



Advisory

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CJLF WINS DECISION TO PRESERVE VALID CONVICTIONS

In a June 21 decision, the California Supreme Court refused to create a new right for criminal defendants to challenge convictions. The case of **People v. Farwell** involved a habitual felon's claim that his conviction of driving without a license should be overturned because the judge failed to instruct him that admitting his guilt to that offense would waive some of his constitutional trial rights.

Randolph Farwell was convicted of vehicular manslaughter after his reckless driving resulted in his car hitting a tree at high speed, killing a female passenger in 2013. At the time of the crash, Farwell's license had been suspended after an earlier reckless driving arrest. Farwell also had a previous conviction for burglary. At trial, Farwell and his attorney agreed to admit guilt on the suspended license charge to prevent jurors from hearing the details of the earlier driving arrest. On appeal, Farwell argued that the law required his conviction to be overturned because the judge did not instruct him on the consequences of his admission of guilt.

The Criminal Justice Legal Foundation (CJLF) joined the case to oppose Farwell's claim. Our brief, authored by CJLF Associate Attorney Kymberlee Stapleton, cited the court's

1992 decision in **People v. Howard**, which held that the law actually allows a review of the entire trial court record to determine if a defendant knowingly and intelligently waived his trial rights when he admits guilt. The Foundation also noted that Farwell was a repeat offender who knew full well what he was doing when he waived argument on his suspended license conviction.

The court's unanimous decision stated, "We hold that the totality of the circumstances test applies in silent record cases as well As amicus curiae Criminal Justice Legal Foundation observes, '[r]ather than carving out a set of cases as being exempt from the *Howard* "totality of the circumstances" rule, *Mosby* is better understood as identifying a frequently occurring fact pattern that typically fails [to satisfy] the rule.'"

"The defendant in this case tried to carve out a new rule which, if upheld by the court, would have given guilty criminals an opportunity to challenge their convictions for a minor error having no impact on the verdict," said Stapleton. "The court recognized this in today's decision, which is certainly a victory for victims," she added.

U. S. ATTORNEY GENERAL ADDRESSES CJLF ANNUAL MEETING

United States Attorney General Jeff Sessions delivered the keynote address at the Foundation's 36th Annual Meeting in Los Angeles on June 26. The meeting, hosted by past CJLF Chairman Bill Shaw, was held at the Millenium Biltmore Los Angeles, with over 100 guests in attendance.

Among the guests were the U. S. Attorneys for California's Central and Southern Districts, the District Attorneys for Ventura, San Diego, Kern, and Monterey Counties, a former Governor of California and a former Los Angeles County District Attorney, along with business and community leaders from across the state.

The Attorney General focused primarily on illegal immigration. Here are excerpts
continued on page 4



U. S. Attorney General Jeff Sessions addressing luncheon attendees.

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VIEWPOINT

CONGRESSIONAL PRISON REFORM = JAILBREAK

In the fall of 2015, a bipartisan group of U. S. Senators introduced S. 2123, a bill called the “Sentencing Reform and Corrections Act,” to address the claim of over incarceration made by President Obama and pro-criminal groups such as the American Civil Liberties Union and the national media.

The narrative was that thousands of harmless blacks and Hispanics were languishing in federal prisons for the possession of illegal drugs. This was largely false, but with support from the libertarian Koch Brothers and progressive George Soros some unwitting Republicans and virtually every Democrat were supporting the bill, which slashed sentences for drug dealers, made thousands of others eligible for early release, and put most of the controls on who got what into the hands of unelected federal judges. As frosting, the proponents coated this poison with corrections reform that allowed prisons to partner with private businesses and religious groups to provide real, verifiable rehabilitation programs for inmates and job prospects upon release.

In our letter opposing the bill, we spelled out how releasing drug dealers back into mostly minority communities, then leaving them there after they re-offended, would punish the very communities the proponents claimed the bill would help. But we also said that the corrections reform provisions were worthwhile and should be enacted separately. Fortunately, S. 2123 died in early 2016. Now, two years later, the proponents have repackaged the jailbreak bill as prison reform.

The new bill, H.R. 5682, is called the “FIRST STEP Act,” and while the corrections reforms are still included, as a primary feature so are early releases of criminals, apparently patterned on California’s disastrous Proposition 57.



