



Advisory

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RULING VOIDING MURDERER'S CONVICTION CHALLENGED

The Criminal Justice Legal Foundation is encouraging the Ninth Circuit to reconsider a December 29, 2017 ruling by a divided three-judge panel, which overturned the first-degree, special-circumstance murder conviction of Francis Hernández.

CJLF argues that, in addition to the major injustice of overturning the conviction of a brutal murderer, the case raises questions about the interpretation of the important 1984 Supreme Court decision of **Strickland v. Washington**.

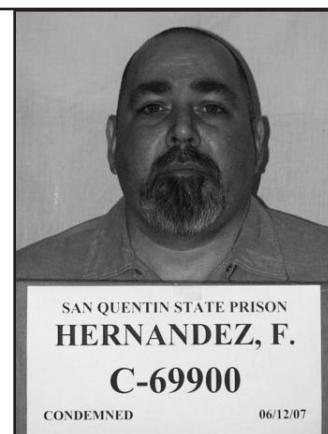
The 35 years of time wasted with multiple reviews of this open-and-shut murder case is also a matter of serious concern.

Facts outlined in the California Supreme Court's 1988 decision in **People**

v. Hernández, upholding the defendant's conviction and death sentence, describe brutal, sadistic assaults on two young women and a mountain of evidence confirming his guilt.

Between January 29 and February 3, 1981, the nude bodies of 21-year-old Edna Bristol and 16-year-old Kathy Ryan were found in grassy fields near two high schools in Long Beach, California. Both victims had been beaten, tortured, and brutally raped before being strangled to death.

Witnesses identified Hernández as being among a group of people with Ryan at a pizza parlor the night she was murdered. They also identified Hernández's van following as Ryan was driven
continued on page 2



Francis Gerardo Hernández was convicted of the mutilation murders of Edna Bristol, 21, and Kathy Ryan, 16. The crimes occurred just five days apart in 1981.

CJLF JOINS SANCTUARY CITY CASE

On April 25, 2017, responding to a lawsuit brought by the City and County of San Francisco and the County of Santa Clara, Federal District Judge William Orrick III issued a temporary injunction blocking enforcement of the President's January 25 Executive Order directing the Attorney General and the Secretary of Homeland Security to begin enforce-

ing an existing federal law regarding illegal immigrants. Seven months later, on November 20, Judge Orrick issued a permanent injunction to block the order, calling it "unconstitutional on its face."

CJLF has joined the Department of Justice's appeal of the permanent injunction, which will be heard in the Ninth Circuit Court of Appeals.

The President's Executive Order directed government agencies under his control to enforce a federal law, adopted by Congress over 20 years ago, which requires government entities to share the immigration status of any person with federal immigration authorities. This followed 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. The Obama Administration gave them time to comply before withholding grants, however, and did not actually withhold any before leaving office. The Trump Administration's Executive Order announced its intention to begin withholding grants for "sanctuary cities," but, to date, no grants have been withheld.

There are several issues at play in the case of **City and County of San Francisco, et al., v. Jeff Sessions, et al.** The initial question is whether a federal judge can block the enforcement of an executive order, when no party in the case has been subjected to the enforcement or suffered any injury. At this stage, the judge has determined that
continued on page 4



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“RULING CHALLENGED”

continued from front page

home later that night. Hernández was subsequently arrested, and a search of his house and van uncovered Ryan’s tennis shoe, jewelry, fibers, and items used in the rapes, as well as blood, saliva, and semen that matched fluids found on the victims’ bodies. In a lengthy tape-recorded statement to police, Hernández 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.

In 1983, a unanimous jury convicted Hernández of the murders and agreed that he should receive a death sentence. Five years later, the California Supreme Court unanimously rejected multiple challenges by his defense

counsel to his conviction and sentence. In 1990, the state Supreme Court denied the murderer’s habeas corpus petition and denied a second petition in 1993.

