



Advisory

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FAST-TRACK REINSTATED IN DEATH PENALTY CASES

Antiterrorism and Effective Death Penalty Act of 1996 Protected

In a unanimous March 23 decision, a three-judge panel of the Ninth Circuit U. S. Court of Appeals overturned a federal district judge’s 2013 ruling which had blocked implementation of a federal law that allows states’ expedited post-conviction review of death penalty cases. The law in question, the Antiterrorism and Effective Death Penalty Act (AEDPA) enacted by Congress and signed by President Clinton 20 years ago,

was passed to limit unnecessary delay of death penalty cases and provide states with an opportunity to significantly reduce the time allowed for federal courts to review a murderer’s error claims on habeas corpus. For many cases, the time savings could amount to ten years.

At issue in **Habeas Corpus Resource Center v. U. S. Dept. of Justice** was Federal District Judge Claudia Wilken’s authority to block the implementation of

the law based upon the claim of a group of government-paid defense attorneys that it would work a hardship on them.

The Criminal Justice Legal Foundation, which had assisted with the adoption of AEDPA, filed arguments in the case on behalf of two family members of murder victims, Marc Klaas of California and Edward Hardesty of Arizona. CJLF argued that the defense attorneys *continued on last page*

STATE POLICIES INCREASING CRIME

Los Angeles County Sheriff Jim McDonnell told guests of the Foundation’s June 1 annual meeting that changes in California policies were causing increased crime virtually everywhere within his jurisdiction. Reinforcing the perspective of other sheriffs across the state, Sheriff McDonnell cited the Governor’s Realignment Law (AB109), Proposition 36 (which weakened the Three Strikes law), and Proposition 47 (which converted property and drug felonies to misdemeanors) as the reason



Los Angeles County Sheriff Jim McDonnell

criminals are being cycled back into communities to commit more crimes.

Sheriff McDonnell was the featured speaker at the 34th annual luncheon meeting. It was co-hosted by CJLF Trustees Mary Rudolph and Faye Battiste Otto at The California Club. During McDonnell’s remarks, he noted that after the Governor signed AB109 into law in 2011, the Los Angeles county jail, which was designed to house minor offenders serving one year or less, has been filling up with hardened repeat felons no longer eligible for prison, some serving over 10 years. He explained that this, coupled with Prop. 47’s downgrading of felony possession of serious drugs (such as heroin and methamphetamine) to misdemeanors, has taken jail time off the table, removing any incentive for drug addicts to participate in rehabilitation programs.

When asked by one guest if the state had been incarcerating too many people, Sheriff McDonnell responded that previous California sentencing policies focused on increasing the consequences for repeat and violent offenders and that those policies had given the public two decades of dramatically reduced crime rates.

CA LEGISLATORS WANT FELONS TO VOTE

In early June, the California Assembly voted 41 to 37 to allow convicted felons serving time in jail to vote in state and federal elections. As noted by San Francisco Chronicle columnist Debra Saunders, if AB2466 passes in the State Senate and Governor Jerry Brown signs it, convicted Stanford rapist, Brock Turner, sentenced to only six months in jail for the rape of an unconscious woman, will be able to vote this November, along with tens of thousands of other jailed felons. The bill was introduced by Assemblywoman Shirley Weber (D) San Diego, with coauthors Holly Mitchell (D) Los Angeles and Assemblywoman Lorena Gonzalez (D) San Diego.

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UPHELD: LAWS REQUIRING DUI SUSPECTS TO CONSENT TO TESTING

Laws in every state that require suspected drunk drivers to consent to a breath test were upheld by a 6-2 U. S. Supreme Court decision announced on June 23. Earlier this year, the high court agreed to review three drunk driving cases involving challenges to North Dakota's and Minnesota's implied consent laws. These laws allow the state to impose criminal penalties upon a lawfully arrested driver who refuses to submit to a breath, blood, or urine test to determine the presence of intoxicants. At issue in the cases of **Birchfield v. North Dakota**, **Bernard v. Minnesota**, and **Beylund v. Levi** was whether these laws violated motorists' Fourth Amendment rights by requiring them to consent to warrantless searches.

The Criminal Justice Legal Foundation had joined the **Beylund** case to argue that an earlier North Dakota Supreme Court decision, which rejected the challenge and upheld the law, was correct and should be affirmed. Implied consent is a legal tool utilized by all 50 states to obtain evidence of blood alcohol concentration ("BAC") levels of arrested motorists. In its decision, the high court upheld the law as applied to breath tests, but it required a search warrant before compelling a blood test.

