



Advisory

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CALIFORNIA SUPREME COURT TO HEAR CHALLENGE TO PROPOSITION 66

“In order to find Prop. 66 in violation of the single-subject rule, the court would have to clear-cut at least 40 years of its own precedent.”

On November 8, 2016, California voters adopted Proposition 66, a measure to speed enforcement of the death penalty, co-authored by Criminal Justice Legal Foundation Legal Director Kent Scheidegger and California’s District Attorneys. At the same election, voters rejected Proposition 62, a measure to abolish the death penalty, proposed by former actor Mike Farrell.

Shortly after Proposition 66 passed, former California Attorney General

John Van de Kamp and former El Dorado County Supervisor Ron Briggs filed a petition in the state Supreme Court seeking a ruling to strike down the new law. The petition names as respondents the Governor and the Attorney General, who share an obligation to enforce it. The petitioners also named the California Judicial Council as a respondent, presumably because the council would need to make some rule changes required by the new law. However,

including the Judicial Council as a party also requires two conservative Supreme Court Justices who serve on the council, Chief Justice Tani Cantil-Sakauye and Associate Justice Ming Chin, to recuse themselves from the case.

The Proposition 66 campaign committee has been accepted as a party in the case, and CJLF is providing representation along with an attorney retained by the committee.

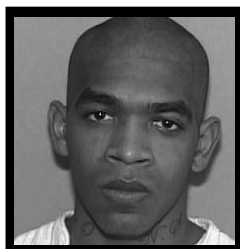
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CJLF OPPOSES DOUBLE MURDERER’S APPEAL

The U. S. Supreme Court has agreed to hear the appeal of a Texas gang member convicted of murder and sentenced to death. He argues 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** is 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 of Appeals finds that the error claim is without merit.

The Criminal Justice Legal Foundation will join the case to encourage the Court not to allow review for this type of claim.



Erick Davila opened fire on a child’s birthday party, killing a 5-year-old girl and her 48-year-old grandmother. He wanted to have a “shoot ‘em up.”

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 if the trial was properly conducted and that 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 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.

This case involves an April 6, 2008, shooting at a children’s birthday party that left a 48-year-old woman and her 5-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

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REVIEW OF JUVENILE MURDERER'S APPEAL

The United States Supreme Court has agreed to review a juvenile murderer's claim that his conviction and life sentence should be overturned because his trial lawyer was incompetent.

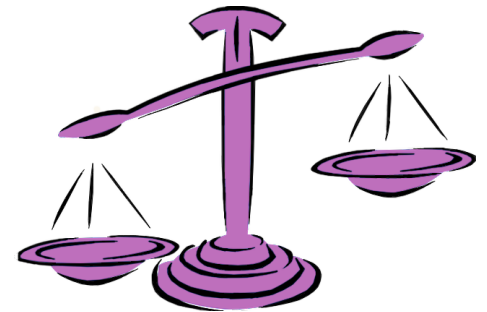
At issue in the case of **Weaver v. Massachusetts** is whether the Constitution requires a conviction be invalidated by an alleged error, even if the error had no effect on the fairness of the trial or the defendant's case.

The Criminal Justice Legal Foundation will file argument with the Court to encourage a decision rejecting the murderer's claim.

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 bag containing necklaces he was selling. When the boy turned down Wendover Street, a group of youths, including Weaver, attacked him, knocked him to the ground, and began to beat him. After one of the youths grabbed the bag, Rucker was shot twice. As Weaver ran, witnesses saw him drop a 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.

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 filed a motion for a new trial, claiming that his trial attorney had been incompetent for failing to adequately argue that his client had been coerced to confess and for failing to object to his mother being 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 his mother 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 Kimberlee Stapleton argues 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 error in this case is a minor one having no impact on the trial or sentencing of this murderer," said Stapleton. "Were the Court to adopt Weaver's claim, other guilty murderers would be able to seek a new trial after their convictions have become final without having to show the alleged error had any effect on the outcome of the case."

Advisory layout design by Irma H. Abella

PROTECTING THE NARRATIVE WHILE INNOCENTS DIE

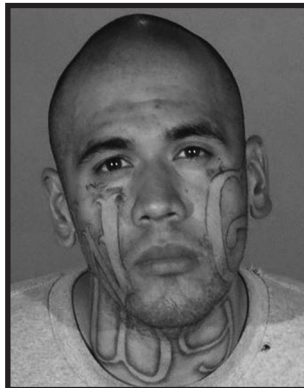
There has been quite a bit of talk about “fake news” in recent months, primarily due to repeated assertions during last year’s presidential campaign that the mainstream media is biased and willing to fabricate stories to further that bias. This suggestion is hardly new. Surveys of the political preferences and contributions to candidates from reporters, editors, and publishers going back to the Nixon Administration have irrefutably shown that the vast majority favor Democrats and Democrat administrations. But the bias has gotten much worse over the past several years and is almost never limited to the editorial page. The reporting of unverified information that furthers a liberal narrative, such as headlines reporting that thug Michael Brown had his hands up when he was shot by a police officer in Ferguson, Missouri, has become routine. That story turned out to be completely false, but it was parroted uncritically in the national media and “hands up, don’t shoot,” remains the mantra for much of the left, including members of Congress.