In 2011, *eighteen years later*, a federal district judge upheld Hernández’s conviction for the rape and murder of the two victims, but overturned his death sentence, citing cumulative errors during the penalty hearing which may have prejudiced the jury toward a death sentence. Not satisfied, Hernández appealed to the Ninth Circuit, arguing that his trial lawyer was ineffective for failing to thoroughly investigate and present evidence of his troubled childhood and mental health problems, and that these failures prejudiced the jury against him.

A Ninth Circuit panel consisting of Judges Harry Pregerson, Stephen Reinhardt, and Jacqueline Nguyen heard oral argument on Hernández’s appeal in January 2015. On November 25, 2017, Judge Pregerson, which the Los Angeles Times described as among the most liberal federal court 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 ineffectiveness of Hernández’s defense counsel. They concluded, under **Strickland**, that this possibility required overturning the conviction. Judge Nguyen’s dissent found that the prejudice requirement 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.

The State of California’s petition for reconsideration notes that Ninth Circuit rules require the appointment of a replacement judge when a member of a sitting panel dies while a case is undecided. Regardless of Judge Reinhardt’s footnote, Judge Pregerson died a month before he could read the final opinion. The state also argues that the ruling erred on material facts and conflicted with both Ninth Circuit and U. S. Supreme Court precedent.

The Foundation’s brief in support, while agreeing with those arguments, pointed to a fourth problem. The standard for determining prejudice under **Strickland** is not the possibility that one juror might have voted differently, but that the jury as a whole would have voted differently. Nowhere in the decision does the Supreme Court refer to a single juror. The Foundation is asking that the Ninth Circuit agree to review the panel’s ruling en banc, meaning that 11 of the court’s judges would decide the case. If the court refuses to rehear this case, CJLF will argue in support of review in the U. S. Supreme Court.

“The practice of courts overturning convictions by second-guessing the defense lawyer is a grave threat to justice. The Supreme Court has put limits on this practice, and this decision evades those limits,” said CJLF Legal Director Kent Scheidegger.

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CRIMINALS HAVE LITTLE TO FEAR FROM CALIFORNIA'S TOP COP

On January 24, 2017, Xavier Becerra was sworn in as California's 33rd Attorney General. Governor Jerry Brown appointed the 12-term Democrat Congressman from Los Angeles after Attorney General Kamala Harris was elected in November 2016 to replace retired Barbara Boxer in the U. S. Senate.

Becerra, like the governor who appointed him, has spent his entire life in government, holding staff positions or elective office for all but one year since graduating law school. As Attorney General, Becerra is California's chief law enforcement officer, yet our research cannot find a pro-law enforcement law or ballot measure he has supported in all his years in elective office. In 2008, Congressman Becerra introduced a bill to require microstamping on firearms supposedly to help police trace guns used in crimes. The bill failed to pass because the technology had yet to be field-tested and would have significantly increased the cost of firearms. Although he served three years as a deputy under liberal Attorney General John Van de Kamp, he has never claimed to have prosecuted a criminal case.

Since becoming Attorney General, the law enforcement positions Becerra has taken include: filing lawsuits against the federal government in defense of sanctuary cities which refuse to help federal immigration authorities identify illegal alien criminals, threatening to sue individuals and businesses in California which cooperate with federal authorities regarding illegal immigrants, and supporting ACLU-backed legislation to eliminate the bail bond industry and let computer software decide which criminals are safe to release on bail. Becerra has also promised to preserve California's recent sentencing "reforms" which have granted early release to at least 30,000 habitual felons, including those with violent priors such as rape and murder. The Attorney General also supports the reduced sentences now given to drug dealers, thieves, child sex traffickers, and criminals who sexually assault intoxicated victims, claiming that this will protect "young men of color."

In the wake of these reforms, violent crime in California has increased significantly for two years in a row . . . the first time this has happened since 1992.

But as bad as Attorney General Becerra's positions on crime policy are, his limp defense of California's justice system is even worse. California's method of execution has been under attack for many years, and under Attorney General Lockyer its defense was assigned to the death penalty specialists of the office who mounted a robust defense. Jerry Brown reassigned the defense to the lawyers of the correction's section, who have shown little interest in pressing the cases to a conclusion. Becerra has continued this policy in capital cases, such that California's capital punishment system has received a less vigorous and less knowledgeable defense than it deserves. Stays of execution have been issued without complying with Supreme Court requirements and in violation of the Prison Litigation Reform Act, yet Becerra does not appeal.

