CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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CJLF OPPOSES LAWSUIT AGAINST FERGUSON POLICE OFFICER

At about 12 noon on August 9, 2014, veteran police Officer Darren Wilson spotted two black men walking down the middle of Canfield Drive in Ferguson, Missouri. The officer had just heard a dispatch that two black men had robbed a nearby convenience store. As he drove past the two men, he ordered them to get out of the middle of the street. When the two continued walking, the officer stopped his car and backed up to block their continued path down the middle of the street. As he stopped the patrol car, the officer ordered the two men to get on the sidewalk. The two men were Michael Brown, a 6'4", 292 lbs. 18-year-old, and 22-year-old Dorian Johnson. From this point, Johnson's version of events differ from the findings of a grand jury and a U. S. Department of Justice investigation of the incident.

According to Johnson, after Officer Wilson stopped in front of them on the street, he opened his door, striking Brown, and then grabbed Brown and threatened to shoot his gun. While Brown struggled to break free, Officer Wilson discharged his gun twice, striking Brown in the arm. At all times during this encounter, Johnson was standing next to Brown. After Officer Wilson shot Brown in the arm, Brown and Johnson ran away from Officer Wilson. Officer Wilson did not order Brown and Johnson to "stop" or "freeze." Rather, Officer Wilson fired his service weapon at the two men, striking Brown several times and killing him. In later testimony, Johnson changed his story, saying that as they ran, Brown suffered a gunshot to the back, stopped running, turned around with this hands up and said, "I don't have a gun. Stop shooting," before Officer Wilson shot and killed him. This later version became the basis for the "Hands up, don't shoot" narrative that inspired weeks of rioting and destruction.

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RULINGS BLOCKING TRAVEL BAN VACATED

On October 10, the U. S. Supreme Court issued the following order in **Trump v. International Refugee Assistance Project**, the Fourth Circuit case challenging the 90-day ban on travel from six countries where the U. S. was unable to properly vet admittees:

> We granted certiorari in this case to resolve a challenge to "the temporary suspension of entry of aliens abroad under Section 2(c) of Executive Order No. 13,780." Because that provision of the Order "expired by its own terms" on September 24, 2017, the appeal no longer presents a "live case or controversy." **Burke v. Barnes**. Following our established practice in such cases, the judgment is therefore vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss as moot the challenge to Executive Order No. 13,780. **United States v. Munsingwear, Inc**. We express no view on the merits.

The Fourth Circuit handed down its ruling on May 25, 2017. The Court held that the government's stated purpose for the temporary travel ban, *i.e.*, to develop a process for vetting visitors from terrorist-infested countries to improve national security, was actually a coverup for a ban on Muslims. As proof, the Court cited statements made by the President when he was campaigning for office.

In the companion case from **Trump v. Hawai'i**, the Ninth Circuit ruled on June 12 that the 90-day travel ban provided no benefit to national security and would cause "irreparable harm" to both the excluded refugees and the state of Hawaii. The ruling addressed two other provisions in addition to the 90-day ban: a provision limiting the number of refugees in the fiscal year just ended, and a 120-day provision which became moot October 24. On October 24, the Supreme Court issued an identical order holding the Ninth Circuit decision moot and instructed the lower court to dismiss it.

The Court's orders mean that the Fourth and Ninth Circuit opinions are erased as precedent. The Criminal Justice Legal Foundation's brief in these cases urged precisely this result.

At the time of the main briefing, CJLF was the only one calling for this, serving up the **Munsingwear** decision as supporting precedent. Later, in a supplemental letter brief in response to the Court's request, the Government changed its prior position and adopted ours. Only Justice Sonia Sotomayor voted to leave either of these very misguided rulings on the books.

VIEWPOINT

GOVERNOR SIGNS BILLS BENEFITTING CRIMINALS

Vetoes Bill Helping Victims

California Governor Jerry Brown has responded to the recently reported increases in violent crime by signing into law ten bills benefitting convicted criminals, and vetoing a bill which passed unanimously in both houses that would have helped the police protect the public from repeat felons. State and federal reports indicate across-the-board increases in violent crime in the Golden State over the past two years, with homicide jumping nearly 5% in 2016 after a 10% increase in 2015. While robbery and aggravated assault were also up, the increase in rape was the highest at over 7%. The state attorney general's report shows that from 2014 to 2016 homicide in California rose by 15.3%, robbery by 12.5%, and aggravated assault by 13.7%.

