum. The ruling in **Department of Homeland Security v. Thuraissigiam** announced that a federal law, which prohibits habeas corpus review of the alien's claim, violates the Constitution's Suspension Clause.

CJLF has joined the case to argue that under the Constitution, Congress has the authority to limit access to habeas corpus by noncitizens who have no substantial connection to the United States.

The case involves the February 17, 2017, arrest of a Sri Lankan national named Vijayakumar Thuraissigiam 25 yards inside the California/Mexico border moments after he illegally entered the U. S. Thuraissigiam claimed that he was a persecuted minority in his home country who had been detained and beaten because of his political beliefs. A review of this claim by the Department of Homeland Security concluded that it was not credible and ordered his deportation. In January 2018, Thuraissigiam filed a petition for habeas corpus in federal District Court, arguing that the deportation order violated his constitutional rights. The District Court rejected the petition, finding that federal law limited access of illegal aliens to judicial review of claims in these cases.

Thuraissigiam appealed that ruling to the Ninth Circuit Court of Appeals, which on March 3, 2019, reversed the lower court and ordered review of his asylum claim. While agreeing that the federal law restricted judicial consideration of his claims, the Ninth Circuit held that such a restriction violated the Constitution's Suspension Clause.

In October 2019, the U. S. Supreme Court agreed to consider the government's appeal of the Ninth Circuit rul-

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HIGH COURT DENIES LAWSUIT IN CROSS-BORDER SHOOTING

"unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. . . . Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. . . . , we refuse to extend *Bivens* into this new field."

In a 5-4 decision announced on February 26, the U. S. Supreme Court affirmed a Fifth Circuit ruling that prohibits the Mexican parents of a Mexican teenager, killed by a U. S. Border Patrol Agent in a cross-border shooting, from suing the agent for damages under the U. S. Constitution.

At issue in **Hernández v. Mesa** was whether parents, who are Mexican citizens, have the right to sue a U. S. law enforcement officer for an incident on the Mexican side of the U. S.-Mexico border, which resulted in the death of their 15-year-old son, also a Mexican citizen living in Mexico.

CJLF originally joined the case in 2017 to encourage a decision denying the lawsuit. In a scholarly *amicus curiae* (friend of the court) brief CJLF Associate Attorney Kymberlee Stapleton argued that under the circumstances of the shooting, the parents cannot seek to hold a border patrol agent personally liable for an alleged offense which occurred in another country. In their lawsuit, the teenager's parents argued that their son's constitutional rights were violated, and thus they were entitled to sue and hold the agent personally liable for excessive force resulting in the death of their son. They cited a 1971 Supreme Court ruling in **Bivens v. Six Unknown Federal Narcotics Agents** for support. In that case, federal agents without a warrant searched the Brooklyn home of Webster Bivens, a U. S. citizen, and arrested him on drug charges which were later dismissed. Bivens sued the agents for violating his Fourth Amendment rights and won.

In a June 2017 ruling, the U. S. Supreme Court sent the **Hernández** case back to the Fifth Circuit Court of Appeals to determine if the lawsuit was affected by the Court's 2017 decision in another case (**Ziglar v. Abbasi**), which held that alleged terrorists from a foreign country could not sue U. S. officials for implementing anti-terrorist policies. In March 2018, the Fifth Circuit held that, after considering **Abbasi,** the unique circumstances of the case precluded the Mexican parents from suing the border patrol agent in a U. S. court.

In 2019, when the Supreme Court agreed to hear Hernandez's appeal, the Foundation again joined the case to encourage a decision affirming the Fifth Circuit's ruling, noting that in light of **Abbasi** and the unique circumstances of this case, **Bivens** should not extend constitutional protections to foreign citizens with no ties to the United States.

Writing for the majority, Associate Justice Samuel Alito stated, "unlike any previously recognized **Bivens** claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Because of the distinctive characteristics of cross-border shooting claims, we refuse to extend **Bivens** into this new field."

