



Advisory

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CALIFORNIA ANNOUNCES NEW EXECUTION PROTOCOL

In compliance with a court order agreed upon last June, the California Department of Corrections and Rehabilitation (CDCR) announced a new, single-drug execution protocol on November 6. The state's new lethal injection process allows for executions to be conducted using lethal gas or a fatal dose of any one of four drugs based primarily upon their availability. The condemned murderer may choose the method of execution, but if he declines to make the choice, lethal injection will be used. The four barbiturates approved for executions include two of which are currently used for executions in other states, Pentobarbital and Thiopental, along with Amobarbital and Secobarbital.

The CDCR announcement follows the settlement of a lawsuit, **Winchell & Alexander v. Beard**, filed last fall by CJLF on behalf of Kermit Alexander, whose mother, sister and two nephews were murdered in 1984, and Bradley Winchell, whose sister was raped and murdered in 1981. They argued that, as relatives of the victims, they have been denied justice by the state's nine-year delay in developing an execution process that complied with state law and a 2006 Federal District Court

ruling. California's existing three-drug execution protocol has been blocked by a federal lawsuit, although the judge's 2006 ruling in **Morales v. Hickman** provided that the CDCR could resume executions if it adopted a one-drug, barbiturate-only protocol. That ruling was later upheld by the Ninth Circuit Court of Appeals. The CDCR had taken no visible action to comply with that holding since it was announced, choosing instead to continue fighting the lawsuit blocking the three-drug protocol.

"The announcement of a new execution protocol after nine years of delay is a major victory for the majority of Californians who support the death penalty and particularly for families of murder victims who have been waiting for justice," said Foundation Legal Director Kent Scheidegger.

There are currently 18 murderers on California's death row who have exhausted all of their appeals. However, the announcement of the new protocol will not result in the immediate resumption of executions. As a result of a 2007 Marin County Superior Court decision, later upheld by the

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COP KILLER'S BID FOR REDUCED SENTENCE TO BE CONSIDERED

The U. S. Supreme Court has agreed to consider a case regarding the mandatory life without parole sentence (LWOP) given to a man who murdered a Louisiana police officer. The perpetrator was 17 years old at the time.

At issue in **Montgomery v. Louisiana** is whether the 2012 Supreme Court ruling in **Miller v. Alabama**, which prohibits an automatic life sentence for convicted juvenile offenders, can be applied retroactively to older cases.

CJLF has joined the case to encourage a decision which says, "no." The petitioner in this case received a fair trial and a just sentence. Moreover, the state supreme court correctly determined that the decision in **Miller** was procedural

and therefore not retroactively applicable.

On November 13, 1963, 41-year-old East Baton Rouge Parish Deputy Sheriff Charles Hurt was fatally shot in a wooded field in Scotlandville, Louisiana, by Henry Montgomery, a 17-year-old high school student who went by the nickname "Wolf Man." He claimed to have "shot in panic" when the officer confronted him while he was playing hooky from school. Gunned down with a .22 caliber pistol stolen by Montgomery, Hurt became the first law enforcement officer shot to death in the parish in three decades. A manhunt for Montgomery rounded up over 60 suspects. After Montgomery was identi-

fied as the shooter, he was arrested and charged with murder. His crime left Hurt's wife without a husband and his three young children without a father.

At his trial in 1964, Montgomery was convicted of first-degree murder and sentenced to death. The Louisiana Supreme Court later found that his trial was compromised by adverse publicity, due to high local coverage at the time, and allowed a retrial in 1969, resulting in a sentence of life in prison without parole after the second jury spared him from the death penalty.

Decades later, in 2012, came the U. S. Supreme Court ruling in **Miller v. Alabama**. By a 5-4 vote, the high court

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“BID FOR REDUCED SENTENCE”

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determined that states are barred from automatically sentencing juveniles convicted of murder to life in prison without parole. Under **Miller**, states must first hold a sentencing hearing where the defendant's youth, upbringing, and circumstances of the crime, among other relevant factors, can be taken into consideration, and a lesser sentence must be an option. The ruling did not ban life without parole sentences for juveniles altogether. What the court did not specify, however, is whether the decision can be applied retroactively to inmates across the country sentenced to life in prison as juveniles.