In a recent article in The Wall Street Journal, Senator Tom Cotton noted that America is currently experiencing a drug epidemic of historic proportions. Last year, over 72,000 Americans died from drug overdoses, many of them from fentanyl smuggled across our borders. As the Senator points out, this is “exactly the wrong time to go soft on crime.” Of the roughly 97,000 federal prison inmates serving time for drug crimes, *only 247 are for drug possession*, the rest are drug dealers, most with priors. Virtually every inmate in federal prison got a plea bargain, meaning they are serving time for fewer crimes than they actually committed.

“In the extreme case of a manifestly unjust sentence, the pardon power is a better instrument of justice than broad sentence reductions. President Trump has already shown himself more than willing to intervene to redress such cases,” writes Senator Cotton.

With only 80% of *reported* property crimes and 50% of violent crimes solved by police, and crime rates on the rise in many parts of the country, mass incarceration is certainly not the problem with our criminal justice system. Releasing criminals and reducing sentences will do nothing but create more victims.

Michael Rushford
President & CEO

Advisory layout design by Irma H. Abella

FEDERAL JUDGE BLOCKS SANCTUARY STATE LAW

A July 5 decision, by Federal District Judge John Mendez in Sacramento, granted in part the federal government's motion for a preliminary injunction in the California "sanctuary state" case **United States v. California**. The suit was filed to block enforcement of a package of three "sanctuary state" bills enacted by the California Legislature. The Criminal Justice Legal Foundation (CJLF) filed argument to block enforcement of the law (AB 450), which punishes employers' voluntary cooperation with federal immigration authorities.

AB 450, which was passed by the Legislature and was signed into law by Governor Brown in 2017, prohibits employers from allowing federal immigration agents to come onto their property or have access to employee records without a search warrant. Employers who violate this prohibition can be fined up to \$5,000 for the first offense and up to \$10,000 for each subsequent offense.

The CJLF *amicus curiae* (friend of the court) brief argued that prohibiting

California employers from cooperating with immigration authorities except for the minimum required by federal law puts them in a dangerous position. They must guess where the sometimes fuzzy boundary of the law is, with a penalty for violating one law or the other if they guess wrong. The law also denies employers their right to cooperate and assist federal law enforcement.

In his decision, the district judge wrote:

"The Court finds that a law which imposes monetary penalties on an employer solely because that employer voluntarily consents to federal immigration enforcement's entry into nonpublic areas of their place of business or access to their employment records impermissibly discriminates against those who choose to deal with the Federal Government."

.....

"Prohibiting employers from reverifying employment eligibility

complicates the subjective element of the crime; e.g., could an employer who might otherwise be found to 'know' that one of its employees lacks authorization find shelter behind the state law because it could not confirm its suspicion? The law frustrates the system of accountability that Congress designed."

The federal government's motion to challenge enforcement of two other "sanctuary state" laws which forbid local governments, including law enforcement agencies, from voluntarily cooperating with federal immigration authorities was rejected. Only the law CJLF opposed was blocked.

"It is unconstitutional for the state of California to prevent an employer from cooperating with federal law enforcement," said Foundation Legal Director Kent Scheidegger. "In a government of laws, such cooperation is the right and duty of every citizen."

This ruling may be appealed to the Ninth Circuit Court of Appeals.

BROWN SIGNS ANOTHER PRO-CRIMINAL BILL

In the last few weeks of the current legislative session, pro-criminal California Democrats amended a budget trailer bill on health care, turning it into a windfall for criminals facing trial for crimes, including murder, rape, and robbery. In late June, AB 1810, the "Omnibus Health Trailer Budget Bill," became a criminal diversion bill, which will allow any judge to "divert" any criminal, including murderers and rapists, from prosecution merely upon a finding that the defendant has a mental health diagnosis and that "played a significant role" in the offense.

"Significant role" is so broad and vague that it could mean just about anything.

Mental disorder is a broad category, and it gets broader with each edition of the psychiatrist's manual. The psychiatric profession is methodically expanding what constitutes mental illness and currently refers to the fifth version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) to make such determinations. If present trends, continue we will all be mentally disordered by the DSM-8.

District attorneys report that the bill, which Governor Jerry Brown signed into law in June, will divert criminal defendants from trial to mental health treatment programs based entirely on a defense attorney's presentation of evidence regarding a defendant's mental health. The prosecutor is not allowed to rebut this evidence. If the judge buys the defense claim, the accused murderer or rapist will be released to a two-year treatment program and all charges will be dismissed as long as he "substantially complies" and does not commit any "significant" new crimes while released for treatment. What constitutes substantial compliance or a significant new crime will apparently be left up to the judge.