By my definition, fake news also includes a reporter’s or editor’s choice to simply not report a news event or to report it incompletely. A recent example is the Associated Press coverage of the February 20 murder of a Whittier police officer by Michael Mejia, a gang member left on the streets due to AB109, Governor Brown’s Public Safety Realignment law. The headline in The Sacramento Bee was “Official: Reforms didn’t cut sentence of suspect in killing.” The Bee joined the Los Angeles Times, ABC News, and other news outlets to highlight a state corrections official’s insistence that AB109 had nothing to do with Mejia being free on the streets to kill Officer Keith Boyer as he was responding to a traffic accident. Because the liberal narrative is that the system has been too harsh on so-called nonviolent offenders, nobody bothered to find out if the corrections official’s claim was true.

In fact, Mejia is a repeat violent felon who went to prison in 2010 for armed



Officer Keith Boyer



Michael Mejia

robbery and was sent back to prison in 2014 for grand theft auto. Not just any prison, but Pelican Bay State Prison, where California’s most dangerous gang members are sent. Because of AB109, Mejia became eligible for release sooner because only his most recent conviction for auto theft could be considered for eligibility, not his prior armed robbery or his membership in a street gang. When he was released on April 16, 2016, AB109 required that he be placed on county probation, rather than state parole. Previously, all state inmates were released on parole, and a violation of parole conditions or the commission of a new crime put the ex-con back in prison for at least one year.

Under AB109, Mejia could not go to prison for violating his probation or for committing most new felonies. He could only be returned to prison upon conviction of a violent felony. Since July 2016, Mejia violated his probation four times, but he never spent more than ten days in county jail. *There is no question* that AB109 allowed this criminal to get out of prison earlier, gave him light supervision, and kept him on the streets until he killed his cousin, Roy Torres, and stole his car on February 20, and then killed Officer Boyer and wounded his partner later that day. Most journalists in the major media chose not to report this.

There are currently several thousand repeat offenders who, like Michael Mejia, have been allowed to remain free in California communities under AB109. The habitual felons who murdered Los Angeles Sgt. Steve Owen last October 6, and Palm Springs police officers Jose Gilbert Vega and Lesley Zerebny on October 8, benefitted from the light supervision and reduced sentences required under that law.

Nobody should be surprised by FBI statistics showing that violent crime increased in two-thirds of California’s large cities last year. The increase was even larger in 2015 when 75% of the state’s largest cities had increases in violent crime and the statewide increase was 2½ times the increase nationally. In Los Angeles alone, violent crime increased by 24.2% in the first six months of 2015. Last year, it increased by 16.8% over the same time period.

The primary job of news journalism used to be to question the claims and policies of government leaders so that the people could know the truth. Today, most of the media functions to protect and defend the narrative of liberal/progressive politicians, regardless of the truth. Even when that narrative is covering up for the murder of innocent people.

Michael Rushford
President & CEO

LAWSUIT AGAINST BORDER PATROL AGENT REACHES HIGH COURT

A federal lawsuit seeking to hold a United States Border Patrol agent personally liable for the shooting of a Mexican juvenile, has been accepted for review by the United States Supreme Court.

The question before the Court in **Hernández v. Mesa** is whether Mexican parents who are Mexican citizens have the right to sue a U. S. law enforcement officer for an incident on the Mexican side of the U. S.-Mexico border, which resulted in the death of their 15-year-old son who was also a Mexican citizen living in Mexico.

The Criminal Justice Legal Foundation has joined the case to encourage the Supreme Court to reject the lawsuit, arguing that under the circumstances of the case there is no constitutional or statutory authority to bring it.

The case involves the death of 15-year-old Sergio Adrian Hernández Guereca on June 7, 2010. On that day, Hernández and several others were hanging around a cement culvert that separates El Paso, Texas, from Mexico. The border runs along the center of the culvert with a fence along the embankment on the U. S. side. The plaintiffs claim that Hernández and his friends were playing a game where they would run up the side of the culvert, touch the fence, and run back. When Border Patrol Agent Jesus Mesa Jr. arrived at the scene, he caught one of Hernández's friends on the U. S. side of the culvert. Then while standing on the U. S. side, Mesa shot and killed Hernández as he was watching from the Mexican side.

A subsequent U. S. Department of Justice investigation found that Hernández was known by law enforcement for illegally smuggling people across the border. On the day of the shooting, Agent Mesa caught a suspect attempting to cross the border at the El Paso culvert. Seeing this, Hernández and his friends began pelting the agent with rocks at close range and, in response, Agent Mesa fired his weapon, killing Hernández.