The Supreme Court's majority opinion authored by Associate Justice Samuel Alito stated, "Having assessed the effect of [blood alcohol concentration] tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great."

The first case was that of Danny Birchfield, whose preliminary breath screening showed a BAC of 0.254%, more than three times the legal limit. He refused a blood test and was convicted of a misdemeanor for refusing. In the second case, the defendant, William Bernard, was a



four-time recidivist drunk driver arrested with alcohol on his breath and bloodshot eyes. He refused a breath test and was convicted for refusal. The third case involved the driver's license suspension of Steve Beylund. He consented to a blood test after being advised of the penalty for refusal, and the test showed a BAC of 0.250%, over three times the legal limit. His license was suspended for two years.

In a scholarly *amicus curiae* (friend of the court) brief in **Beylund**, CJLF Associate Attorney Kymberlee Stapleton argued that the license to operate a motor vehicle is a privilege granted by the state, conditioned upon the driver's agreement to consent to testing for the presence of intoxicants. Each year thousands of Americans suffer death, injury, and destruction by drunk drivers.

"This decision recognizes that the public's interest in protecting innocent people and keeping intoxicated motorists off of the roadways is significant in comparison to the privacy interests of a lawfully arrested motorist who made the choice to drink and drive," says Stapleton. "The Court's decision to uphold the criminal penalties for motorists who refuse to take a breath test also recognizes that the state-granted privilege of operating a motor vehicle must respect the fundamental rights of others to be free from bodily harm."

Advisory layout design by Irma H. Abella

SUPREME COURT REBUKES NINTH CIRCUIT IN CALIFORNIA MURDER CASE

In a May 31, 2016 decision, the U. S. Supreme Court summarily reversed a Ninth Circuit ruling, which had overturned the conviction of a murderer. At issue in the case of **Johnson v. Lee** was the procedural default rule, a California rule that prohibits defendants who fail to raise claims against their conviction or sentence at the initial state appeal from raising them years later on habeas corpus. When such a rule is not respected by the federal courts, it results in additional years of review and possibly the overturning of a valid conviction or sentence. Quoting an earlier decision, the high court noted, “A state’s procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.”

CJLF joined the case at the request of the California Attorney General, filing a brief to encourage the high court to consider the state’s appeal. In the Foundation’s brief, Legal Director Kent Scheidegger argued that the ruling violated Supreme Court precedent upholding a similar California rule in **Walker v. Martin** (won by CJLF). The Foundation also suggested that the Supreme Court could avoid a hearing on such an obviously flawed ruling by issuing a summary reversal. The Court accepted both suggestions, citing the **Martin** decision as support for its summary reversal.

In its 2015 ruling, the Ninth Circuit held that California’s procedural default rule was “inadequate” because the California Supreme Court, when rejecting frivolous claims filed too late, often rejects the claims because they are meritless rather than because they were not raised in the initial appeal. Dismissing such claims on either ground is well within a reviewing court’s authority.

The case involves the 1995 stabbing murders of two women by Paul Carasi and his girlfriend Donna Lee. The victims were Doris Carasi (Paul Carasi’s mother) and Sonia Salinas (Paul Carasi’s ex-girlfriend and the mother of his child). In the months leading up to the murders, Salinas had left him, he lost custody of his child, and he was ordered to pay child support. He found a new girlfriend, Lee (who divorced her husband to move in with Carasi), and sought a restraining order against his mother because she fought with Lee and was friends with Salinas. On more than one occasion, Carasi’s co-workers overheard him say he wished his ex-girlfriend were dead. Three days before the murders, Lee’s co-workers heard her say she was going to do “something stupid” and would be going to prison for it.

On Mother’s Day, May 14, 1995, Carasi took his mother, ex-girlfriend, and infant child to dinner in a restaurant at the Universal Studios’ CityWalk in Los Angeles. Later that night, Carasi reported that he had been attacked in the CityWalk parking garage by an unidentified assailant who stabbed his mother and ex-girlfriend to death. Carasi was covered in the victims’ blood. A short time later, Lee called police from a freeway call box five miles away to report that she had been robbed and stabbed. A parking ticket stub from the CityWalk parking garage, along with items taken from the victims and a knife stained with one victim’s blood, were found in Lee’s car. Investigators found Lee’s blood at the murder scene and took statements from witnesses who saw Lee in the vicinity of the parking lot at the time of the murders. The day after her arrest, Lee changed her story, telling police she did not know how she had been stabbed. Expert evidence introduced at trial indicated that there had been more than one assailant, and the coroner’s report noted that there had been a vigorous fight between the victims and their attackers.