The following year, the Louisiana Supreme Court, in a 5-2 decision, concluded that **Miller** would not apply retroactively to overturn final judgments. Under the U. S. Supreme Court's 1989 decision in **Teague v. Lane** (won by CJLF), a new ruling which changes the law applies retroactively *only* when a “substantive” issue has been decided, such as deeming a crime unconstitutional or when a specific type of punishment is eliminated entirely.

The Louisiana high court held that the decision in **Miller** changed the *procedure* by which LWOP sentences could be applied, but not the penalty itself; thus, it did not apply retroactively. As argued by the Orleans Parish District Attorney, “it would be nonsensical to ask local judges decades after a crime was committed to evaluate a juvenile's capacity to change.”

In a scholarly *amicus curiae* (friend of the court) brief, CJLF argues that the trial court's denial of Montgomery's motion following the **Miller** ruling properly applied the rule in **Teague**, barring retroactive application. The Foundation also notes that Montgomery's claim that he had no opportunity to present any evidence regarding his age and relevant attributes in mitigation of his sentence was unfounded, as his youth would have been obvious to a jury. In the second trial, the jury spared him from the death penalty, suggesting that such mitigating factors were considered. The brief notes that Montgomery received a just sentence for his crime, having had “life and the opportunity to find meaning in it,” something that Deputy Hurt did not. The CJLF brief also asserts that what Montgomery is actually seeking is mercy rather than justice, a request that should be addressed to the Governor and the Board of Pardons, not to the Supreme Court. In the end, “the murder of Charles Hurt was final; the sentence for his murderer should be final as well,” said CJLF Legal Director Kent Scheidegger.

In a recent note to Scheidegger, Colin Clark, the Louisiana Assistant Attorney General in charge of the Montgomery case, wrote: “I just read your brief. It is truly wonderful. I have sat with this issue for over three years now and you have thought of important points that I would never have. I really appreciate your hard work and your thoughtfulness in this case.”

“CA EXECUTION PROTOCOL”

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First District Court of Appeal, the protocol must now go through a public comment process required under the state's Administrative Procedures Act (APA), which was not considered a requirement prior to that decision. The November 6 announcement also provides for a public comment period extending to January 22, a full month beyond the standard 45-day public comment period.

“Had the state appealed the 2007 decision to the Supreme Court eight years ago, it is quite possible there would be no APA requirement for this protocol. In addition, for the CDCR to add another month of delay to the approval of an execution method already upheld by the courts and currently in use by other states is difficult to justify,” said Scheidegger.


Advisory layout design by Irma H. Abella

CJLF FIGHTS TO RESTORE DEATH SENTENCES OF THREE MURDERERS

The U. S. Supreme Court has agreed to review a 2014 Kansas Supreme Court ruling that overturned the death sentences of three murderers. At issue in the three cases, **Kansas v. Jonathan Carr**, **Kansas v. Reginald Carr, Jr.**, and **Kansas v. Sidney Gleason**, is the Kansas court's finding that the state's standard jury instruction for sentencing juries in death penalty cases violates the United States Constitution. Because similar instructions are used in several other states, a decision to uphold the Kansas court's ruling could affect many death penalty cases.

CJLF has filed argument in these cases on behalf of the National District Attorneys Association and the California District Attorneys Association to encourage a Supreme Court decision to overturn the Kansas court's ruling.

The cases, which are being considered together on the jury instruction issue, involve brutal murders.

On December 8, 2000, habitual felon brothers Reginald and Jonathan Carr began what would later be known as the "Wichita Massacre" with the robbery, kidnapping, and aggravated assault of 23-year-old Andrew Schreiber. Three days later, they shot Linda Walenta during an attempted robbery. Walenta, a cellist with the Wichita Symphony, was paralyzed by her injury, but able to describe her attackers to police before dying a few days later. At 11:00 p.m. on a snowy December 14 night, the brothers invaded the home of three men and two female guests, all in their twenties. After ransacking the house, the Carrs forced their victims to undress and made them perform sex acts on each other, then raped both of the girls. They then took the five naked victims to a snow covered soccer field, forced them to kneel, shot each of them in the back of the head, and drove their truck over the bodies. Miraculously, one of the young women survived to identify her attackers and testify at trial.

