CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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APPEALS COURT REINSTATES DOUBLE MURDERER'S CONVICTION

On January 14, a unanimous panel of the Ninth Circuit Court of Appeals reinstated the conviction and life without parole sentence of double-murderer rapist Francis Hernandez, overturning a 2017 ruling by a divided panel of the same court that had found the conviction unconstitutional.

At issue in **Hernandez v. Chappell** was the earlier panel's finding that errors made by the defense counsel during the trial prejudiced the case. The two-judge majority held that because of this, under the U. S. Supreme Court's 1984 decision in **Strickland v. Washington**, one juror might have decided not to find the defendant guilty. Applying this "one juror" standard, the court overturned Hernandez's conviction.

The Criminal Justice Legal Foundation had joined the state to request a review of the ruling, arguing that the two-judge majority had misinterpreted **Strickland**. The panel applied a "one juror" requirement to the determination of guilt when Supreme Court precedent only supports applying it to penalty verdicts in capital cases in states where a single juror can block a death verdict.

Writing for the unanimous panel, Judge Jacqueline Nguyen declined to even mention the "one juror" standard. "[E]ven assuming that counsel's performance was constitutionally deficient, as discussed, Hernandez did not suffer any prejudice due to the overwhelming evidence of his intent to rape and murder Ryan," she wrote.

The case involves the brutal 1981 sexual assaults and murders of 21-year-old Edna Bristol and 16-year-old Kathy Ryan over a five-day period in Long Beach, California. Both victims had been beaten, tortured, and brutally raped before being strangled to death. After witnesses identified Hernandez with one of the victims on the night she was killed, a police search of his house and van uncovered the dead girl's shoe, jewelry, fibers, items used in the rapes, and blood, saliva, and semen that matched fluids found on both victims' bodies. In a lengthy tape-recorded statement to police, Hernandez arrogantly claimed that he had consensual sex with both victims and that he had accidently killed them. He admitted burning the victims with a lighter and matches, biting them, and that he "probably" used a baseball bat to penetrate them both.

After three decades of court decisions upholding Hernandez's conviction, a Ninth Circuit panel consisting of Judge Harry Pregerson, Stephen Reinhardt, and Jacqueline Nguyen reviewed Hernández's appeal in 2015. On November 25, 2017, Judge Pregerson, whom the Los Angeles Times described as among the most liberal federal judges in the country, died. A month later, the panel announced a divided ruling overturning Hernandez's conviction. The majority opinion by Judge Reinhardt and "joined" by the then-deceased Judge Pregerson announced its conclusion that by failing to attempt a mental defense the defense attorney had been ineffective. The majority further concluded that, if the mental defense had been presented, at least one juror might have been swayed to find Hernandez innocent. Because of this, they concluded, the conviction was

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NINTH CIRCUIT TO HEAR PETITION TO LIFT EXECUTION STAYS

In October 2018, on behalf of the families of five murder victims whose murderers are on California's death row, the Criminal Justice Legal Foundation asked to file an *amicus curiae* (friend of the court) brief challenging the 24 stays of execution granted since 2006 by a federal district court in San Francisco. In November, District Judge Richard Seeborg announced that he would not consider CJLF's brief.

On January 22, 2019, on behalf of the same two families, CJLF filed a Petition for Writ of Mandamus in the Ninth Circuit Court of Appeals (**In re Kermit Alexander**), asking for an order to vacate all of the stays of execution, prohibit the district court from granting any additional stays, and lift restrictions on preparations for executions.

On February 5, 2019, the Ninth Circuit ordered attorneys for the 24 condemned murderers, the state Department of Corrections and Rehabilitation (CDCR), the warden of San Quentin, and Governor Gavin Newsom to submit argument within 21 days.