This year's criminal justice measures passed by the legislature and signed by the Governor include:

- AB 1308, expands parole eligibility for violent criminals who committed their crimes before the age of 25 and are now over 60.
- AB 1448, expands parole eligibility for violent criminals who have served at least 25 years in prison.
- SB 180, repeals the three-year sentence increase for habitual drug dealers.
- SB 190, repeals fines assessed on the parents of juvenile criminals.
- SB 310, establishes a *right for county jail and state prison inmates* to change their name and/or gender and require jail and prison administrations to recognize and accommodate such changes.
- SB 312 and SB 393, expands opportunities for adults to seal their juvenile criminal records.
- SB 394, allows murderers sentenced to life without parole, who killed their victim(s) before reaching the age of 18, to become *eligible for parole* after serving 25 years.
- SB 395, requires an attorney be present before police can question a suspect aged 15 or younger.
- SB 620, eliminates the 10-year sentence enhancement for a *criminal who uses a gun during the commission of a felony*.

On October 15, a bill supported by virtually every law enforcement organization in California was vetoed by Governor Brown. AB 1408 was introduced by Assembly Majority Leader Ian Calderon and passed both the Assembly and Senate with unanimous bipartisan votes. The bill made modest changes to current law in order to give local law enforcement agencies more control over the tens of thousands of habitual criminals left in communities by AB 109 (the Governor's Realignment law) and Proposition 47, the 2014 ballot measure sponsored by the ACLU and George Soros which downgraded property and drug felonies to misdemeanors. Among its provisions, AB 1408 would have required the Department of Corrections and Rehabilitation to provide local police agencies with the parole records of inmates released. It would have required the parole board to consider a criminal's entire record, not just the most recent conviction, when determining if he would be a threat to public safety if released. It would have required that a criminal who violates parole for a third time be brought before a judge to determine if he should be sent back to prison. It would have prohibited short county jail sentences (flash incarceration) for a third violation of probation and allowed for the arrest of criminals on probation who failed to appear in court on a violation.

In his veto message, the Governor said, "I do not agree that a three-strikes and you're out approach is the correct solution."

Over the past 13 months, under the Governor's Realignment law and Proposition 47, five California police officers have been murdered by habitual criminals released from prison and kept on the streets after committing additional crimes.

Over the past year, California's Governor has proven once again that he is more concerned about reducing the accountability of criminals than about protecting police officers, the law-abiding public, or crime victims.

Michael Rushford
President

BOXSCORE

An accounting of the state and federal court decisions handed down over the past year on cases in which CJLF was a participant. Rulings favoring CJLF positions are listed as WINS, unfavorable rulings are LOSSES, and rulings which have left the issue unsettled are DRAWS.

Trump v. International Refugee Assistance Project, Trump v. Hawai'i: 10/10/17, 10/24/17. U. S. Supreme Court orders voiding earlier rulings by the Fourth and Ninth Circuit courts of appeal, which had blocked enforcement of the President's 90-day travel ban for visitors of six Middle Eastern countries overrun with terrorists. Last June, the high court stayed both rulings and allowed the travel ban to proceed until it could review the cases in October. CJLF had joined these cases to encourage the high court to find both lower court rulings moot, because the temporary travel ban would expire before the October review. On October 10, in **Trump v. IRAP**, and on October 24, in **Trump v. Hawai'i**, the Court mooted both cases and ordered them dismissed, *wiping out both rulings as precedent*. Only Justice Sonia Sotomayor voted to leave either of these misguided rulings on the books. **WIN**

Briggs v. Brown: 8/24/17. California Supreme Court decision upholding Proposition 66, an initiative CJLF co-authored to speed enforcement of the death penalty and adopted by voters in November 2016. Death penalty opponents filed a lawsuit attacking the initiative the day after it passed, claiming that it violated the state's single-subject rule and that other provisions were unconstitutional. Concerned that the state would not make a strong argument to uphold the initiative, CJLF won the court's agreement to accept the campaign committee as a party. In its brief, CJLF noted that previous Supreme Court decisions had rejected single-subject challenges to more complex initiatives. The brief also noted that the court would have to clear-cut 40 years of its own precedent to uphold the opponent's claims. In June, CJLF Legal Director Kent Scheidegger presented oral argument at the court hearing on the initiative. The court ruled 7-0 to reject the single-subject challenge and uphold the initiative as a whole. The court also denied, 5-2, claims against two individual provisions. **WIN**

