



Advisory

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MURDERER'S BID TO EXPAND APPEALS REJECTED

In a 5-4 decision announced on June 26, 2017, the U. S. Supreme Court upheld the conviction and death sentence of a Texas gang member convicted of murdering a woman and her five-year-old granddaughter. The defendant, Erick Davila, argued that his conviction of capital murder should be overturned because his state-appointed habeas corpus attorney failed to claim that his state-appointed appeals attorney was incompetent for failing to argue that an instruction given to the sentencing jury was improper.

At issue in **Davila v. Davis** was whether earlier Supreme Court precedent allowing review of a defaulted claim of substantial error by a *trial*

attorney should extend to claimed errors by a murderer's *appellate attorney*, even when a federal court finds that the error claim is without merit.

The Criminal Justice Legal Foundation had joined the case to encourage the Court not to allow a defendant's post-conviction review to include this type of claim.

For death penalty cases there are five separate types of legal proceedings: 1) the trial to determine the defendant's guilt of a class of murder eligible for a death sentence; 2) the sentencing hearing to determine if the convicted murderer should be sentenced to death or life in prison without the possibility of parole; 3) the direct appeal to determine



Erick Davila shot into a child's birthday party, killing a 5-year-old girl and her 48-year-old grandmother.

if the trial was properly conducted and that the evidence supports the verdict; 4) habeas corpus review in state court to consider facts outside the trial record; and 5) habeas corpus review in federal *continued on page 4*

SUPREME COURT UPHOLDS PROP. 66

In an August 24, 2017 decision, the California Supreme Court upheld Proposition 66, The Death Penalty Reform and Savings Act, adopted by voters last November. The court's decision in **Briggs v. Brown** unanimously rejected the opponent's claim that the measure violated the state's single-subject rule. On that point, the decision's author, Acting Chief Justice Carol Corrigan wrote, "As the findings and declarations prefacing the measure make clear, it was intended as an extensive reform of the entire system of capital punishment to make it more efficient, less expensive, and more responsive to the rights of victims. With that purpose in mind, it is readily apparent that the provisions identified by the petitioner are reasonably germane to the 'comprehensive criminal justice reform' approved by the voters." The decision to uphold all of the measure's provisions was joined by five justices, with two dissenting.

"Death penalty opponents made their case to the people and lost. Their effort to get the courts to overturn Proposition 66 would have left California with a dysfunctional death penalty process and thwarted the clear will of the voters," said CJLF Legal Director Kent Scheidegger, who co-authored the initiative and delivered oral argument before the court.

MURDERER'S CONVICTION UPHeld

On June 22, 2017, the United States Supreme Court announced its decision to reject a juvenile murderer's claim that his conviction and 15-to-life sentence should be overturned because his trial lawyer failed to object to the closure of an overcrowded courtroom during jury selection that resulted in its closure to the public.

At issue in the case of **Weaver v. Massachusetts** was whether the Constitution requires that a conviction be invalidated by a trial error, even if the error had no effect on the fairness of the trial or the defendant's case.

The Criminal Justice Legal Foundation joined the case to argue that when a defendant claims that his trial attorney was ineffective for failing to object to a structural error at trial, the defendant must prove the error prejudiced his case in order for his conviction to be overturned. In other words, he must prove that the jury would have been less likely to find him guilty had *continued on last page*

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VIEWPOINT

**BROKEN PROMISES
 ON CALIFORNIA
 SENTENCING REFORMS**

On April 5, 2011, Governor Edmund G. Brown, Jr. signed AB 109, the “Public Safety Realignment” act into law, announcing that it would “stop the costly, ineffective and unsafe ‘revolving door’ of lower-level offenders and parole violators through our state prisons.”