As noted in the Fall *Advisory*, for 13 years, two federal district judges in San Francisco have blocked the executions of every eligible death-sentenced murderer in California. The original 2006 order stayed the execution of Michael Morales,

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SAN DIEGO DISTRICT ATTORNEY ADDRESSES ATTENDEES AT CJLF ANNUAL MEETING

The Criminal Justice Legal Foundation held its first board meeting of 2019 on February 26 in Los Angeles. The luncheon portion of the meeting featured a compelling presentation by Summer Stephan, the newly elected District Attorney of San Diego County. Last November, Stephan fended off a challenge by a public defender with over $1 million in contributions from liberal hedge-fund billionaire George Soros to win the election by the largest margin in the county's history. In her remarks, District Attorney Stephan detailed the aggressive effort to eliminate the consequences for crime that the state legislature and Governor Brown have engaged in over the past eight years and the impact this effort has had on public safety in California.

Summer Stephan
San Diego Co. District Attorney

"NINTH CIRCUIT TO HEAR PETITION"

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sentenced to death for the 1981 kidnap, rape, and brutal murder of high school cheerleader, Terri Winchell, in Lodi. Then sitting judge Jeremy Fogel issued a federal injunction finding that the state's three-drug protocol amounted to cruel and unusual punishment in violation of the Eighth Amendment and granted the stay. For the next five years, Judge Fogel continued to grant stays to other condemned murderers for the same reason. In 2011, Judge Fogel took an administrative post, and Judge Seeborg was assigned to the case. That judge has continued to grant stays, even after the state had abandoned the execution method that justified them.

In November 2016, California voters adopted Proposition 66, a ballot measure to speed up enforcement of the death penalty. Among its provisions, the measure exempted execution protocols from the burdensome Administrative Procedure Act, restoring the law to what it was understood to be before an erroneous California Court of Appeal decision in 2008. This act had been misused to prevent CDCR from issuing new procedures to meet the federal court's requirements. A legal challenge to the initiative, filed the day after it passed, took the California Supreme Court a year to resolve. CJLF played a major role in both drafting Proposition 66 and winning the decision to uphold it. CDCR then issued a new execution protocol.

Since October 2017, after Attorney General Xavier Becerra failed to respond to CJLF's written request to appeal the invalid stays, Judge Seeborg has rejected a petition from district attorneys asking him to apply the law and overturn the stays and denied CJLF the right to submit argument on behalf of the families of murder victims.

"For 13 years, a single federal judge has been allowed to illegally block enforcement of California's death penalty because neither the Governor, the CDCR under his control, nor the Attorney General have been willing to take the legal action available to them," said CJLF Legal Director Kent Scheidegger. "Because of this, we are taking that action, to uphold the right of the people of California and the families of murder victims to put an end to this obstruction and enforce the law."

Watch for developments in this case in future editions of the *Advisory*.

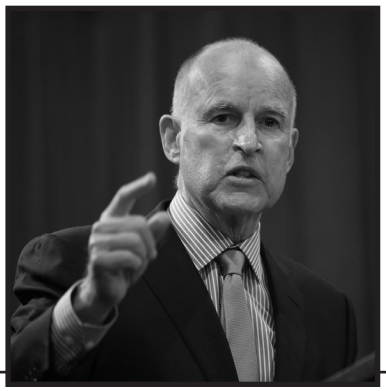
Advisory layout design by Irma H. Abella

WHAT JERRY BROWN LEAVES BEHIND

Several columns have been written about what will be four-term California Governor Jerry Brown's legacy. One recent piece recounted how Brown, when asked by a reporter early last year what he considered his legacy would be, responded, "Governors don't have legacies. That's my number 1 proposition." He is wrong, of course. As with all past governors, the people of California are going to have to live under the policies and decisions Jerry Brown has made over the past eight years, just as they did after his first two terms in the Governor's office.

Much of the focus has been about Brown's policies on the environment, public employee unions, infrastructure, the state budget, health care, social justice, and the economy, but the greatest impact on law-abiding Californians will, without question, come from his approach to crime.