On February 12, 2004, Sydney Gleason, Damien Thompson, Ricky Galindo, Brittany Fulton, and Mikiala Martinez robbed a man at his home in Great Bend at knifepoint. After Gleason and Thompson learned that their two female accomplices, Fulton and Martinez, had talked to the police about the robbery, they went to Martinez's home, shot and killed her boyfriend, and wounded her. They then took her to a rural area where they strangled and shot her to death.

The Carr brothers and Gleason were convicted on overwhelming evidence and sentencing juries unanimously agreed that they should receive death sentences.

On direct appeal, the Kansas Supreme Court upheld the guilt of all three murderers, but overturned their death sentences. In order for a murderer to be eligible for a death sentence in Kansas, the sentencing jury must find one or more of a specified list of aggravating circumstances occurred in concert with the



Heather Muller



Brad Heyka



Aaron Sander



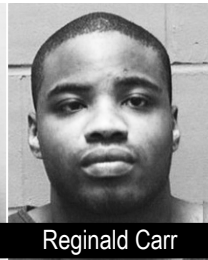
Jason Befort



Linda Walenta

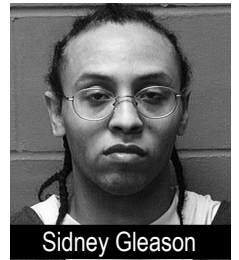


Jonathan Carr



Reginald Carr

TOP: Carr brothers' victims, Heather Muller, Brad Heyka, and Aaron Sander, were shot in the back of the head and killed, along with "H.G.," who miraculously survived to tell of the horror that befell them. Linda Walenta had already been shot three times and rendered a paraplegic before dying of complications.



Sidney Gleason

murder. For example, the rape and murder of the same victim, or the murder of a witness to a crime. Kansas law requires that sentencing juries in capital cases be instructed that they must find that the aggravating circumstances occurred beyond a reasonable doubt. The jury is also instructed that they can consider any mitigating circumstances which may support a sentence other than death, but they are not told that these circumstances must meet the "reasonable doubt" standard, because that standard is not required for mitigating circumstances.

In its ruling, the Kansas court announced that the Constitution requires that the jury receive an instruction specifying that mitigating circumstances need not be proven beyond a reasonable doubt. When the U. S. Supreme Court agreed to hear the Kansas Attorney General's appeal of that ruling, the Criminal Justice Legal Foundation was invited to join the case.

Representing CJLF supporters, along with the National District Attorneys Association and the California District Attorneys Association, the Foundation submitted a scholarly *amicus curiae* (friend of the court) brief, arguing that the Kansas ruling assumes that, without its required instruction, jurors are likely to sentence murderers to death even if they don't believe it is the appropriate sentence. The Foundation notes that at the trial the same jurors found the defendants guilty of murder and heard all of the brutal details of the crime. It borders on the absurd to assume that the jurors at the sentencing hearing would fail to seriously consider both the aggravating and mitigating circumstances because they did not receive an instruction on the lower standard allowed for mitigating evidence.

"Jurors unanimously agreed to give the murderers in these cases the sentences they deserved. Nothing in the Constitution requires reversing their verdicts on the type of flimsy reasoning advanced by the Kansas Supreme Court," said Foundation Legal Director Kent Scheidegger.

THE MYTH OF OVER-INCARCERATION

For at least the last 15 years, liberal academics, civil rights groups, and most of the American media have been waging a campaign to convince the public that the criminal justice policies implemented in the 80s and 90s that increased prison sentences for violent and habitual criminals were a spectacular failure, having little or no impact on crime while wasting hundreds of millions of dollars and systematically targeting minorities. The term “incarceration nation” has been used to describe the United States since the International Centre for Prison Studies released its first World Prison Brief, which ranked the U. S. as having the highest incarceration rate in the world. That announcement was embraced by anti-sentencing groups, such as the American Civil Liberties Union (ACLU), The Sentencing Project, and the NAACP. It was parroted without analysis by virtually every major news outlet in the world, including all three major U. S. television networks and newspapers such as The New York Times, The Washington Post, the Los Angeles Times, the Chicago Tribune, and The Dallas Morning News.