When the people adopted Proposition 66 to speed up California's death penalty process and it was attacked in court, Becerra followed the same path. Fortunately, our Foundation won the court's approval to allow the campaign committee for the measure to be included as a party with CJLF representing it. At oral argument, CJLF Legal Director Kent Scheidegger, who co-authored Proposition 66, promptly disposed of the opponents' claims, leaving the justices with few questions to ask him. On August 24, the court upheld the initiative in its entirety. A month later, opponents filed a petition for reconsideration, which the Attorney General did not bother to answer; but we did, and the court denied their petition last October.

Now that Proposition 66 is state law, the resumption of executions in California requires that an injunction against executions entered six years ago, based on the Administrative Procedure Act, be lifted. Proposition 66 *completely eliminated the legal basis for the injunction*, so the Attorney General should have moved to lift it the day after the initiative took effect. Instead, nothing happened, and CJLF finally made the motion on behalf of a family member of murder victims, as reported in this issue. Only afterward did the Attorney General belatedly join the motion. Simply put, the state is dragging its feet on the resumption of capital punishment, and the people of California do not have an Attorney General willing to press the issue.

There are also consequences when an Attorney General uses the state's Department of Justice to prevent the federal government from enforcing immigration law. In January, a previously deported illegal alien was charged with raping four young women, while working as an Uber driver in coastal California. Alfonso Alarcon-Nunez, a Mexican citizen, targeted intoxicated women leaving parties or bars. He drove the girls to their homes and raped them before robbing them of their cell phones, computers, and jewelry. Alarcon-Nunez was deported to Mexico in 2005. Because California issues driver's licenses to illegal aliens, Alarcon-Nunez illegally crossed the border and acquired one in 2015, which helped him qualify as a driver for Uber. The rapes began in mid-December 2017 in the seaside town of San Luis Obispo, home to Cal Poly State University. With the help of DNA evidence, detectives were able to identify Alarcon-Nunez as a suspect and arrest him. If convicted on all counts, the illegal alien could receive a life sentence. The arrest came just one week after Attorney General Becerra threatened to prosecute employers who give Immigration and Customs Enforcement officials information that helps identify illegal aliens.

While this predator will be held responsible for the coeds he attacked, they, like many other Californians, are also the victims of an attorney general more interested in protecting criminals in the country illegally than the safety of the law-abiding public.

Michael Rushford
President & CEO

CJLF HOSTS DEBATE ON LEGALIZED POT

At its meeting in Los Angeles on February 6, 2018, the Criminal Justice Legal Foundation Board of Trustees and invited guests heard a debate on the possible impact of recently legalized recreational marijuana in California. Presenting contrasting views on the issue were Diane Carlson, co-founder of Smart Colorado, a group formed to protect children in Colorado from marijuana, and Nick Morrow, a retired sheriff's deputy and member of the Law Enforcement Action Partnership, which supports legalization. CJLF Chairman Rick Richmond served as moderator for the debate.

Ms. Carlson noted that after Colorado legalized recreational marijuana in 2012, state and local efforts to regulate the sale of the drug, its potency, and to prevent children from using it have largely failed. She reported that the marijuana being sold today is several times more potent than what was available in the 1980s, and as a result, marijuana-related hospitalizations and even deaths have increased. Ms. Carlson also pointed out that several new forms of marijuana are being sold in Colorado's 424 pot stores, including edible candies and cookies in packaging that is attractive to children. National surveys have ranked Colorado first in the nation for

marijuana use among 12-17 year olds. She also argued that the wealthy interests which backed legalization have hired an army of lobbyists and made political contributions to block tougher regulation of the drug.

Mr. Morrow suggested that California will do a better job than Colorado has done on regulating the sale and potency of marijuana. He said that well-regulated legalization will reduce illegal marijuana trafficking and actually reduce its availability to children.