During his first two terms (1975-1983), while Democrats held a majority in the State Legislature, the two parties were less polarized. A law and order Republican was the Attorney General, and crime in California was increasing rapidly with polls showing it as a leading public concern. In this climate, while it was apparent that the Governor's sympathies were with criminal defendants, politics required that he be pragmatic, resulting in him signing a mixed bag of laws dealing with crime. In 1976, he agreed to sign SB 42, a bipartisan bill to require fixed sentences for most crimes (determinate sentencing), but only after insisting that the sentences be low. The next year, with support from district attorneys, police, and sheriffs, and a growing victims' rights movement, Republicans got bipartisan support for AB 476, a bill increasing the sentences, which Brown reluctantly signed. In 1977, the Legislature voted to override the Governor's veto of a bill to restore the death penalty, and voters passed an initiative strengthening it the next year. He signed an "inmates bill of rights" bill, but also signed the "Use a gun go to prison" law— a bipartisan bill to require a mandatory year in prison for criminals who used guns. By 1982, after several



Governor Jerry Brown

anti-crime bills had either failed to pass out of the Legislature or were vetoed by the Governor, Republican legislators and victims' groups put them into Proposition 8, the "Victims' Bill of Rights" initiative. Brown opposed it, but the voters passed it by 56.4%.

The Governor was far less concerned about the political consequences of his judicial appointments. During his first two terms, he packed the California courts with liberal, mostly pro-defendant, judges. He appointed Rose Bird (his Secretary of Agriculture and a former public defender) as Chief Justice of the state Supreme Court, and appointed two other liberals, Joseph Grodin and Cruz Reynoso, to serve with her. Often joined by Governor Pat Brown's appointee Stanley Mosk, the majority's rulings in both criminal and civil cases were so controversial that, in 1986, state voters made history by rejecting all three Jerry Brown appointees for a second term.

In the 25 years after Brown left office, the public enacted 13 ballot measures to fix problems with the criminal justice system (some created by his judges) and crack down on habitual criminals. During that period, Brown ran for President twice and U. S. Senate once. In 1999, he got himself elected Mayor of Oakland as a crime fighter. During his eight years as Mayor, violent crime in Oakland increased 32% and murders more than doubled. In 2007, Brown ran for California Attorney General, promising to enforce the death penalty and keep repeat offenders behind bars. He did neither, passing up opportunities to speed appeals for condemned murderers and refusing to challenge the California Department of Corrections and Rehabilitation's release of 20,000 sexually violent predators without the legally required psychiatric screening.

Shortly after beginning his third term as Governor, it became obvious that Brown had shed his pragmatism on the crime issue. In April 2011, four months after taking office, Brown signed AB 109 into law. The 423-page bill, passed through both houses on a party-line vote with no committee hearings, gutted the state parole system and dumped roughly 30,000 habitual felons released over the next two years from state prison onto county probation departments. The bill, which proponents called "Public Safety Realignment," prohibited state prison sentences for virtually all property crimes, most drug crimes, and other serious crimes, such as domestic violence. No matter how many times a criminal committed these offenses, the highest sentence an offender could get was time in county jail. As the jails began filling to capacity, sheriffs were forced to release thousands of repeat felons early, some after serving only a few weeks.

In 2013, Governor Brown signed AB 4, "The Trust Act," which prohibits county sheriffs from holding criminal illegal aliens for deportation by ICE, and another law, AB 60, which since 2015, has allowed over one million illegal immigrants to obtain driver's licenses.

In 2014, the ACLU and groups funded by billionaire George Soros pooled roughly $10 million to fool state voters into passing an initiative called "The Safe Neighborhoods and Schools Act." Proposition 47 converted many drug felonies and all property crimes valued at $950 or less to misdemeanors. Governor Brown, campaigning for his fourth term, took no position. But his Lieutenant Governor, Gavin Newsom, and the state Democratic Party he led, supported it.