Among the claims made repeatedly in the anti-incarceration narrative are: the U. S. has only 5% of the world’s population but nearly 25% of its prisoners, and more than half of all prisoners are serving time for nonviolent drug offenses with blacks most likely to be incarcerated. An often-quoted 2014 report by Human Rights Watch claims that “tough-on-crime” laws adopted since the 1980s have filled U. S. prisons with mostly nonviolent offenders.

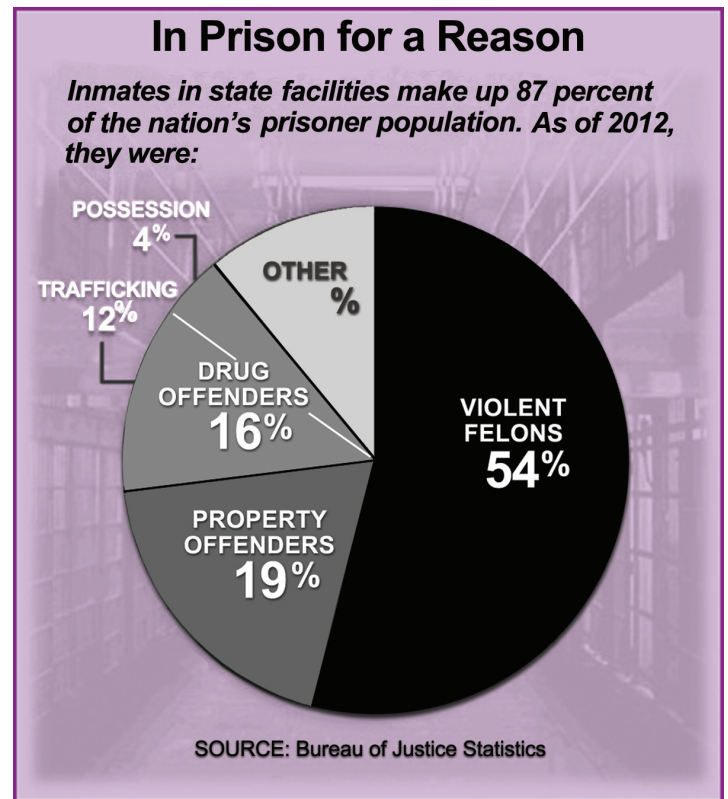
President Barack Obama has become the most prominent leader in the movement. Last July, he told the NAACP, “In too many places, black boys and black men, and Latino boys and Latino men, experience being treated different under the law,” claiming his assertion wasn’t “anecdote” or “barber shop talk,” but instead backed by data. “The real reason our prison population is so high,” he said is because America has “locked up more and more nonviolent drug offenders than ever before.” Apparently responding to those claims, in early November the President authorized the early release of 6,000 drug offenders from federal prison, one of the largest one-time releases of federal inmates in U. S. history.

For many Americans who do not have personal experience as a crime victim or in law enforcement, this narrative may be persuasive. But, in reality, the effort to end so-called mass incarceration is political. Those demanding alternatives to incarceration, from the President on down, are using half-truths, inaccurate statistics, and outright lies to undo sentencing policies that have spared millions of Americans from becoming crime victims.

Much can be learned by following the money. The International Centre for Prison Studies (“The Centre”) receives significant support from the Open Society Foundation, which is funded by ultra-liberal billionaire George Soros. The introduction to The Centre’s most recent World Prison Population List admits that it does not have accurate information about prisoners in several countries, including China, and that for the U. S. it includes inmates in local jails, although this data is often unavailable in some other countries. This suggests that

The Centre’s estimate will always disfavor the U. S., which holds thousands of minor offenders for a day or two in local jails and honestly reports its inmate population, while the Centre estimates that China’s oppressive regime with 1.3 billion people, and regimes in South Africa, Korea, and the Middle East, have fewer inmates per capita.