In their lawsuit, Hernández's parents argue that their sons's constitutional rights were violated, and thus they are entitled



Concrete culvert separating Ciudad Juarez, Chihuahua, Mexico, and El Paso, Texas, United States.

to sue and hold Agent Mesa personally liable due to excessive force resulting in the death of their son. They cite a 1971 Supreme Court ruling in **Bivens v. Six Unknown Federal Narcotics Agents** for support. The **Bivens** ruling allowed a U. S. citizen whose home was searched without a warrant, before he was arrested, strip searched, and interrogated on an unsubstantiated narcotics violation, to sue federal authorities for damages.

In a scholarly *amicus curiae* (friend of the court) brief, Foundation attorney Kymberlee Stapleton argues that no decision after **Bivens** extended the right to sue federal agents to foreign citizens with no ties to the United States for an act that occurred in a foreign country. In fact, in its 2001 decision in **Correctional Services Corporation v. Malesko**, the Court noted that it had “consistently refused to extend **Bivens** liability to any new context or new category of defendants.” The CJLF brief also argues that Congress has expressly prohibited recovery for tort

claims against the government that arise in a foreign country due to federal official misconduct.

Among the other organizations which filed briefs supporting the plaintiffs (Hernández) in this case are the American Civil Liberties Union, Amnesty International, the Constitutional Accountability Center, and the American Immigration Council.

“Congress, not the judiciary, is the proper branch to decide if noncitizens can recover money damages for tortious government conduct occurring in a foreign country,” said Stapleton. “A decision to allow this lawsuit would permit the family of an alien with no ties to the U. S., who was likely engaging in criminal activity, to force a border patrol agent into litigation over an incident that has been investigated by the Department of Justice and would chill the enforcement of America's border security,” she added.

“DOUBLE MURDERER’S APPEAL”

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fire into the group as the children and adults struggled to get inside. The little 5-year-old 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. In 2016, the Fifth Circuit Court of Appeals, while noting that Davila’s claim against his direct appeal attorney was defaulted because it should and could have been raised at an earlier review, *considered the claim anyway and found it to be without merit.*

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 argues 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 appeals court held that claim meritless.

Remarkably, in January, the high court agreed to consider that claim.

CJLF is submitting a scholarly *amicus curiae* (friend of the court) brief, arguing 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.

“Enough is enough. The time wasted reviewing this cold-blooded murderer’s groundless claim demonstrates exactly what’s wrong with the post-conviction review process,” said Foundation Legal Director Kent Scheidegger. “Beyond a certain point, further reviews should be reserved for substantial claims of actual innocence, and nearly all death-row inmates are clearly guilty,” he added.

At the election last fall, voters in most states elected leaders who promised to crack down on criminals and secure our borders from drug, gun, and human traffickers. But a few states, and particularly California, have chosen to keep politicians in office who have released thousands of habitual criminals into communities to rape, rob, and murder innocent people. CJLF is holding those politicians accountable by reporting the truth about why crime is rising. We are also fighting in courts to assure that criminals are held responsible for their crimes. Help us continue by making your tax-deductible 2017 contribution today. 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!*

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“CHALLENGE TO PROP. 66”

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In **Briggs v. Brown**, the petitioners argue that the provisions of Proposition 66 violate the state’s single-subject rule for ballot measures. They cite four provisions, which they argue are unrelated to the enforcement of the death penalty: 1. The provision that requires death-sentenced murderers in prison to work and pay restitution to victims’ families. 2. The provision that removes lengthy bureaucratic paperwork requirements for developing and approving execution protocols. 3. The provision that allows physicians to advise on the development of the execution protocol and protects them from being punished by licensing boards and medical groups for their participation. 4. The provision that gives the California Supreme Court control over the currently unregulated state agency which was created to provide representation on habeas corpus in death penalty cases and to assist private attorneys in such cases.

“Petitioners do not provide a single legally supported reason why these provisions cannot be enacted.”

The Yes on 66 Committee’s brief responds by noting that all of these provisions are directly related to the initiative’s goal of more effectively and efficiently enforcing judgments in capital cases and cites numerous previous California Supreme Court decisions upholding a much broader spread of provisions incorporated in previous ballot measures. As noted by CJLF Legal Director Kent Scheidegger, “in order to find Proposition 66 in violation of the single-subject rule, the Court would have to clear-cut at least 40 years of its own precedent.”

The petitioners go on to attack other provisions that set deadlines for filing appeals, place the first post-conviction review of a capital case in the same court

where the trial was held, and place limits on successive petitions. While it is clear that they dislike these provisions, they do not provide a single legally supported reason why these provisions cannot be enacted. As detailed in the Committee brief, similar reforms have been adopted in other states and in the federal system. All are well within the legislative authority of California voters.

“Death penalty opponents made their case to the people and lost. Now they are trying to get the courts to maintain the dysfunctional status quo in order to frustrate the will of the people,” said Scheidegger.

Final briefs in the case will be submitted in early April.



CJLF legal arguments filed, press releases, publications, and information on the ongoing fight against AB109 and Proposition 47 are available on our Website at:

www.cjlf.org

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