Two years later, the Governor qualified Proposition 57, The Public Safety and Rehabilitation Act of 2016, for the November ballot. Brown contributed $4.1 million from his campaign war

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"BROWN'S LEGACY"

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chest, while Soros kicked in over $5.8 million. The initiative, which was billed as providing nonviolent offenders a chance for early release and rehabilitation, passed despite warnings from district attorneys and sheriffs that the measure would allow habitual felons with priors for rape and murder to gain release. The Governor denied this, but last year a Los Angeles appellate court and a Sacramento judge both ruled that the warnings were correct.

Then in 2017, Governor Brown signed three laws, turning California into a sanctuary state for illegal immigrants. AB 450 allowed the state to fine businesses up to $10,000 if they cooperate with federal immigration authorities. SB 54 prohibited state and local police and sheriffs' departments from cooperating with federal immigration authorities, including notifying ICE when a criminal alien is released from jail or prison. AB 103 required the Attorney General to review and report on how state prisons and jails are protecting the rights of criminal aliens.

The Governor also signed SB 620 in 2017. That bill eliminated the mandatory sentence increase for the criminal use of a firearm, allowing judges to give gun-wielding criminals shorter sentences.

In 2018, Governor Brown used his last year to deliver additional benefits to criminals. By signing SB 215, Brown allowed judges to *dismiss any criminal charge,* with the exception of murder, manslaughter, or rape, if the defendant claims a mental disorder played a major role in his commission of the crime. Drug use can qualify as a mental disorder under this law.

The Governor also signed SB 1391, which prohibits violent juvenile criminals, aged 14 and 15, from being tried as adults. This was great news for murderers like Daniel Marsh, who in 2013, at age 15, tortured and mutilated an elderly couple in the small college town of Davis. Marsh admitted that he butchered the couple because he wanted to know what it felt like. By signing SB 1437, the Governor abolished the felony-murder rule, which will permit hundreds of accomplices to murder during the commission of a felony to get an early release from prison. It will also protect future defendants from the consequences for the natural and probable results of a crime in which they willingly participated—such as a gang member driving the car during a drive-by shooting that kills a child.

Last August the Governor signed SB 10, a bill which eliminates the private bail bond industry in California. The new law requires judges to release arrestees on their own recognizance if they are assessed to be "low risk" offenders. The assessment will utilize the same computer software which has allowed so-called "low risk" prison inmates the freedom to commit rapes and murders after gaining early release under AB 109 and Proposition 47.

The Governor's concern for criminals' rights since returning to office in 2011 extended beyond pro-defendant legislation and ballot measures. During his second two terms, Brown granted 1,332 pardons. By contrast Arnold Schwarzenegger granted 15 pardons, while Governors Pete Wilson and Gray Davis gave no pardons during their terms.

The Governor's criteria regarding judicial appointments was similar to his first two terms, choosing mostly academics and social justice advocates. Since 2011 he has appointed over 450 Superior Court judges, 52 appellate judges, and 4 members of the 7-member state Supreme Court. This has put hundreds of pro-defendant judges in charge of enforcing laws giving new rights and opportunities for early release to criminals.

The impact of Governor Brown's policy choices has been significant. The annual drop in California crime rates reversed the year after his election. Reported property crime initially rose, then declined after passage of Proposition 47, which converted thousands of felonies to misdemeanors that are often unreported. Violent crime, which had steadily declined for all but one of the 17 years prior to his taking office, increased in each of the past three years—a trend not seen in California since 1992. To paraphrase a former district attorney, "blood will have to be running on the streets before the public demands change."

The December 2018 murder of a 33-year-old police officer during a traffic stop in the small town of Newman, California, by an illegal alien with two priors for drunk driving, was the logical result of the "sanctuary state" laws Governor Brown signed. The murderer had a driver's license and had been jailed twice for drunk driving, yet police were discouraged from reporting him to ICE and prohibited from holding him for deportation. The Los Angeles County sheriff's sergeant executed in Lancaster in October 2016 and the two Palm Springs officers gunned down three days later were killed by habitual felons who should have been in prison for prior felonies rather than free on probation under Governor Brown's Realignment law. Thousands of innocent people are becoming crime victims every year because of these laws.