The Supreme Court has not extended a **Bivens**-type cause of action and remedy to a new context in over 30 years. The Foundation's *amicus curiae* brief argued that Congress, not the judiciary, is the proper branch to decide if noncitizens can recover money damages for government conduct occurring in a foreign country. Noting that Congress has enacted no statute that permits a noncitizen who was injured abroad to file a damages claim against a federal law enforcement officer, the CJLF brief states that the "fact that Congress has deliberately and expressly

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PUTTING POLITICS AHEAD OF THE LAW

One of the lasting legacies of Jimmy Carter's single term as President (1977-1981) was his appointment of 15 liberal-activist judges to the 29-member Ninth Circuit Court of Appeals. The Ninth is easily the largest circuit in the nation, with jurisdiction over the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In the decades since President Carter replaced half of its members, the Ninth Circuit has earned its reputation as the most accommodating federal appeals court in the country for criminal defendants. When our Foundation was formed in 1982, the initial focus was to oppose the assault on law enforcement by California's ultra-liberal Supreme Court. But by 1987, our attention was shifting to the federal courts and particularly to the Supreme Court's review of Ninth Circuit rulings. While we continued to join state cases, and some from the other federal circuits, a large share of our participation over the past 23 years was in state appeals from pro-defendant Ninth Circuit rulings.

In virtually every case we joined, an Attorney General from one of the nine western states was appealing a Ninth Circuit ruling overturning a criminal's conviction or sentence. This has changed in California, where an appeal by the Attorney General to the Supreme Court after a clearly unjust Ninth Circuit ruling is no longer a sure thing.

A summary reversal of a California murder conviction issued on January 15, by an en banc panel of the Ninth Circuit may offer a preview of things to come. In its reversal, the court revealed a new defense claim it would like to invent. An actual decision by the court would have sidestepped the deference requirement for state court decisions required by Congress in the Antiterrorism and Effective Death Penalty Act (AEDPA). This unique holding occurred in **Ellis v. Harrison**, a 31-year-old murder case prosecuted in San Bernardino, California.

In 1989, habitual felon Ezzard Ellis shot two young men waiting in a crowded McDonald's drive thru in order to steal their car. One of the victims died. Ellis and an accomplice were both sentenced to life without parole for these crimes. Both Ellis's conviction and sentence were upheld on direct appeal before California courts. In 2003, 14 years after his conviction and state appeals, Ellis, who is black, learned that his trial attorney was prejudiced against minorities. On state habeas corpus, Ellis claimed that his attorney's bias created a conflict of interest which rendered him ineffective, invalidating his conviction. Ellis failed to establish that his trial counsel did anything or failed to do anything which prejudiced his defense. Every court that reviewed this claim, including the state courts of appeal, a federal District Court, and a panel of the Ninth Circuit, denied it, noting that the U. S. Supreme Court in **Strickland v. Washington** requires a reasonable probability that counsel's alleged errors made a difference. The courts also noted that the Supreme Court's decision in **Teague v. Lane** (won by CJLF) prohibited the lower courts reviewing a case on habeas corpus from announcing a new rule of law. The California Attorney General's Office had successfully upheld Ellis's conviction through all 30 years of review, but last year, after the Ninth Circuit agreed to reconsider en banc its panel's earlier decision to deny Ellis's prejudice claim, Attorney General Xavier Becerra's office *changed its position* and announced that it would no longer defend the conviction.

In response, the Ninth Circuit invited CJLF Legal Director Kent Scheidegger to submit an *amicus curiae* brief and participate in oral argument in opposition to Ellis's claim. The CJLF brief argued what the lower courts had recognized, that the **Strickland** standard had not even been approached, let alone met, and that the deference requirement in AEDPA must be respected. The state courts had rejected the claim that the personal views of the defense attorney, unknown to the defendant or the court, which had no demonstrable impact on his performance, somehow constitutes ineffective assistance of counsel. That decision does not contradict any U. S. Supreme Court precedent, and Congress has forbidden the lower federal courts from overturning state court decisions based merely on their own disagreement.