The jury convicted Carasi and Lee on overwhelming evidence, and later recommended the death penalty for Carasi and life without parole for Lee.

Five years later, Lee presented five claims challenging her conviction in state court on direct appeal, all of which were rejected. A year later, she filed habeas corpus petitions in both the state court and the Federal District Court, raising several new frivolous claims which could have been raised on direct appeal. Eventually both the state court and the Federal District Court held that the claims were barred under California’s procedural default rule. In 2007, Lee filed an amended petition in federal court, adding even more claims which were also held defaulted under the rule. On appeal, the Ninth Circuit reversed the lower courts and ordered the Federal District Court to determine the adequacy of the state rule. After the lower court responded, finding that the rule was applied fairly, the Ninth Circuit reversed that finding, deciding that the rule was not adequate and ordered the lower court to review all of Lee’s claims.

“For many years, the Ninth Circuit has required the federal district courts to waste resources and cause delay by deciding over again claims that were properly dismissed by the state courts,” said Scheidegger. “Those claims rarely have anything to do with the defendant’s guilt. It has done this in defiance of Supreme Court precedent. Under this decision, the Supreme Court has said that this waste and delay must stop.”

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



Rising Crime Derails Federal Sentencing Reform

As reported in an earlier column, last fall a bi-partisan group of legislators from both houses of Congress introduced bills to address the “mass incarceration” of minorities in the federal prison system. These bills were a response to a multi-year effort by civil rights leaders, academics, the American Civil Liberties Union, and think tanks, including the Marshall Project and the Brennan Center. These proponents argued that young, mostly black men were being systematically targeted by federal law enforcement primarily due to overly harsh drug laws. They insisted that a new “smart on crime” approach focused on rehabilitation was needed to restore justice.

The bill receiving the most publicity was S.2123, introduced by Senate Judiciary Committee Chairman Chuck Grassley (R) and ranking member Patrick Leahy (D). It would have made tens of thousands of drug traffickers in federal prison eligible for early release and allowed unelected federal judges to determine if newly charged federal offenders should be eligible for reduced sentences. These changes would be on top of recent changes in federal sentencing guidelines urged by the current President and former Attorney General Eric Holder that have already allowed several thousand federal felons to gain early release from prison.

CJLF and several law enforcement groups and legal scholars joined to oppose the bill arguing that in light of the recent explosion of violent crime in large U. S. cities and sharp increases in fatal drug overdoses in virtually every part of the country releasing more drug dealers from prison and reducing the sentences for new drug dealers is a very stupid idea.

But supporters of the bill, including most presidential candidates, insisted that the measure would only allow for the release of nonviolent offenders who should be in rehabilitation programs instead of serving time in prison.

Then in January, a woman and her two daughters, aged 7 and 10, were stabbed to death by crack dealer Wendell Callahan, who was caught in the act by the mother’s boyfriend. Callahan, who



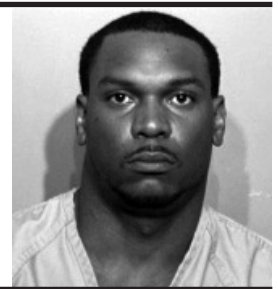
Erveena Hammonds, 32, and her daughters, Anaesia Green, 10, and Brea Hammonds, 7, were murdered by Wendell Callahan.

was a former boyfriend of the murdered woman, had been determined to be a nonviolent offender and released from federal prison four years early under sentencing guidelines revised twice by the current administration. Without the early release, Callahan would still have been in prison instead of slaughtering the 32-year-old mother and her daughters.

As CJLF supporter and Georgetown Law Professor William Otis noted, when this crime and Callahan’s early release were reported, sentencing reformers had no answer. Mostly the response was to refuse to discuss it. The best a flummoxed Senate staffer could squeak out was, “hey, look, we can’t catch everything.”

There have been numerous other reported killings committed by offenders released under the current relaxed guidelines. These, coupled with the

Wendell Callahan was released four years early from prison under revised sentencing guidelines.



explosion of big city homicide and fatal drug overdoses in virtually every senate district, took the wind out of the sails of sentencing reformers, and S.2123 is dead for now.