It is hard to imagine what else Jerry Brown could have done to guarantee that Californian's will suffer more crime and violence over the next two decades. Whether he likes it or not, this will be his legacy.

Michael Rushford
President & CEO

"COURT REINSTATES"

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unconstitutional. Judge Nguyen's dissent found that the prejudice threshold of **Strickland** had not been met and that it was "not even a close call." In a footnote, Judge Reinhardt said that Judge Pregerson had fully participated in the case and had formally concurred with the opinion before he died. On March 29, 2018, Judge Reinhardt, the court's "liberal lion," died of a heart attack at age 87.

Last July, the Ninth Circuit agreed to reconsider the earlier ruling, and on September 24, 2018, a reconstituted panel of the Ninth Circuit made up of Judge Nguyen and Judges Milan Smith and Kim McLane Wardlaw heard oral argument. The decision followed four months later.

"This unanimous decision restores justice in a case where the evidence of intent to rape and murder was so strong that the claimed defense error would have made no difference to the jury," said CJLF Legal Director Kent Scheidegger. "Whether a defense lawyer is required to present a meritless mental defense or not, the conviction need not be overturned when there is no reasonable chance it would have produced a unanimous 'not guilty' verdict," he added.

RULING OVERTURNING MISSOURI KILLER'S DEATH SENTENCE CHALLENGED

The U. S. Court of Appeals for the Eighth Circuit is reviewing a District Court ruling overturning the death sentence of a double-murderer. The case involves the conviction of Carman Deck for the burglary, robbery, and murder of an elderly couple in 1996. During the 12 years following his 1998 conviction and sentence, Deck won two appellate court rulings granting him new sentencing trials. At each new trial, a new jury recommended the death sentence. Finally in 2017, Deck won a Federal District Court ruling announcing that the years spent on his resentencing violated his constitutional rights and that the attorney for his third resentencing was incompetent.

CJLF has joined the case of **Deck v. Steele** on behalf of the family of the murdered couple to encourage a decision overturning that ruling.

Evidence introduced at trial indicates that Carman Deck and his sister went to the home of Zelma and James Long in the small town of DeSoto, Missouri, on a summer evening in 1996. After waiting for nightfall, Deck and his sister knocked on the door of the Longs' home, and when Mrs. Long answered, they asked for directions. Mrs. Long invited them in, and she and Mr. Long assisted them with directions. When Deck moved toward the door to leave, he drew a pistol, pointed it at the Longs, and ordered them to lie face down on their bed. The Longs did so, offering up money and valuables throughout the house and all the while begging that he not harm them. After Deck finished robbing their house, he stood at the edge of their bed, deliberating for 10 minutes over whether to spare them. He ignored their pleas and shot them each twice in the head. Deck later told police that he shot the Longs because he thought that they would be able to recognize him.

James and Zelma Long (left) were murdered by Carman Deck (right) after they let him and his sister into their home believing they needed help. He ordered them to lie face down on their bed and shot each one twice in the head.

Deck was convicted and sentenced in 1998.

After a third jury sentenced Deck to death in 2008, he petitioned the Federal District Court on habeas corpus to review his 32 claims of trial, sentencing, and defense counsel errors. The court dismissed 30 of those claims, but upheld the claim that Deck's rights were violated by resentencing him so long after the crime and also found the defense attorney for his third sentencing trial incompetent for not raising that claim.

On behalf of the victims' family, CJLF has joined the case to argue that the judge's ruling creates new rights for Deck that have never been identified by the U. S. Supreme Court. The 1989 Supreme Court decision in **Teague v. Lane** (won by CJLF) prohibits the lower federal courts from discovering new rules of law on habeas corpus. The Foundation also notes that a defense attorney who does not invent a claim unsupported by existing law is not incompetent.