Davila v. Davis: 6/26/17. U. S. Supreme Court decision to reject a double murderer's claim that his death sentence should have been overturned because his lawyer for the first appeal failed to challenge a jury instruction given at his sentencing hearing. Erick Davila was convicted of firing into a crowd of children at a birthday party, killing a woman and her five-year-old granddaughter. At the third post-trial review of his case, Davila claimed, for the first time, that his first appeals attorney was incompetent because he failed to challenge the jury instruction. This claim was rejected by a federal district court and the court of appeals as both defaulted (he should have raised it earlier) and without merit (meaning the instruction was allowable). In the Supreme Court appeal, CJLF argued that if the high court set a precedent allowing defendants to raise defaulted claims against their appeals attorneys at a third or fourth round of review it would have created an endless cycle of review effectively blocking enforcement of the death penalty. The court's 5-4 decision agreed. **WIN**

Weaver v. Massachusetts: 6/22/17. U. S. Supreme Court decision upholding the conviction of a murderer who claimed that his rights were violated because the courtroom was too crowded during jury selection for his mother to sit with him. The case involves the 2003 murder of 15-year-old Germaine Rucker by 16-year-old Kentel Weaver. Witnesses and DNA evidence identified Weaver as the shooter. Prior to the trial, the courtroom was so crowded with prospective jurors that Weaver's mother could not sit with him for the jury selection, but she did sit with him for the entire trial. On appeal, Weaver claimed that closing the courtroom during jury selection violated his constitutional right to a public trial, invalidating his conviction. CJLF joined the case to argue that for the error to require overturning his conviction, Weaver must prove that the exclusion of his mother during jury selection undermined his ability to prove his innocence at his trial, which it did not. The high court's 7-2 decision adopted that argument. **WIN**

Hernández v. Mesa: 6/26/17. U. S. Supreme Court case which had raised the question of whether a foreign national can sue a U. S. law enforcement officer for an injury occurring in his home country. The case involved a U. S. border guard who, while arresting an illegal on the U. S. side of the border, shot and killed a Mexican teenager throwing rocks at him on the Mexico side of the border. The teen's parents, also Mexican citizens, sought to hold the border guard liable for their son's death. CJLF argued that foreign citizens have no right to relief under U. S. law for an incident that occurred outside of the country, citing high court decisions declining to grant such a right. Without deciding the issue, the Supreme Court punted the case back to the federal court of appeals, which had previously denied the claims, for further consideration based on another case decided in the same term. **DRAW**

Moore v. Texas: 3/28/17. U. S. Supreme Court ruling announcing that, while its 2002 holding in **Atkins v. Virginia** prohibiting the execution of mentally retarded murderers had been left to the states to determine what factors should be considered to determine if a defendant is mentally retarded, the state of Texas failed to adopt the correct standards. Bobby Moore was convicted and sentenced to death for shooting an elderly store clerk in the head with a shotgun during a 1980 robbery. After the **Atkins** decision was announced, Moore claimed that he was mentally retarded. When the Texas courts determined that he was not, Moore appealed to the U. S. Supreme Court, attacking the state's evaluation process as outdated. CJLF joined the case to argue that allowing periodic changes in the standard for determining retardation would invite an endless cycle of review. **LOSS**

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BOXSCORE

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Peña-Rodriguez v. Colorado: 3/6/17. U. S. Supreme Court ruling announcing that a criminal defendant has a constitutional right to introduce statements made by jurors after a trial is over to challenge the validity of the conviction. In this case, a child molester, found guilty by a unanimous jury, argued that state and federal rules requiring that jury deliberations be kept confidential denied his right to present statements made by jurors after the trial which implicated one juror of being biased against Mexicans. CJLF argued that Supreme Court decisions have held that statements made by jurors during deliberations should be kept confidential to allow jurors to express their views without fear of reprisal. The high court's 5-3 ruling found that the Sixth Amendment allows juror statements to be used when they suggest that a verdict might have been based upon racial bias. **LOSS**

TOTAL	4 Wins	2 Losses	1 Draw

Case Report

A Summary of Foundation Cases Currently Before the Courts

People v. Farwell: California Supreme Court case to review 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. 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 argues that the law requires his conviction to be overturned because the judge did not instruct him on the consequences of his admission of guilt. CJLF has joined the case to oppose Farwell's claim, arguing that the law actually allows a review of the entire trial court record to determine if he knowingly and intelligently waived his trial rights when he admitted guilt on the driving without a license charge.