How America votes in November will determine the chances that another “let the drug dealers go” bill is likely to be adopted next year.

*Michael Rushford
President & CEO*

“FELONS TO VOTE”

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Adoption of this bill would be a bonus for proponents of Governor Brown’s “Jailbreak Initiative,” formally titled, “The Public Safety Rehabilitation Act of 2016,” which is almost certain to appear on the state ballot this fall. The initiative eliminates the sentence increases for prior serious felonies, which voters adopted with the “Three Strikes” initiative, and sentence enhancements for aggravating factors, such as use of a firearm during the commission of a felony. Under the initiative, a residential burglar with multiple prior violent and serious felony convictions for crimes such as rape, murder, or robbery will serve less than half the sentence he would receive today and maybe much less than half. The “Jailbreak Initiative” amends the State Constitution to grant the Department of Corrections and Rehabilitation unlimited authority to award “good time” credits to any felon, except life-sentenced murderers, making them eligible for parole after serving an even smaller fraction of their sentence.

State law prohibits criminals serving time in prison to vote, but due to the Governor’s 2011 Realignment Law (AB109) criminals convicted of almost all property felonies, including auto theft, fraud, identity theft, and commercial burglary; many drug crimes; and some crimes that most folks consider violent, such as assault and domestic violence, cannot be sentenced to prison. Tens of thousands of these criminals are now serving time in overcrowded county jails.

Does anyone wonder how they will vote on the “Jailbreak Initiative”?

HIGH COURT OVERTURNS RULING TO SUPPRESS EVIDENCE

In a June 20 decision, the U. S. Supreme Court overturned a Utah Supreme Court ruling which held that evidence obtained in a police search must be suppressed under the federal exclusionary rule. The issue in the case of **Utah v. Strieff** was whether the Fourth Amendment requires that valid evidence discovered during a lawful arrest with a warrant must be suppressed because the officer mistakenly thought he had enough reasonable suspicion to detain the suspect.

The Criminal Justice Legal Foundation had joined the case to argue that nothing in the Constitution's Fourth Amendment requires that valid evidence must be excluded from trial because a police officer made an honest mistake leading up to the search of a suspect who had a warrant out for his arrest.

In the Court's 5-3 majority opinion, Associate Justice Clarence Thomas wrote, "We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because the discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest."

The case involves a December 2006 incident when Salt Lake City narcotics Detective Doug Fackrell, an 18-year law enforcement veteran with specialized drug enforcement training, responded to an anonymous tip reporting narcotics activity at a house in South Salt Lake. During surveillance of the house, Detective Fackrell observed numerous short-term visitors consistent with drug activity.

After Detective Fackrell observed Strieff leave the house on foot, he followed him for about a block before stopping him. A check of Strieff's identification revealed there was a warrant for his arrest. In a search incident to the arrest, the Detective found methamphetamine, a glass pipe to smoke the drug, and a small plastic scale with white residue in Strieff's possession.

At trial, Strieff was charged with possession of methamphetamine and drug paraphernalia. He moved to suppress the evidence, arguing that it was the fruit of an unlawful investigatory stop. The prosecutor agreed that the facts available to Detective Fackrell at the time of the stop did not "quite meet the level

of reasonable suspicion under" **Terry v. Ohio**, but he argued that under existing precedent the evidence should be admitted because the arrest and search were based on the warrant, not on the suspicion leading to the initial stop.

The state trial court agreed, concluding that Fackrell's initial stop "was not a flagrant violation of the Fourth Amendment" nor did he exploit "the initial unlawful detention to search" Strieff since he had no prior knowledge of the arrest warrant. With his motion to suppress denied, Strieff pleaded guilty to possession of drug paraphernalia and attempted possession of a controlled substance.

On appeal, Strieff lost a 2-1 decision in the state appellate court which held that the stop was not "in knowing or obvious disregard of constitutional limitations." The court agreed that the pre-existing warrant was an intervening circumstance that "sufficiently attenuated" the taint of the stop.

The Utah Supreme Court reversed that decision in a ruling which acknowledged that Strieff was lawfully arrested and lawfully searched incident to arrest, but because the stop was unlawful, the evidence should have been excluded.

The state high court held that the attenuation exception does not apply when the intervening event is based on a warrant, applying only when the event involves "a defendant's independent acts of free will," such as a confession.