A leading advocate for reduced sentencing in the U. S. is the American Civil Liberties Union. Last November, the ACLU partnered with Soros’ Open Society Foundation with combined contributions of over \$5 million to convince California voters to pass Proposition 47, which redefined several felonies, including firearm theft, as misdemeanors. Days after that measure was adopted, the Open Society Foundation contributed \$50 million to the ACLU to campaign for sentencing reductions throughout the United States.



So who is in U. S. prisons and why are so many behind bars?

U. S. Department of Justice (DOJ) figures indicate that inmates in state prisons, which house 87% of all criminals, are there for mostly violent crimes: 54% of inmates are serving sentences for violent crimes, 19% for property crimes, and 16% are drug offenders of which the vast majority are dealers. Almost all inmates, particularly property and drug offenders, received a plea bargain, meaning they agreed to plead guilty to lesser crimes than they actually committed.

In federal prisons, which house 13% of U. S. inmates, 30.3% are violent criminals, while 10.8% committed property crimes, 9.1% immigration crimes, and 48.3% drug crimes. Because most violent and property crimes are prosecuted by the states

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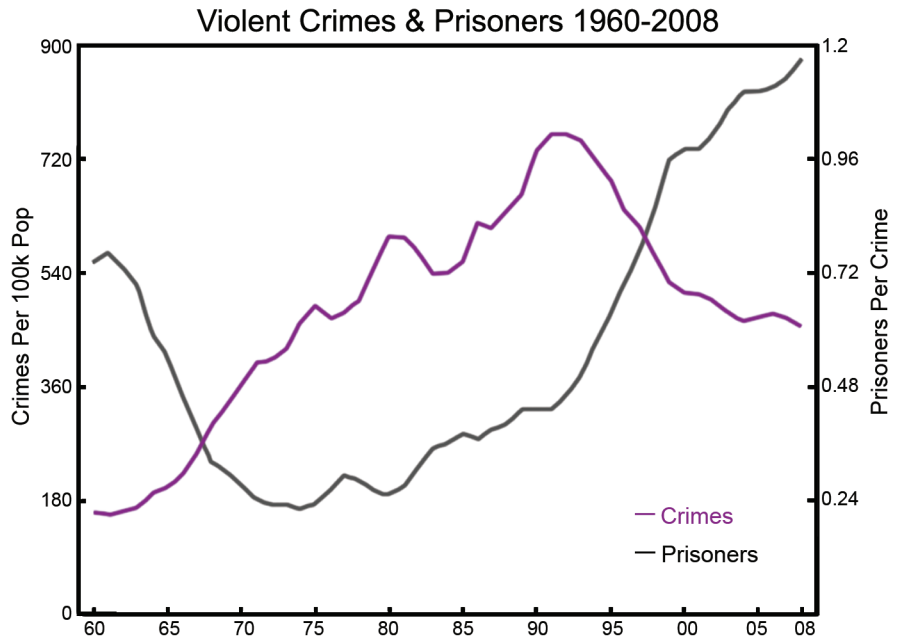
“OVER-INCARCERATION MYTH”

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and drug trafficking is both a state and federal crime, the percentage of drug offenders in federal prisons is higher than for state prisons. A study by the Urban Institute found that 99.5% of drug offenders in federal prisons are dealers. The race of drug dealers varies by the drugs they sell—88% of the crack cocaine dealers are black, 54% of the powder cocaine dealers are Latino, and 48% of the methamphetamine dealers are white—and almost all of them received a plea bargain.

The reason that there are more blacks and Latinos in state and federal prisons is because they commit more crimes than other races. For example, while blacks make up roughly 13% of the U. S. population, DOJ statistics indicate that they accounted for 52.5% of homicide offenders from 1980 to 2008. The offending rate for blacks was almost eight times higher than whites, and *the victim rate was six times higher*. Most homicides were intraracial, with 84% of white victims killed by whites, and 93% of black victims killed by blacks.