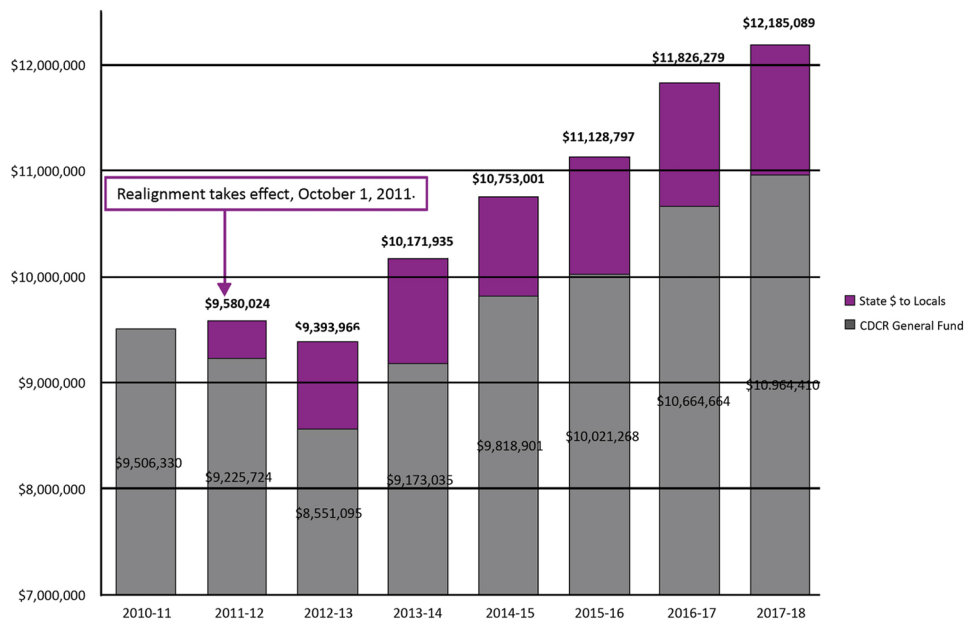
The April 2012 report, *The Future of California Corrections*, issued by the California Department of Corrections and Rehabilitation, stated “. . . upon full implementation of realignment, the department’s annual budget will be reduced by \$1.5 billion through reduced expenditures associated with declining offender populations and new efficiencies.” Similar promises were made in 2014 to encourage California voters to support Proposition 47, “The Safe Neighborhoods and Schools Act.” In its endorsement, the Los Angeles Times called it “a good and timely measure that can help the state make smarter use of its criminal justice and incarceration resources.” Supporters of Proposition 47 claimed that the initiative could save as much as \$150 million in incarceration costs. Proponents of both measures promised that the savings in corrections and county jail costs would be used to fund rehabilitation programs to keep nonviolent offenders from committing new crimes.

Both measures reduced sentences for property and drug crimes, made several thousand criminals in state prisons and county jails eligible for early release, drastically reduced supervision of those released, and prevented criminals convicted of most new felonies from receiving prison sentences.

Today, six years after the Governor signed Realignment into law and nearly three years since voters passed Proposition 47, state corrections costs have *increased* by over \$1.7 billion and total state expenditures for prisons, county jails, and rehabilitation programs have gone from \$9.5 billion in the 2010-2011 fiscal year to nearly \$12.2 billion for the 2017-2018 fiscal year, according to the Governor’s budget.

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**Corrections Spending Pre- and Post-Realignment
 (Dollars in Thousands)**



Figures reported by the Governor’s Budget Office

CJLF JOINS TRAVEL BAN APPEAL

On October 10, the United States Supreme Court will review the Department of Justice's appeal of two lower federal court rulings blocking enforcement of the Trump administration's March 6, 2017 Executive Order (EO2), restricting visitors from six Middle Eastern countries overrun with terrorists for 90 days. Rulings from the Fourth Circuit Court of Appeals, partially blocking enforcement, and the Ninth Circuit Court of Appeals, broadly blocking enforcement, were stayed in part by a *unanimous* U. S. Supreme Court on June 26, in an order announcing that the Court would formally reconsider both rulings on October 10.

The Fourth Circuit's ruling came on May 25, 2017, in a lawsuit named **International Refugee Assistance Project v. Trump**. The court's divided ruling announced that the government's stated purpose for the temporary ban, *i.e.*, to develop a process for vetting visitors from certain countries to improve national security, was actually a cover-up for a ban on all Muslims. As proof, the Court cited statements made by the President when he was campaigning for office.