When the U. S. Supreme Court agreed to hear Utah's appeal, CJLF joined the case. In a scholarly *amicus curiae* (friend of the court) brief, the Foundation argued that in this case the question of "reasonable suspicion" was a close one, and Detective Fackrell reasonably believed he had met the requirement. While the question before the Court must include the attenuation analysis engaged by the Utah courts, it also fairly includes the question of whether suppression of evidence should be the consequence of an investigatory stop that is later found to be unlawful but was not clearly so at the time. There is no violation of the Fourth Amendment in this case that justifies the extreme remedy of suppressing evidence.

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CJLF was able to join and win the cases reported here as a result of the tax-deductible contributions from people like you. You have helped make it possible for our victories in five U. S. Supreme Court cases and two before the Federal Court of Appeals, removing barriers to the enforcement of the death penalty and strengthening law enforcement's ability to arrest, prosecute, and punish child abusers, drunk drivers, and drug dealers. Help us continue fighting for your safety by renewing your annual support today. Please clip and return the card on the right along with your check. For credit card gifts go to our website (www.cjlf.org) or call us at 916-446-0345. **Thank you for your help!**

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“FAST-TRACK REINSTATED”

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did not have a legal right (standing) to challenge the law and that it was not appropriate for the district court to review any challenge at this time. The Ninth Circuit opinion utilized argument and research introduced by the Foundation.

In the court’s opinion, Judge Carlos Bea writes, “the Defender Organizations did not have standing to bring this suit. . . . We find the challenges to the substance of the Final Regulations not ripe for review at this time.”

“The district judge’s ruling blocking the implementation of this law violated the law itself, as well as established law limiting the authority of federal courts. It was a blatant attempt by the plaintiffs and the judge to block an act of Congress that they do not agree with,” said Foundation Legal Director Kent Scheidegger.

The key requirement for compliance under AEDPA is that a state seeking the fast-track review must provide condemned murderers with an attorney to present claims on a second round of review in state court. Most death penalty states already do this, although it is not required by the Constitution. One objective of AEDPA was to encourage those states who do not provide an attorney to do so in order to resolve their death penalty cases more quickly and with less expense.

In 2006, Congress amended the law to require states to apply for the fast-track process with the U. S. Attorney General, who was assigned under the law to develop regulations on the certification procedure. If the Attorney General denied an application, the state could appeal to the Federal Court of Appeals for

the District of Columbia Circuit. In fall 2008, President Bush’s Attorney General issued the rules for applications. Days later the California Habeas Corpus Resource Center, a state agency charged with helping speed the death penalty process, won a preliminary injunction from Federal District Judge Claudia Wilken, announcing that if the regulations went into effect they would “immediately thrust Plaintiff (defense attorneys) into uncertainty.”

Weeks later, Eric Holder, the new Attorney General, rescinded the regulations and began another lengthy consideration and review process.

In April 2013, the Arizona Attorney General got tired of waiting and applied without the regulations, giving Attorney General Holder 90 days to respond. In August after no response, Arizona took its application to the D.C. Circuit, as provided under AEDPA, for a ruling. The next month Attorney General Holder issued the new regulations. On October 18, Federal District Judge Claudia Wilken issued a temporary restraining order to prevent certification of any state application for the fast-track process. As a result, applications from the states of Arizona and Texas were indefinitely delayed. The U. S. Department of Justice appealed.

In its brief, the Foundation argued that neither AEDPA nor the Constitution provide any federal district judge with the jurisdiction to hear argument or issue rulings regarding the certification process. The law places jurisdiction exclusively with the D.C. Circuit. Also, in the term used by the Supreme Court, a challenge to the regulations is not “ripe” until they have been used in an actual certification decision. Finally, a group of attorneys do not have legal standing to challenge enforcement of this law. Supreme Court precedent notes that Congress “has explicitly limited such review to claims brought by person(s) suffering legal wrong(s) because of agency action.” Groups of lawyers who must merely deal with unanswered legal questions do not qualify.

“This decision is important not only for the families of murder victims, but also for everyone in the United States who depends upon the rule of law and relies upon the courts to follow it,” said Scheidegger.

“SUPPRESS EVIDENCE”

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“Criminal trials should be about whether the defendant is guilty, and all reliable evidence should be considered on that question. Complaints about the conduct of the police should be addressed in other ways, not by suppressing valid evidence,” said Foundation Legal Director Kent Scheidegger. “This decision is an important step in the right direction,” he added.

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