INITIATIVE LAUNCHED TO FIX CA SENTENCING

Assemblyman Jim Cooper (D) Elk Grove, Sacramento County District Attorney Anne Marie Schubert, and several law enforcement and victims' groups recently announced a ballot initiative to fix some of the unintended consequences of the state's "Public Safety Realignment" law (AB109) and Proposition 47. The measure would add several offenses to the list of violent crimes, including rape of an unconscious person, human trafficking of a child, and assault on a police officer, making them no longer eligible for early parole. The measure would also require the parole board to consider an inmate's entire criminal record when determining if he should be eligible for release. The measure would require that probation be terminated if an offender violates the conditions for a third time or fails to attend a violation hearing. Finally, DNA samples would be required for offenders who commit crimes converted from felonies to misdemeanors by Proposition 47, and felony status would be restored for a third theft of property valued at $250 or more. The proponents must gather roughly 370,000 signatures to put the initiative on the November 2018 ballot.

City of Hays v. Vogt: U. S. Supreme Court case to review a federal appeals court ruling that would prevent introduction of valid evidence in criminal trials. The case involves a police officer's voluntary admission to the police chief that he took a knife from a crime scene. After an internal investigation uncovered evidence of possible theft, the state took over the case and brought criminal charges against the officer. At a pretrial hearing, the officer's admission and the corroborating evidence were introduced to support the charges. The judge dismissed the charges for lack of probable cause. The officer sued, claiming that when he made the statement he became a witness against himself and that the statement and the related evidence should have been excluded from the pretrial hearing. The district court rejected the claim, finding that the protection against self-incrimination only applies to a trial. The Tenth Circuit Court of Appeals reversed, ruling that the evidence was used in a criminal case. CJLF has joined the case to argue that the Tenth Circuit's ruling unnecessarily expands the already overly broad exclusion of valid criminal evidence and should be overturned.

Johnson v. City of Ferguson: Federal Eighth Circuit Court of Appeals case to review lower court decisions that would allow Dorian Johnson, the 22-year-old companion of Michael Brown, to sue the city and Officer Darren Wilson for violating his rights. In August 2014, Officer Wilson shot and killed 6'4", 290 lbs. Michael Brown. Brown had just robbed a convenience store when Officer Wilson saw the pair walking down the middle of a street in Ferguson, Missouri. Johnson claims that when Officer Wilson ordered them to the sidewalk, he had unlawfully seized him in violation of the Fourth Amendment. Although both federal and grand jury investigations of the incident found that Johnson had lied about the events leading up to the shooting and the shooting itself, motions to dismiss the lawsuit have been rejected by the Federal District Court and a divided Eighth Circuit panel. When the circuit agreed to reconsider the panel's ruling en banc, CJLF joined the case on behalf of the National Police Association arguing that by Johnson's own admission he was not ordered to stop or prevented from leaving, which he did when he eventually ran. Citing its 1991 U. S. Supreme Court victory in **California v. Hodari D.**, CJLF argues that the facts Johnson describes of his encounter in the middle of the street with Officer Wilson do not constitute a seizure. Because of this, the lawsuit should be dismissed.

SUPREME COURT TO HEAR BID TO EXCLUDE EVIDENCE

The U. S. Supreme Court has agreed to hear an appeal by the City of Hays, Kansas, regarding a lawsuit seeking to expand the scope of the Constitution's protection against self-incrimination. At issue in the case of **City of Hays v. Vogt** is whether a police officer's admission to taking a knife from a crime scene, which prompted an investigation and hearing on felony charges, violated his Fifth Amendment rights.

In 2013, Matthew Vogt was a police officer with the Hays Police Department. That year, he interviewed for a new job at the police department in Haysville, Kansas. During the interview, Vogt revealed he possessed a knife that he had taken from a crime scene in Hays. At the close of the interview, Vogt was offered the new job on the condition that he inform the Hays chief of police about the knife he had taken. When Vogt did this, the chief asked him to write down how he had acquired the knife, which he did. With the intention of taking the new job at Haysville, Vogt also informed the chief that he would be resigning from his job at Hays PD.

The Hays PD opened an internal investigation, asking Vogt for a more detailed statement about the knife and gathered other related evidence. The department then suspended its investigation and turned the case over to the Kansas Bureau of Investigation, which opened a criminal investigation. Learning this, the Haysville Police Department withdrew Vogt's job offer.

At a preliminary hearing, Vogt's admission to the Hays police chief and the other evidence gathered were introduced to support felony charges, but the court dismissed the case for lack of probable cause.

Vogt subsequently sued for money damages, claiming that by introducing the statement he gave to the police chief and the other collected evidence at the hearing, the Hays PD had violated his privilege against self-incrimination. A Federal District Judge dismissed the suit, holding that in order for there to be a Fifth Amendment violation, Vogt's statement would have to have been introduced at a trial, not a preliminary hearing. On appeal, the Tenth Circuit reversed, announcing that because the hearing was part of a "criminal case" introduction of the statement was unconstitutional.