The chart (above right) helps to explain why the U. S. incarceration rate is high. During our nation’s last flirtation with soft sentencing in the 1960s, as sentences dropped, violent crime skyrocketed. By the 1980s, the public demanded sentencing increases and violent crime plummeted. While academics continue to debate the impact that sentencing increases had on crime, University of Texas Professor of



Public Affairs William Spelman, a Harvard-educated opponent of tough sentencing, grudgingly attributes the increased sentences with 27% of the drop in crime. Even that arguably low number amounts to nearly 3 million fewer violent crime victims between 1992 and 2014, including almost 40,000 fewer murder victims. Many of the so-called nonviolent felons who were kept on the streets by compassionate sentencing policies of the 60s and 70s evolved into violent criminals by the time America came to its senses. The large U. S. prison population over the past 20 years is part of the price the nation paid for that compassion, along with several million innocent crime victims.

Releasing drug dealers and other so-called nonviolent criminals back into U. S. communities and keeping them there with reduced sentences is already disproportionately hurting the very population that President Obama and anti-sentencing advocates claim to be helping: urban blacks.

*Michael Rushford
President & CEO*

In recent weeks, the President authorized the early release of 6,000 criminals from federal prisons. In California, policies supported by the Governor and the Legislature have released 30,000 hardened criminals back into communities and prohibited sending them back to prison for most new convictions, including drug dealing, identity theft, auto theft, and stealing guns. CJLF is the only organization fighting these soft-on-crime policies in our courts, in Congress, state legislatures, and in the media, but we cannot continue without your support. Please make your tax-deductible contribution today. To use a credit card, visit our website, www.cjlf.org, or call (916) 446-0345. To mail a check, send it along with the card on the right. **Thanks so much!**

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NINTH CIRCUIT REINSTATES CALIFORNIA DEATH PENALTY

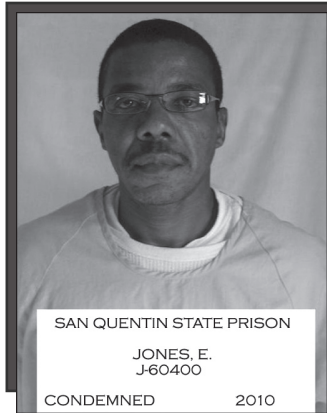
On November 12, 2015, the United States Court of Appeals for the Ninth Circuit reversed a decision issued last year that had declared California's death penalty unconstitutional due to excessive delay.

Ernest Jones raped and murdered his girlfriend's mother, and in 1995 a jury unanimously decided that death was the appropriate punishment. That judgment was affirmed by the California Supreme Court in 2003, but the case has dragged on for another 12 years in secondary reviews, called habeas corpus.

Advocates for crime victims and law enforcement groups have for many years decried the excessive delay. However, a key congressional reform remains mired in litigation, and the California Legislature has killed needed reforms in committee repeatedly over the years.

In July of last year, Federal District Judge Cormac Carney decided that the excessive delays violate the rights of the defendant, despite the fact that defendants are the ones filing the actions and law enforcement regularly opposes the delay. Similar arguments have been made from time to time over the years, but courts have uniformly rejected them. When the state appealed that ruling to the Ninth Circuit, CJLF filed argument encouraging that it be overturned.

In 1989, the U. S. Supreme Court decided that federal courts sitting in habeas corpus could not make up new rules



of constitutional law and impose them retroactively on the states. This decision in the case of **Teague v. Lane** was made at the suggestion of the Criminal Justice Legal Foundation, which was cited for doing so in the court's lead opinion.

In **Jones v. Davis**, the majority of the three-judge panel decided that Judge Carney's decision violated the **Teague**

rule. Judge Susan Graber wrote for the majority, "Because we conclude that Petitioner's claim asks us to apply a novel constitutional rule, we must deny the claim as barred by **Teague**. Accordingly, we reverse the district court's judgment granting relief." Judge Johnnie Rawlinson joined this opinion.

Judge Paul Watford concurred separately on the ground that Judge Carney's ruling violated a different rule, that state prisoners must take their claims to the state courts first before turning to the federal courts.

"This is a major victory for justice in California," said CJLF Legal Director Kent Scheidegger, who authored the Foundation's "friend of the court" brief in the case. "The lower court's decision was wrong in every aspect. With this barrier out of the way we can continue with the work of reinstating justice in our state."



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