Nick Morrow, retired sheriff's deputy and member of the Law Enforcement Action Partnership, and Diane Carlson, Co-Founder of SMART Colorado, debate legalized marijuana.

He pointed to California's regulation of medical marijuana as an example of how the sales of the drug for recreational use would be controlled. He said that the tax revenue from pot sales would be used to fund programs to discourage drug abuse and provide treatment for addicts. Morrow argued that by making possession and use of marijuana legal, California law enforcement could focus more resources on people committing serious crimes and improving public safety.

continued on page 5

“SANCTUARY CITY CASE”

continued from front page



just the threat of withholding grant funds from San Francisco and Santa Clara has subjected them to injury. The court may also consider upon what legal basis a judge can block an Executive Order directing cabinet officers to exercise their existing authority to enforce an existing law. Finally, CJLF argues that Judge Orrick improperly gave the order an excessively expansive interpretation and that when properly interpreted it is clearly constitutional.

“It is difficult to imagine a greater intrusion into the constitutional power of the executive by the judiciary,” said CJLF Legal Director Kent Scheidegger. “The Constitution requires that executive officers be under the direction of the President, but Judge Orrick has effectively placed them under *his* direction. We expect a higher court to make this clear in its decision to overturn his ruling,” he added.

COURT: PROP. 57 APPLIES RETROACTIVELY TO JUVENILES

Juveniles convicted of violent crimes got a break in February after the California Supreme Court unanimously ruled that Proposition 57 applies retroactively to cases where violent juvenile offenders had faced trial in adult court. The ruling came in the case of **People v. Lara**, involving the Orange County District Attorney's June 2016 decision to prosecute a 14-year-old violent sex offender in adult court. Pablo Lara faced charges for the kidnapping, forcible rape, and sodomy of a 7-year-old girl.

In November 2016, California voters passed Proposition 57, which removed the discretion to charge a juvenile in adult court from the district attorney and placed it with a juvenile court judge.

CJLF had joined a separate case, **People v. Cervantes**, involving the 2012 conviction of Alexander Cervantes, who was 14 years old when he committed horrific sex crimes against a 13-year-old girl and attempted to murder her and her 1-year-old brother. After raping and sodomizing the girl, Cervantes stabbed her 42 times, collapsing a lung, and lacerating her liver and spleen. He stabbed the infant 13 times. Both children survived. Cervantes was directly charged as an adult and convicted by a jury on all charged substantive offenses.

After Proposition 57 passed, both Cervantes and Lara filed petitions challenging the direct filing of their cases in adult court. In Cervantes' case, a state

appeals court had already ruled that his trial attorney had been ineffective and partially reversed the judgment and remanded the case for retrial. The Court of Appeal further held that Proposition 57 gave a juvenile court judge the authority to determine if retrial should be held in juvenile court. CJLF joined the state's appeal to the Supreme Court to argue that Proposition 57 only applies prospectively. Because Cervantes' case was lawfully initiated in adult criminal court all proceedings from that point occurred as if he were an adult, the retrial and resentencing should be held in adult court.

But, before a high court hearing was scheduled in the Cervantes case, the California Supreme Court decided **People v. Lara**, announcing that Proposition 57 applied retroactively to all nonfinal cases. Because Cervantes' case was still pending when Proposition 57 passed, the ruling applies to his case. The ruling also applies to all violent juveniles whose cases were directly filed in adult court and are currently pending or are still at some stage of appeal. In all of these cases, a juvenile court judge must decide if a retrial will be held in juvenile or adult court. The two largest financial contributors to Proposition 57, the *Public Safety and Rehabilitation Act of 2016*, were Governor Jerry Brown and New York hedge-fund billionaire George Soros.

“POT DEBATE”

continued from page 4

Ms. Carlson brought up the practice of “dabbing” that has become a serious problem in her state. It involves using butane to distill the intoxicating ingredient of marijuana, called THC, resulting in hash oil, a concentrate with up to nine times the potency of today's already potent weed. Users dab this oil on cigarettes or burn it and inhale the fumes. Both debaters agreed that dabbing can be dangerous and even fatal, but Morrow did not agree that it should be illegal.

