CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

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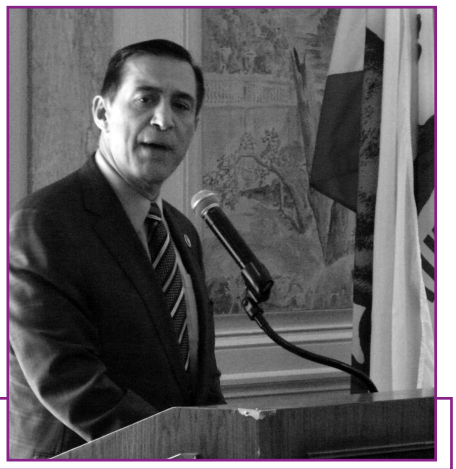
CONGRESSMAN DARRELL ISSA ADDRESSES CJLF ANNUAL MEETING

The Criminal Justice Legal Foundation's Board of Trustees held its 33rd annual meeting in Los Angeles on May 28, which featured a keynote address by California Congressman Darrell Issa. The meeting was hosted by CJLF Board Member Samuel Kahn, President of Kent Holdings and Affiliates in San Diego.

At a closed session, prior to the luncheon at the California Club, the Foundation's Board re-elected Chairman Rick Richmond, President Michael Rushford, and Secretary/Treasurer Faye Battiste Otto, and elected Terence Smith, President of TLS Logistics, as Vice Chairman, to two-year terms.

Congressman Issa's remarks outlined some of the reforms that the House of Representatives will pursue over the coming months and included his work to hold the Obama Administration accountable for multiple scandals, including Benghazi, IRS targeting of conservative groups, illegal immigration, and the lack of border security.



Congressman Darrell Issa
49th District

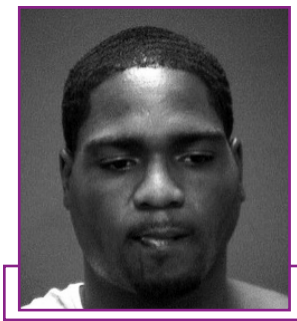
SUPREME COURT REJECTS CHILD ABUSER'S BID TO SUPPRESS EVIDENCE

Decision in **Ohio v. Clark** *overturns state court ruling*

In a June 18 decision, the U. S. Supreme Court overturned a divided Ohio Supreme Court ruling, which held that a child abuser's conviction was unconstitutional because the trial judge allowed the testimony of two teachers who asked the child about his injuries.

The issue in **Ohio v. Clark** was whether the teachers' testimony (about what the victim told them) should be allowed at trial when the three-year-old victim was considered incompetent to testify. In a ruling last year, the Ohio Supreme Court held that allowing the teachers to give that testimony violated the Constitution's Confrontation Clause.

The Criminal Justice Legal Foundation had joined this case to argue that when someone other than a police officer believes a crime has occurred and asks the victim, "what happened?," the statements made by the victim should be considered "non-testimonial," *i.e.*, not made for the purpose of being used as evidence at a trial. In this case, the teachers wanted to know if someone was abusing the child in order to protect him from further injury. Such testimony does not violate the Confrontation Clause because in these circumstances the teacher and not the child is the witness, and the defense's cross-examination of the teacher satisfies the constitutional requirement.



Darius Clark

In the Court's majority opinion for six of the Justices, Associate Justice Samuel Alito wrote, "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." The remaining three Justices agreed that the statements were admissible in separate opinions.

The case involved the 2010 conviction of Darius Clark of multiple counts of felony assault, child endangerment, and domestic violence stemming from the physical abuse of his girlfriend's 3-year-old son and 2-year-old daughter. Facts introduced at trial indicate that on March 16, 2010, the children's mother, who was a prostitute, took a bus to Washington to meet with clients, leaving her two children with Clark, who

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CALIFORNIA SETTLES LAWSUIT ON EXECUTION PROTOCOL DELAY

The California Department of Corrections and Rehabilitation (CDCR) has agreed to settle a lawsuit brought by two families of murder victims seeking to end the state's delay of executions. The Sacramento Superior Court ruled in early February that CDCR must defend itself in a lawsuit claiming grossly excessive delay in establishing a new execution protocol to replace the one that had previously been held invalid nine years ago. Following that ruling, the parties reached a settlement.

The suit, **Winchell & Alexander v. Beard**, was filed in November 2014 by the Criminal Justice Legal Foundation 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 1983. They argued that, as relatives of the victims, they have been denied justice by the continued delays.

Both murderers, Michael Morales and Tiequon Cox, have exhausted all appeals and, along with a dozen other murderers on death row, would likely have already been executed or would be facing execution soon if CDCR had moved promptly to adopt a new method as other states did.

California's existing three-drug execution protocol has been blocked by a federal lawsuit for the past nine years, although a 2006 Federal District Court ruling in **Morales v. Hickman** held that CDCR could resume executions if it adopted a one-drug, barbiturate-only protocol. CDCR inexplicably adopted and litigated a new three-drug protocol even after other states had adopted the one-drug method and resumed executions. In April 2012, CDCR revealed that the Governor had directed it to investigate other methods, but two and half years later nothing had been done, and CDCR rejected the victims' request to adopt a new protocol without giving any reason for its refusal.