The Ninth Circuit's summary reversal was based entirely on the Attorney General's waiver of the **Teague** rule and his concession at the rehearing that Ellis's conviction should be overturned.

Because the Attorney General agreed with the reversal, he will not appeal on behalf of California and no one else can take his place. A concurring opinion, signed by three of the judges on the panel, including the Chief Judge, provided an emotional 15-page discussion on how the racial bias of a defense attorney creates a conflict of interest with a minority defendant, virtually guaranteeing that his performance at trial will be inadequate. Somehow this entirely new rule complies with Supreme Court precedent. Every defense attorney in the circuit will now understand that the Chief Judge and some of his colleagues will entertain a petition by a patently guilty murderer claiming "defense attorney bias" prejudiced his case.

When another California murderer raises the new "defense attorney bias" claim on habeas corpus, will Attorney General Becerra defend the conviction? If the claim is raised in a case stemming from Arizona or Idaho, with Attorneys General that actually argue the law rather than taking a political position, will the Ninth Circuit embrace it in a decision likely to be appealed? We shall see.

Ellis's accomplice, who had a different defense attorney, will serve out his life sentence. Unless the San Bernardino District Attorney can successfully retry Ellis 31 years after the murders, he will likely go free. Welcome to the world of woke justice.

Michael Rushford
President & CEO

"ILLEGAL ALIEN RIGHTS"

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ing. Thuraissigiam is represented by the American Civil Liberties Union with briefs in support from ten other organizations, including the American Bar Association, most represented by attorneys from "white shoe" law firms who have donated their services. The American people are represented by the U. S. Solicitor General, with supporting briefs filed by two groups of state attorneys general and the Criminal Justice Legal Foundation.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Legal Director Kent Scheidegger argues that the Constitution gives Congress the authority to limit the right of federal habeas corpus for noncitizens. The Ninth Circuit's ruling to the contrary violates the separation of powers and is invalid. Thuraissigiam's attorneys rely on a 2008 Supreme Court ruling in **Boumediene v. Bush** where a one-vote majority of the Court extended some constitutional rights to suspected terrorists detained in Guantanamo Bay. The Foundation argues that this "deeply flawed" ruling gave rights to aliens "living in the United States" or at least in territory under U. S. control, not aliens who just stepped across a U. S. border. Extending that ruling to include Thuraissigiam would compound an already improper intrusion into Congressional authority.

"The constitutional privilege of habeas corpus belongs to the people of the United States. While that includes resident aliens as well as citizens, it does not extend to someone who just stepped across the border. Whether border jumpers will be allowed to sue the government in our courts is for Congress, not the courts, to decide," said Scheidegger.

"CROSS-BORDER SHOOTING"

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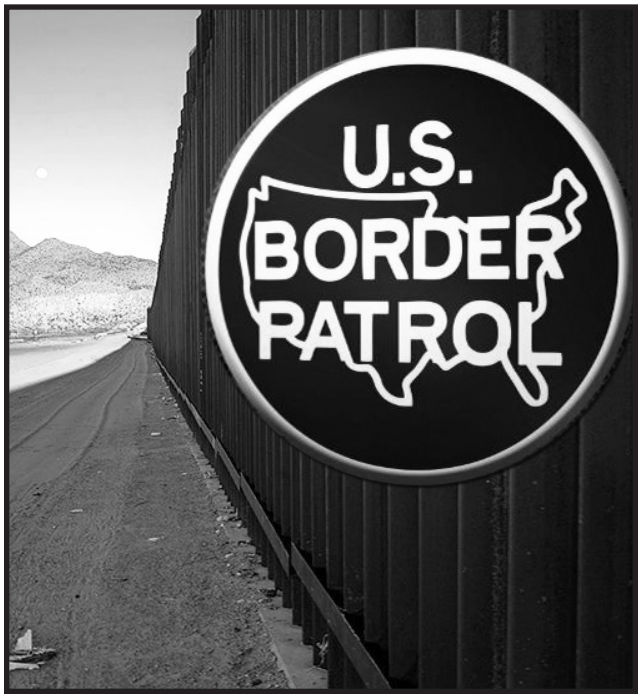
excepted the recovery of monetary relief for torts occurring in a foreign country should speak volumes" to the Court.