Both agree that marijuana stays in a user's system from 10 to as long as 45 days, depending upon the frequency of its use. This sparked a question by an employer in the audience about what kind of jobs would be available for regular users. He noted that he and many of his friends in business require drug testing of employees and have a zero tolerance for applicants or employees who come to work with marijuana in their systems. Mr. Morrow agreed that employers have a right to test employees for drugs, but suggested that education programs, funded by taxes on marijuana sales, should inform the public that smoking pot could cost a user his job.

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Help CJLF fight for your rights and safety. While in most parts of America, federal and state law enforcement are cracking down on drug dealers, criminal aliens, and street gangs, in California, the Attorney General, the Governor, and the Legislature are doing all they can to protect criminals and illegal aliens. CJLF has gone to court to defend the federal crackdown on sanctuary cities, to enforce the death penalty both in California and nationally, and to prevent activist judges from inventing new constitutional rights to overturn the convictions and sentences of guilty criminals. Help us continue our work with your tax-deductible 2018 contribution. Please return the card on the right along with your check, or visit www.cjlf.org to use your credit card. *Thank you so much!*

INJUNCTION BLOCKING EXECUTIONS ATTACKED BY CJLF

The Criminal Justice Legal Foundation has filed a motion in Marin County Superior Court seeking to lift a 2012 injunction blocking executions in California.

CJLF has initiated this legal action in **Sims v. CDCR** on behalf of Kermit Alexander, whose mother, sister, and young nephews were murdered in 1984 by gang member Tiequon Cox, who is on death row still awaiting execution for these crimes.

The original injunction was announced in 2007 by Marin County Judge Lynn O'Malley Taylor. In her ruling, Judge Taylor announced that California's execution protocol violated state law because it had not been adopted through the state's cumbersome Administrative Procedure Act (APA), which required public input. This was the first time in state history that execution procedures were considered subject to this requirement. When the state's appeal to overturn Judge Taylor's ruling failed in the liberal First District Court of Appeal neither Governor Arnold Schwarzenegger nor Attorney General Jerry Brown bothered to appeal to the state Supreme Court.

Three years later, the California Department of Corrections and Rehabilitation (CDCR) announced a new execution protocol, which had gone through the APA. Condemned inmate Michael Sims immediately filed a petition in the Marin County Superior Court, claiming that

CDCR had failed to comply with the APA. In 2012, a different judge now presiding over the case ruled in favor of the murderer, issuing a permanent injunction holding the state's lethal injection protocol invalid. As with the earlier ruling, the state appealed to the First District and lost. Governor Jerry Brown and new Attorney General Kamala Harris chose not to appeal the case to the Supreme Court.

In November 2016, California voters adopted Proposition 66, a ballot measure CJLF co-authored, which *removed the court-created requirement that the state's execution protocol had to comply with the APA*. The initiative was immediately challenged and, with the CJLF's help, on August 24, 2017, the California Supreme Court rejected the opponents' claims and upheld the new law. That decision became final on October 25, 2017. For the

next three months, Californians waited in vain for their Attorney General to file a motion in the Marin County court to lift the injunction blocking enforcement of the new law.

Tired of waiting, on January 22, 2018, CJLF filed a motion on behalf of Mr. Alexander. A few weeks later, CDCR announced it would join our motion. Argument is scheduled for March 28. In the motion, CJLF Legal Director Kent Scheidegger argues that state law prohibits injunctions that prevent the execution of a public statute by officers of the law for the public benefit. Proposition 66 is a valid state law and the injunction is preventing its enforcement in defiance of the public interest.

"The people have spoken and eliminated the legal basis for his injunction. It should be promptly lifted," said Scheidegger.



CJLF legal arguments filed, press releases, publications, and information on the fight against inmate releases and enforcement of Proposition 66 are available on our Website at:

www.cjlf.org

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