The Ninth Circuit's June 12, 2017 ruling in **Hawai'i v. Trump**, concluded that "[t]here is no sufficient finding in EO2 that the entry of the excluded classes would be detrimental to the interests of the United States." The court also concluded that the 90-day travel ban caused *irreparable harm* such as "prolonged separation from family members, constraints to recruiting and attracting students and faculty members to the University of Hawai'i, decreased tuition revenue, and the State's inability to assist in refugee resettlement."

"The Fourth Circuit's finding that the EO2 is actually a Muslim ban, when 90% of the world's Muslims do not live in the six listed countries, is ridiculous. The Ninth Circuit's ruling, substituting its judgment on national security for that of the President, the Secretary of Defense, and the Secretary of Homeland Security, and then classifying a three-month postponement of visitors from the six countries as causing irreparable



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harm is remarkable," said CJLF Legal Director Kent Scheidegger .

Hundreds of government-supported organizations, colleges and universities, and non-profit groups filed briefs in the Ninth Circuit case, arguing to block the travel ban, including the Southern Poverty Law Center; the American Bar Association; the states of California, Washington, New York, and Massachusetts; the American Federation of Teachers; the Association of Art Museum Directors, and The National Queer Asian Pacific Islander Alliance. It is likely that even more groups will file briefs in the Supreme Court review of the two rulings.

The Foundation has submitted a scholarly *amicus curiae* (friend of the court) brief in these cases, now named **Trump v. International Refugee Assistance Project and Trump v. Hawai'i**. The Foundation argues that, assuming the clock for the 90-day travel ban started ticking on June 26, 2017,

when the Supreme Court lifted much of the two lower court injunctions, then the ban will expire on September 24, 2017, and there will be no travel ban in place when the Court hears argument on October 10, 2017. The cases are therefore moot and should be dismissed. The Foundation also argues that the two lower court decisions set questionable precedent that should not be allowed to influence any future litigation. For this reason, the Supreme Court should vacate the lower court rulings.

"There are major flaws in both of these rulings which would unfairly prejudice parties in future cases. To prevent this, the Supreme Court should wipe them from the books," said Scheidegger.

Watch for a decision in this important case in an upcoming *Advisory*.



CJLF legal arguments filed, press releases, publications, and information on the ongoing fight against AB109 and to enforce Proposition 66 are available on our Website at:

www.cjlf.org

“MURDERER’S BID REJECTED”

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court to determine if a defendant’s federal constitutional rights were violated. Typically, the state habeas corpus review focuses on claims that the defendant’s trial attorney was incompetent or that material evidence was not disclosed to the defendant.

In the Court’s majority decision, Associate Justice Clarence Thomas wrote, “Our decision in this case is guided by two fundamental tenets of federal review of state convictions. First, a state prisoner must exhaust available state remedies before presenting his claim to a federal habeas court. . . . Second, a federal court may not review federal claims that were procedurally defaulted in state court”

This case involves an April 6, 2008, shooting at a children’s birthday party that left a 48-year-old woman and her five-year-old granddaughter dead. Three other children and one adult were wounded by the gunfire.

The party was being held during a warm evening on the front porch of a home in Fort Worth, Texas. As the children were eating cake and ice cream, one of the children saw a black car and a gun inside pointing toward them. She then saw the car stop in front of the neighboring house and a man open fire on the party. The man continued to fire into the group as the children and adults struggled to get inside. The five-year-old little girl was hit multiple times and died at the scene along with her grandmother.

Police tracked suspect Erick Davila to an apartment complex. When he spotted the officers, he tried to escape, crashing into several cars and hitting a fence before fleeing on foot. When SWAT officers caught him, he was carrying a gun. Davila is a known gang member who had been released from prison the previous year for a home burglary conviction. Following his arrest, Davila told officers that he and a friend had been driving around in a black Mazda and decided to have a “shoot ’em up.” He said that, when they spotted the party, he decided to shoot the guys on the porch and was trying to get “the fat dude,” whom he said he recognized.

Davila was convicted of capital murder based on the circumstance that he murdered more than one person. At sentencing, the jury then heard evidence that Davila had attempted to escape from jail and seriously injured an officer. They also learned that, two days before the birthday party shootings, Davila had committed an armed robbery and another murder. In mitigation, the defense presented evidence of Davila’s troubled childhood. The jury recommended that he be sentenced to death in 2009.