"A decision to allow this lawsuit to proceed would have permitted the family of a noncitizen with no ties to the U. S., who was likely engaging in criminal activity, to force a border patrol agent into litigation over an incident that had been investigated by the Department of Justice," said Stapleton. "Border patrol agents are our country's frontline guards and they must make split second judgments on a daily basis. If the Court had opened up the ability for them to be personally liable for those difficult decisions, it would have chilled the enforcement of America's border security."



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www.crimeandconsequences.com

CRIME & CONSEQUENCES

CJLF CHALLENGES LAW SHORTENING SENTENCES FOR JUVENILE MURDERERS

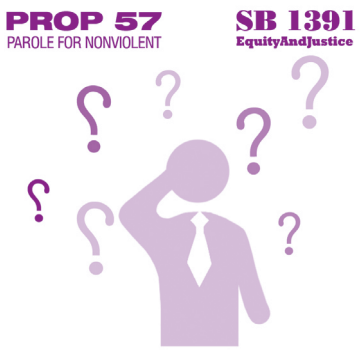
The California Supreme Court has agreed to review a constitutional challenge to a 2018 law (SB 1391) that prohibits all 14 and 15 year olds, including the worst juvenile murderers, from being tried in adult court.

The California Constitution specifies that a ballot initiative adopted by the voters cannot be amended by the Legislature unless the initiative specifically allows it. An initiative can only be amended by the voters' adoption of another initiative.

At issue in the case of **O.G. v. Superior Court**, is whether SB 1391, signed into law in 2018 by Governor Jerry Brown, conflicts with Proposition 57, a Brown-sponsored ballot initiative adopted by California voters in 2016. Proposition 57 allows a judge to decide if a 14- or 15-year-old murderer should be tried in adult court. A unanimous panel of the state's Second District Court of Appeal held that SB 1391 conflicts with Proposition 57 by removing this option and is therefore invalid. Five divided panels of the Fourth, Fifth, and Sixth District Courts of Appeal ruled that there was no conflict. The Supreme Court has stayed those rulings until it decides the **O.G**. case.

The Criminal Justice Legal Foundation is joining the case to argue that SB 1391 is unconstitutional.

The **O.G.** case involves a 15-year-old street gang member who is facing trial



for fatally shooting Jose Lopez, 22, of Port Hueneme on April 22, and stabbing Adrian "Mikey" Ornelas, 26, of Oxnard to death on May 20, in order to gain respect from his fellow gang members.

When the Ventura County District Attorney requested that the killer be tried in adult court, the presiding judge granted it, noting that by requiring he be tried in juvenile court SB 1391 violated Proposition 57. When the murderer appealed that holding, California Attorney General Xavier Becerra filed an *amicus curiae* (friend of the court) brief supporting his appeal. Following the unanimous decision of the Second District, the Supreme Court agreed to review the lower court decision.

Both the murderer and Attorney General Becerra claim that Proposition 57 allows amendments by the Legislature if the amendments are "consistent with and will further the intent" of the initiative. They argue that Proposition 57 was enacted to reduce the number of juveniles tried in adult court by removing the decision from the District Attorney and placing it with a judge. It is their position that eliminating all 14 and 15 year olds from being tried as adults therefore furthers the initiative's goal.

In a scholarly *amicus curiae* brief, Foundation Associate Attorney Kymberlee Stapleton will argue that a law that allows the prosecution of a juvenile murderer in adult court is not consistent with a law that prohibits it. The intent of the voters and the proponents of Proposition 57 was to leave that decision with a judge. Because SB 1391 prevents a judge from making that decision, it is inconsistent with the intent of the initiative.