"Deck would have been executed long ago if courts had not bent over backwards in his favor on his request. It is absurd that this excessive leniency is now cited as a reason to let him off permanently," said CJLF Legal Director Kent Scheidegger. "This cold-blooded killer richly deserves the sentence that three separate juries have given him, and the illegal ruling sparing him must not stand," he added.

CJLF is able to fight for common-sense law and order because of the contributions of our loyal supporters. We receive no government support for our work and must rely on people like you who are concerned about the breakdown in the rule of law and its impact on the safety of law-abiding Americans. Help us continue our efforts to win court decisions to assure that criminals are held accountable for their crimes and to fight policies that tie the hands of police and prosecutors by making your tax-deductible contribution today. Please return the card on the right with your check, or go to www.cjlf.org, or call us at (916) 446-0345 to contribute with your credit card. **Thank you so much.**

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Winter 2019

CHILD MOLESTER SEEKS TO OVERTURN HIS CONVICTION

The California Supreme Court has agreed to hear the appeal of a child molester who claims that the trial court violated his rights by preventing him from making eye contact with his victims as they testified.

At issue in the case of **People v. Arredondo** is whether the judge's decision to use a computer monitor to block the direct view of the defendant from the girls he molested as they testified violated his Sixth Amendment right to confront the witnesses against him.

The Criminal Justice Legal Foundation has joined the case to encourage a decision rejecting the child molester's claim.

In 2015, Jason Arredondo, who had a previous conviction for child molestation, was found guilty of repeatedly molesting his girlfriend's daughters for eight years beginning in 2005 when the girls were eight, six, and five years old. The molestations stopped in 2013 after he molested one of the girl's friends when she was visiting. The friend relayed the incident to a school counselor who reported Arredondo to police. While all of the girls had been severely traumatized by the years of abuse, the oldest suffered from emotional and psychological problems that required that she be held back in school.

At trial, when the oldest victim, then 18, was unable to testify with Arredondo staring at her, the judge had a computer monitor, which was already attached to the witness stand, raised slightly to prevent her from seeing his face. Arredondo objected on the ground that blocking his view of his victims' faces violated the Constitution's confrontation clause, but the objection was overruled, and all three victims testified with the raised monitor. The jury convicted him on 16 counts of child molestation, and the judge sentenced him to 33 years and an indeterminate term of 275 years to life in prison.

A year later a divided state court of appeal upheld Arredondo's conviction, but ordered resentencing on 3 of the 16 counts. He appealed that ruling and in 2017, the state Supreme Court agreed to hear his Sixth Amendment claim regarding the computer monitor.

CJLF filed a brief, arguing that the minor accommodation made by the judge to allow the victims' testimony did not violate the defendant's rights. Associate Attorney Kymberlee Stapleton notes that a defendant's right to physically confront his accuser is not absolute.

Last December, CJLF filed a scholarly *amicus curiae* (friend of the court) brief, arguing that the minor accommodation made by the judge to allow the victims' testimony did not violate Arredondo's rights. Foundation Associate Attorney Kymberlee Stapleton noted that a defendant's right to physically confront his accuser is not absolute. The CJLF brief pointed out that U. S. Supreme Court decisions have allowed alternatives to face-to-face confrontation, particularly in cases involving sexually abused children. These alternatives include having victims testify in another room on closed-circuit television. California law goes further, allowing sexual assault victims 15 years old or younger to submit videotaped testimony, and extends this protection to victims of spousal rape or traumatic injury *regardless of the victim's age*. The minor accommodation made for Arredondo's victims did not prevent him from seeing them, hearing their testimony, or from cross-examination by his attorney. It simply blocked him from staring at their faces.

"The victims in this case, after years of sexual abuse, had good reason to be very afraid of their attacker," said Stapleton. "The importance of helping these victims participate in the trial far outweighs the minor accommodation made by the judge in this case," she added.

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