Two years later, the Texas Court of Criminal Appeals (TCCA) affirmed his conviction and death sentence. He did not challenge the jury instruction on multiple murder in this appeal,

which would have been the correct proceeding to make that claim. In 2013, the trial court denied Davila’s claims on habeas corpus and the TCCA affirmed the lower court’s holding. In 2014, Davila filed his federal habeas corpus petition in District Court, arguing that his previous state habeas corpus attorney was ineffective because he failed to argue that the direct appeal attorney was ineffective for not challenging the jury instruction. The District Court denied this and Davila’s other claims. Further, the court considered the claim anyway and found it to be without merit. In 2016, the Fifth Circuit Court of Appeals held that Davila’s claim against his direct appeal attorney was defaulted because it should and could have been raised at an earlier review.

Last fall, Davila asked the U. S. Supreme Court to hear his appeal of the Fifth Circuit’s decision, arguing that two of the Court’s previous rulings supported review of his claim. He cited a 2012 ruling in **Martinez v. Ryan**, which announced that a defendant can use the habeas corpus process to claim that his habeas corpus attorney was ineffective because he did not attack the competence of his trial attorney. He also cited the 2013 ruling in **Trevino v. Thaler**, which extended the **Martinez** ruling. Davila argued that these decisions clear the way for review of his claim attacking the competence of his earlier habeas corpus attorney because he failed to attack the competence of his direct appeal attorney for failing to challenge a jury instruction, even though a federal court held that claim meritless. In January, the high court agreed to consider that claim.

In a scholarly *amicus curiae* (friend of the court) brief, Foundation Legal Director Kent Scheidegger argued that the extension of **Martinez** and **Trevino**, which were both based on the competence of trial counsel, to claims against lawyers representing murderers on direct appeal, would open the door to endless review of claimed errors that prior attorneys have considered not worth arguing. Absent a substantial claim of actual innocence, cases should not be reopened to consider such claims.

The Court’s decision noted, “Adopting petitioner’s argument could flood the federal courts with defaulted claims of appellate ineffectiveness. For one thing, every prisoner in the country could bring these claims.”

“This decision is of critical importance in death penalty cases because of the already excessive amount of time wasted in the post-conviction review process,” said Scheidegger. “Today, the Court set a limit on the practice of endlessly raising new claims by trashing the murderer’s previous lawyers,” he added.

“BROKEN PROMISES”

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Proponents of Realignment and Proposition 47 also promised that nonviolent criminals could be safely released and rehabilitated, actually making California safer. That promise has also proven false. In 2015, crime in California was up significantly in every category but burglary. The FBI Uniform Crime Report found a violent crime increase of 8.5% fueled by higher rates of murder, rape, robbery, and assault. The just-released report *Crime In California* for 2016 shows across-the-board increases in violent crime, with homicide jumping nearly 5% 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%. Rape shows a much larger increase over this period, but some of this may be attributed to a broadening of the definition of rape in 2014. The statistics suggest that each year more Californians are becoming victims of these reforms.

California news outlets are reporting dozens of serious crimes each week, committed by repeat felons free on probation under Realignment and Proposition 47.

Some examples:

On August 9, a repeat felon on probation broke into a Sacramento woman’s home about 5:00 a.m. and attacked her with a knife. Neighbors, alerted by her screams, caught Jordan Lynch attempting to flee and subdued him until police arrived. Lynch had violated his probation three times since his 2016 robbery conviction. He is being charged with attempted murder. The victim was hospitalized with stab wounds in her neck and back. (Sacramento Bee, 8/9/17.)

On July 31, a habitual criminal on probation, classified under California law as a nonserious, nonviolent offender, shot two Los Banos police officers before being fatally injured by return



fire. There were restraining orders against Norberto Nieblas Reyes from his estranged wife and the owner of her apartment for previous incidents when he climbed into her apartment through a window at 6:18 a.m. He attacked responding officers and grabbed one of their guns before shooting one officer in the chest and the other in the head, torso, and leg. Nieblas Reyes had multiple priors for DUI, drug possession, assaults on police officers, and spousal abuse. (Los Banos Enterprise, 8/4/17.)