Under current California law, a murderer convicted in juvenile court can only be incarcerated up to age 25. "A ruling upholding SB 1391 would permit the early release of some of the state's most violent juvenile criminals, and it would open the door to appeals from other juvenile murderers who received adult sentences to claim that they are entitled to a new trial in juvenile court," said Stapleton. "Such a ruling would undermine direct democracy in California by allowing the Legislature to amend voter approved initiatives based on its subjective view of 'voter intent,' " she added.

CJLF participation in the cases reported in this *Advisory* would not be possible without the annual support of loyal contributors. Right now we are following cases to restrict federal funding of sanctuary cities, block a law allowing shorter sentences for the worst juvenile murderers, and restore enforcement of the federal death penalty. In recent months, laws adopted to protect you and your loved ones have come under attack by progressives who care more about criminals' rights than the safety of law-abiding Americans. Help us continue to oppose their efforts by making your annual tax-deductible contribution today. Return the card on the right with your check, go to www.cjlf.org, or call us at (916) 446-0345 to contribute with your credit card. **Thank you!**

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"DEATH SENTENCE FOR DOUBLE MURDERER"

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the home of Christine Mertens, 40, who was alone. McKinney attacked Ms. Mertens, beating and stabbing her savagely as she fought for her life. He then held her face down on the floor and killed her with a shot to the back of the head. The pair then ransacked the house stealing $120 in cash. Two weeks later, McKinney and Hedlund broke into the home of 65-year-old Jim McClain. After shooting Mr. McClain in the back of the head while he slept in his bed, the pair burglarized his home and stole his car.

In 1993, McKinney and Hedlund were convicted of first-degree murder. At the sentencing hearing the court found several mitigating factors, including McKinney's difficult childhood and psychiatric testimony that he suffered post-traumatic stress as a result. Aggravating factors included the fact that McKinney killed his victims for money and that he brutally stabbed and beat Ms. Mertens as she fought for her life before killing her with a shot to the back of the head. The court determined that the aggravating factors outweighed the mitigating factors and sentenced McKinney to death. After his claims of error were rejected on direct appeal, McKinney's petition for federal habeas corpus was rejected by a federal district judge. In 2015, the Ninth Circuit reversed the district court ruling by a narrow 6-5 vote, finding that McKinney's sentencing judge had not adequately weighed the aggravating and mitigating factors.

In 2018, the Arizona Supreme Court conducted a review of the evidence introduced at sentencing and determined that the undisputed evidence in aggravation still outweighed the evidence in mitigation, justifying McKinney's death sentence.

Last year, the U. S. Supreme Court agreed to hear McKinney's appeal. He claimed that because the Arizona Supreme Court conducted a new review of his sentencing hearing his case was not final, and therefore he is entitled to an entirely new sentencing hearing before a jury. He additionally claimed that **Ring v. Arizona** requires that the sentencing jury, rather than a judge, determine that the aggravating factors outweigh the mitigating factors "beyond a reasonable doubt" before giving him a death sentence.

The Criminal Justice Legal Foundation joined this case at the invitation of the Arizona Attorney General to encourage the Supreme Court to reject this murderer's claims. In a scholarly *amicus curiae* (friend of the court) brief, Foundation Legal Director Kent Scheidegger argued that no federal law or Supreme Court decision requires that McKinney receive a new sentencing hearing. **Ring** requires a jury to find the factors which qualify a murderer for a death sentence, but does not extend to the actual choice of which sentence the murderer should receive. The choice, between life without the possibility of parole or death, is and should remain based on the nature of the crime, the criminal, and the circumstances by which he killed his victim(s).

"The Arizona Supreme Court properly weighed the aggravating and mitigating evidence in this case, fixing the problem the Ninth Circuit claimed to find," said Scheidegger. "Nothing in federal law requires sending this case back to a jury and starting the appeals process all over again."

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