With the session ending on August 30, district attorneys were successful in getting the Governor to actually read the bill he signed and consider ramming through another measure, which would limit diversion to nonviolent offenders and give prosecutors a voice in the determination process. As Michele Hanisee, head of the 1,000 strong Association of Deputy District Attorneys of Los Angeles, noted, "This misuse and abuse of the legislative process is not justice."

“ATTORNEY GENERAL ADDRESSES”

continued from front page

from his remarks:

“By definition, we ought to have zero illegal immigration in this country. But we have more than 1 million illegal aliens just in the Los Angeles area. It is widely estimated that there are more illegal aliens in California than there are people in New Mexico.

There is no other area of American law with this level of illegality.

This is a big group of people. Too many of them have committed crimes here. By definition, every one of those crimes is preventable.

Thousands of illegal aliens are sitting in California jails that you pay for. 39,000 are in federal prisons. Another 16,000 are in custody of the U.S. Marshals.

Those are people who had to be tracked down and arrested by our law enforcement—every time, putting them in potentially dangerous situations.

In this city [Los Angeles], Americans have been victimized countless times by people who shouldn’t even be here.

Here are just a few of the people arrested by ICE just this month for crimes that would have been prevented with effective border enforcement:

a gang member who had been convicted of rape,

a man convicted of assault with intent to commit rape, and

a man convicted of assaulting an officer, beating his wife, and assault with a deadly weapon.

I could go on and on. These are the kind of people that sanctuary politicians want to keep in California. This is who they want to give sanctuary to.

The open borders politicians say they’re being compassionate. But where is their compassion for that rape victim? How do they explain to her that her attack happened because of their so-called compassion for her rapist.

Consider the rise of sanctuary policies.

It may sound nice, but these are de facto open borders policies. At their root, they are essentially a rejection of all immigration law.

Think about it. Under sanctuary policies, someone who illegally crosses the border on a Monday and arrives in Sacramento or San Francisco on Wednesday is home free—never to be removed.

Police are often forced to release criminal aliens back into the community—no matter the crime. Police may be forced to release pedophiles, rapists, murderers, drug dealers, and arsonists back into the communities where they had no right to be in the first place.

That has real consequences.

ICE tells us that they are able to locate only about 6 percent of the criminals they ask sanctuary jurisdictions to turn over. The other 94 percent are walking free and often on their way to their next victim.

If they won’t allow us to deport someone who enters illegally and then commits another crime—who will they agree to deport? Sadly, we know the answer to this. Nobody.

And that sends a message around the world. People in developing nations don’t know the laws on our books. But they see what we do. And so do the

gangs and drug cartels. They see whether we deport criminals or not. They see whether we have a border wall or not. They see whether we reward illegal aliens with benefits or not.

That’s why, under President Trump’s leadership, the Department of Justice is working to end sanctuary policies. In March, we sued the state of California over their sanctuary laws. And you’ve stood by us all the way. Thank you for your strong amicus brief and thank you for your strong support.

I am confident that together we are going to win that case. It has been settled since 1819 that a state cannot actively attempt to undermine the execution of federal law or discriminate against the federal government.

The American people are with us on this issue. One poll last year showed that 80 percent of the American people oppose sanctuary policies. Most cities are not sanctuary cities.

We have also supported the state of Texas in its efforts to ban sanctuary cities. And since I became Attorney General, we have filed briefs to defend state or local law enforcement in about thirty cases. A number of courts have ruled in these cases that state or local cooperation with federal immigration enforcement efforts does not violate federal law.

We have stopped rewarding sanctuary cities with taxpayer dollars. If sanctuary cities want to receive federal law enforcement grants, then they should stop impeding federal law enforcement. That is not too much to ask.”



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CRIME & CONSEQUENCES



ANOTHER “RESISTANCE RULING” FROM THE NINTH CIRCUIT IN SANCTUARY CITY CASE

On August 1, 2018, a divided panel of the Ninth Circuit Court of Appeals upheld a district court injunction blocking enforcement of an Executive Order, which directs the Attorney General and the Secretary of Homeland Security to withhold federal law enforcement grants from cities and counties that refuse to cooperate with federal immigration authorities.

The President’s January 25, 2017 Executive Order directed government agencies to enforce a federal law, adopted by Congress over 20 years ago and signed by President Clinton, that requires government entities to share the immigration status of any person with federal immigration authorities. This was followed by a July 2016 determination by the Obama Administration’s Department of Justice that compliance with this law was a requirement for cities and counties to receive federal law enforcement grants. In spite of that finding, the Obama Administration chose not to exercise its discretion to withhold grants from cities and counties that refused to comply. The Trump Administration’s Executive Order announced its intention to begin withholding grants for those “sanctuary cities,” but, to date, no grants have been withheld.