On July 18, a Riverside County jury found habitual felon Michael Dwayne Hughes, 34, guilty of second-degree murder for a January 18, 2013, auto accident which killed two 12-year-old girls and a 56-year-old grandmother en route to a church dance. Hughes was driving drunk on a suspended license and on probation for prior convictions, and his probation had been revoked three times prior to the crash. (The Press-Enterprise, 7/19/17.)

Californians were sold a pack of lies about the sentencing reforms pushed by the Governor, the Legislature, and the ACLU. Releasing repeat criminals into our communities has actually increased state prison and local law enforcement costs, while allowing innocent people to be attacked, injured and murdered by dangerous criminals who should have been behind bars.

*Michael Rushford
President*

Advisory layout design by Irma H. Abella

Help us protect your safety. CJLF is fighting on many fronts to prevent another 1970s style crime wave with endless reports of drive-by shootings, home invasion robberies, rapes, and murders. We are raising public awareness of rising crime because of California’s slap-on-the-hand sentencing policies for repeat felons and working to enforce the death penalty for the worst murderers and a national crack-down on drug traffickers. Help us continue to fight for the safety of you and your loved ones by making your tax-deductible 2017 contribution to CJLF today. Use our website (www.cjlf.org) for credit card gifts, or mark and return the card on the right with your check. *Thank you very much!*

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“MURDERER’S CONVICTION UPHELD”

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the error not occurred.

In the Court’s 5-2 majority opinion, Associate Justice Anthony Kennedy writes, “To obtain relief on the basis of ineffective assistance of counsel, the defendant . . . must show deficient performance—that the attorney’s error was ‘so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.’ . . . Second, the defendant must show that the attorney’s error ‘prejudiced the defense.’ ”

The case involves the 2003 murder of 15-year-old Germaine Rucker by then 16-year-old Kentel Myrone Weaver. Evidence introduced at trial indicates that on August 10 of that year, Rucker was alone riding his bicycle in the Boston neighborhood of Dorchester carrying a backpack containing necklaces he was selling. When the boy turned on Wendover Street, a group of youths, including Weaver, attacked him, knocking him to the ground and began to beat him. After one of the youths grabbed the backpack and ran off, Weaver pulled a gun and shot Rucker twice in the head. As Weaver ran, witnesses saw him drop his gun and lose his baseball cap. He picked up the gun, but left the cap. Later, DNA testing linked Weaver to the cap. Prior to his arrest, Weaver’s mother questioned him extensively about the crime. After denying any involvement for two days, Weaver admitted to her that he was the shooter. He later admitted this to police during questioning.

Prior to the trial, during jury selection, the number of prospective jurors was so large that they filled every seat in the courtroom with many standing in the aisles. As a result, Weaver’s mother was not able to be in the courtroom during the two days it took to empanel the jury. Weaver’s defense attorney did not object to this.

At trial, Weaver claimed that his confession violated **Miranda** because his mother coerced him into confessing to police. The trial judge rejected that argument. The jury found him guilty of first-degree murder and unlawful possession of a firearm for which he was sentenced to life in prison with the possibility of parole after 15 years.

Weaver appealed, claiming that his trial attorney had been ineffective for failing to adequately argue that he had been



coerced to confess, and for failing to object to his mother having been kept out of the courtroom during jury selection.

After the Supreme Judicial Court of Massachusetts rejected both claims in a 2016 decision, Weaver appealed to the U. S. Supreme Court, arguing that the exclusion of the public during jury selection was a structural error that violated his constitutional rights and invalidated his conviction.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Associate Attorney Kymberlee Stapleton argued that in order for the error to invalidate Weaver’s conviction, he must prove that the failure of his attorney to object to the exclusion of his mother during jury selection somehow undermined his ability to prove his innocence during the trial. The Supreme Court adopted this reasoning in its decision.

“The lower federal courts were divided on the question of whether a structural trial error automatically required a new trial or whether the defendant must show that the error had a negative impact on his case,” said Stapleton. “With this decision, the Court has prevented other guilty murderers from seeking reversal of their convictions on technical errors which occurred at trial that did not have any effect on their trial or sentencing,” she added.

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