When the Supreme Court agreed to hear the state's appeal, CJLF joined the case. In a scholarly *amicus curiae* (friend of the court) brief, Associate Attorney Kymberlee Stapleton argues that the Fifth Amendment's Self-Incrimination Clause "that no person . . . shall be compelled in any criminal case to be a witness against himself" has been interpreted too broadly, actually allowing the exclusion of valid evidence from criminal trials. In this case, Vogt's statement admitting the theft to the Police Chief, the use of the statement to gather corroborating evidence, and the use of that statement and related evidence at the preliminary hearing do not violate the Fifth Amendment. As a result, the Tenth Circuit's ruling should be reversed. "There are already too many rules excluding relevant evidence from juries. In this case, we are asking the Supreme Court not to expand them any further," said Stapleton.

Advisory layout design by Irma H. Abella

The CJLF victories reported in this *Advisory* would not have been possible without your valuable support. We are now working to rein in the renegade federal judges who are trying to block the President's efforts to secure our borders and crack down on illegal aliens committing crimes in America. We are also fighting against the slap-on-the-hand sentencing policies that are leaving more drug dealers, thieves, and violent criminals in our neighborhoods. Please help us to stay in the fight to protect your rights and safety by returning the card on the right with your check, or going to www.cjlf.org or calling us at (916) 446-0345 to use your credit card. **Thank you very much.**

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Fall 2017

"LAWSUIT AGAINST OFFICER"

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According to the grand jury and the Justice Department, after Officer Wilson stopped his car, Brown reached in and tried to grab Officer Wilson's gun. During the struggle, two shots were fired, one striking Brown in the hand, and both Brown and Johnson started running. Officer Wilson radioed for backup before exiting his car to give chase. Wilson ran after the pair ordering them to stop and get on the ground. At about 150 feet from the patrol car, Brown and Johnson stopped, and Brown turned around and charged Officer Wilson. Officer Wilson fired multiple shots, hitting Brown as he kept charging, before a bullet to the head stopped him.

Three separate autopsies confirmed Brown had been shot from the front while coming forward, not in the back as he ran. Multiple witnesses testified before the grand jury and were later interviewed by federal investigators. Virtually all of them were bi-racial or black. Many gave versions similar to Johnson's account, but different on important details. Some of these witnesses later admitted they were lying. None who claimed to see Officer Wilson shoot Brown in the back, or as he was standing with his hands up, were determined to be credible. Some of the witnesses who corroborated Officer Wilson's account expressed fear of reprisal for telling the truth. Other evidence included Brown's DNA on Officer Wilson's gun and on the door handle of the police car.

After the grand jury and the Justice Department investigation concurred that Officer Wilson had shot and killed Michael Brown in self-defense, Dorian Johnson filed a federal lawsuit against Officer Wilson and the Ferguson Police Department for violating his civil rights. In **Johnson v. City of Ferguson, et al.**, Johnson claims that when Officer Wilson stopped him and Brown in the middle of the street and ordered them to the sidewalk, he had unlawfully seized Johnson in violation of the Fourth Amendment.

Both Officer Wilson and the City of Ferguson asked the Federal District Court to dismiss the suit, but the court rejected their petitions. They appealed that rejection to the Eighth Circuit Court of Appeals where a divided panel also refused to dismiss the case. The Eighth Circuit later agreed to reconsider the panel's denial en banc, meaning the entire court would review the case.

In September, the National Police Association asked CJLF to submit an *amicus curiae* (friend of the court) brief on their behalf, encouraging the Eighth Circuit to dismiss Johnson's lawsuit.

Dorian Johnson in the middle with his hands up.

In the brief, CJLF Legal Director Kent Scheidegger argues that on the undisputed facts Johnson was not seized by Officer Wilson when he and Brown were told to leave the street and go to the sidewalk. Officer Wilson was acting in the scope of his duties in ordering Johnson and Brown to stop walking down the middle of the street, which is against the law. Officer Wilson's order did not prevent either man from continuing on the sidewalk. By Johnson's own admission, he was not ordered to stop and was not prevented from leaving, which he did when he ran. Citing the Foundation's 1991 U. S. Supreme victory in **California v. Hodari D.**, CJLF argues that the facts Johnson describes of his encounter in the middle of the street with Officer Wilson do not constitute a seizure. Because of this, the lawsuit should be dismissed.

"Johnson is the one who should be liable. His 'hands up' lie caused enormous damage," said Scheidegger. "His claim that his rights were violated is frivolous and should be dismissed."

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