The court’s ruling announced that it was the intent of the President to withhold *all* federal grants from sanctuary cities and counties, without authorization to do so from Congress. Only the plaintiffs in **City and County of San Francisco v. Sessions** claimed that all grants could be withheld. The Department of Justice

just the threat of withholding grant funds from San Francisco and Santa Clara has subjected the plaintiffs to injury. In his dissenting opinion, Judge Fernandez notes that, under the circumstances, there is no controversy “ripe” for a decision.

“The majority begins by assuming one side’s interpretation of the Executive

The majority begins by assuming one side’s interpretation of the Executive Order, dodging the real question for most of the opinion, only to brush it off in a few paragraphs deep within,”
said CJLF Legal Director Kent Scheidegger.

and CJLF argued that only federal law enforcement grants were at issue. By framing the question as the plaintiffs presented it, the two-judge majority could rule that the Executive Order exceeded the President’s authority. The majority did get one thing partially right. The district judge was not justified in making this ruling effective nationwide.

The question the panel evaded is whether a federal judge can block the President’s instructions to his cabinet, when no party in the case has yet been subject to any enforcement action. At this stage, the court has determined that

Order, dodging the real question for most of the opinion, only to brush it off in a few paragraphs deep within,” said CJLF Legal Director Kent Scheidegger. “The majority also commits the straw man fallacy, attacking an argument the defendants did not make, thus being doubly fallacious.”

The federal government will likely seek further review, and the case may end up before the United States Supreme Court. CJLF will continue to participate, arguing to have this erroneous decision overturned.

Thanks to your loyal support CJLF had three victories to report in this *Advisory*. We won an opportunity to overturn an activist ruling, voiding a double-murderer’s conviction. We won a decision blocking a law that punishes California businesses for cooperating with federal immigration authorities, and we won another decision *citing our arguments* to prevent a new court-created rule helping guilty criminals escape justice. Help us carry on the fight for common-sense justice by making your 2018 tax-deductible contribution today. Please return the card on the right along with your check or visit www.cjlf.org to use your credit card. *Thanks so much for your help.*

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NINTH CIRCUIT TO RECONSIDER RULING VOIDING MURDER CONVICTION

The verdict of guilt was affirmed on appeal, on state habeas corpus, and on federal habeas corpus. Then, a three-judge panel of the Court of Appeals reversed in a “two-to-one” decision (although one of the two judges in the majority opinion died before the final decision). This “majority” held that defense counsel had been ineffective in not raising a diminished capacity defense.

CJLF has helped convince the Ninth Circuit Court of Appeals to reconsider a ruling handed down last December that overturned the murder conviction of a man who raped and killed two young women in Long Beach.

Overwhelming evidence introduced at trial convinced a unanimous jury to find Francis Hernández guilty of the murders of 21-year-old Edna Bristol and 16-year-old Kathy Ryan over a five-day period in 1981. Both victims had been beaten, tortured, and brutally raped before being strangled to death. After witnesses identified Hernández as among those who were 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 both rapes, and blood, saliva, and semen that matched fluids found on both victims’ bodies. In a lengthy tape-recorded statement to police, Hernández arrogantly claimed that he had consensual sex with both victims and that he had accidentally 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 Hernández’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 Hernández’s conviction. The majority opinion by Judge Reinhardt, and joined by the then-deceased Judge Pregerson, announced its conclusion that at least one juror might have been swayed by the supposed ineffectiveness of Hernández’s defense counsel, which they concluded, under prior Supreme Court precedent (**Strickland v. Washington**), rendered the conviction 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 died of a heart attack at age 87.

A month later, CJLF joined the state to encourage a rehearing in the case, arguing that the December ruling misinterpreted **Strickland** to invent the one-juror rule. The Foundation also noted that federal rules do not allow deceased judges to participate in decisions.

A newly constituted panel, including Judge Nguyen and two other judges, will hear oral argument in September.

CORRECTIONS:

- In the Spring 2018 *Advisory*, the page 6 article on the passing of George Deukmejian incorrectly reported that he served as Governor of California from 1982 to 1986. Governor Deukmejian was elected to two terms as California’s 35th Governor, serving from **1983 to 1991**.
- The Spring 2018 edition was incorrectly numbered as Volume 36, No. 1. It should read Volume 36, **No. 2**.

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