The settlement, which has been approved by the Superior Court, requires CDCR to develop a new execution protocol and submit it to the Office of Administrative Law within 120 days of the U. S. Supreme Court's June 29, 2015 decision in **Glossip v. Gross**, which rejected a challenge to Oklahoma's lethal injection process.

"Because this settlement is in the form of a court judgment, it has the force of law, meaning that if the state fails to comply, it will have to answer," said Foundation Legal Director Kent Scheidegger. "It is very regrettable that victims of crime needed to file this action in the first place. With some leadership at CDCR and in the Governor's Office, this would have been done years ago," he added.

CJLF LEGAL DIRECTOR WINS AWARD

For the second time in 18 years, the prestigious Association of Government Attorneys in Capital Litigation has recognized CJLF Legal Director Kent Scheidegger for his outstanding legal work. The group, which is comprised of the top state and federal capital appellate attorneys, had recognized Scheidegger for excellence in capital litigation in 1997. In July of this year, he received the Board of Directors' Advocacy Award at a ceremony in Charleston, South Carolina.

Kent S. Scheidegger (right), receiving award from Stephen Creason, President, AGACL (left).

SUPREME COURT REJECTS LETHAL INJECTION CHALLENGE

In a June 29 decision, the United States Supreme Court rejected a challenge by three brutal murderers to Oklahoma's lethal injection process. The murderers claimed that the three-drug protocol used in executions may cause extreme pain and is therefore unconstitutional.

The case of **Glossip v. Gross** involved the state's effort to carry out executions of condemned murderers in an environment where death penalty opponents have intimidated drug manufacturers into refusing to supply states with the drugs most commonly used for the lethal injection process. As a result, Oklahoma has been forced to switch anesthetics twice in recent years. Because the preferred anesthetic, pentobarbital, was no longer available, Oklahoma substituted another anesthetic, midazolam, for its execution protocol.

The Criminal Justice Legal Foundation had joined the case to encourage a decision rejecting the murderers' claim, arguing that the Eighth Amendment does not allow torturous methods of execution, but also does not require completely painless ones. Defendants who claim that a particular execution protocol may create an unintended risk of pain should be required to present alternative protocols that present substantially less risk.

Writing for the Court's 5-4 majority, Associate Justice Samuel Alito stated, "Because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.' . . . Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." Justice Alito also noted that "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims."

In their petition to the Supreme Court, the Oklahoma murderers cited the January 15, 2015, execution of Charles Warner,

for the rape and murder of an 11-month-old girl. The state used midazolam, which the murderers claimed caused a painful execution. As evidence, they noted that during the execution process, a news reporter quoted Warner saying, "my body is on fire." The report actually said that Warner made this statement while receiving a saline solution, prior to receiving any of the execution drugs. When the drugs were administered, the Associated Press reported that Warner became unconscious and stopped breathing seven minutes later with no signs of physical distress.

The three petitioners are Richard Glossip, who hired a co-worker to beat his employer to death with a baseball bat; Benjamin Cole, who murdered his nine-month-old daughter by bending her in half backward because her crying interrupted his video game; and John Grant, who was serving 130 years for four armed robberies when he pulled a female prison food service supervisor into a closet, put his hand over her mouth, and stabbed her 16 times with a shank, killing her.

The Foundation introduced a scholarly *amicus curiae* (friend of the court) brief, arguing that Oklahoma has been forced to select alternative execution drugs because of a restriction on the availability of preferred drugs by European death penalty opponents. Overturning the enforcement of a lawful sentence due to the actions of foreign governments is an assault on the sovereignty of the United States. The CJLF brief also notes that the petitioners' claim that Warner's execution was painful because of his "on fire" statement is further evidence of deception by defense lawyers and death penalty opponents. The Foundation's brief cites a 2014 Associated Press report that prior to his execution, Ohio murderer Dennis McGuire told guards that his defense attorney counseled him to make a show of his death that would, perhaps, lead to abolition of the death penalty.

Tracing the history of challenges to methods of execution, CJLF's brief distinguishes between methods that are inherently and intentionally cruel—the methods our Founders wrote the Eighth Amendment to prohibit—and methods designed to inflict little or no pain, but which are challenged as having a risk of severe pain. For the second type, CJLF argued, the Supreme Court's precedents require that the challenges show that a better method is realistically available.

The Supreme Court's decision included a requirement that the inmate show the existence of an alternative in this type of challenge. This important decision will greatly reduce the misuse of method-of-execution challenges as devices to prevent the execution altogether.

"The death penalty is supported by the vast majority of the American people. Justice in these horrible cases must not be obstructed by a conspiracy to cut off the needed drugs. The Supreme Court affirmed today that states can take the necessary measures to defeat that obstruction of justice," said Foundation Legal Director Kent Scheidegger.

Advisory layout design by Irma H. Abella

ENOUGH! . . .

ANOTHER STUDY COVERS FOR REALIGNMENT

The Public Policy Institute of California released a July 2015 study by Sonya Tafoya titled "Pretrial Detention and Jail Capacity in California." Here is the summary of the study:

> "California's persistently overcrowded jails are facing additional challenges now that public safety realignment has shifted many lower-level offenders from state prisons to county supervision. Jail capacity challenges are prompting a reconsideration of California's heavy reliance on holding unsentenced defendants in jail pending trial—known as pretrial detention. The legal rationale for pretrial detention is to ensure court appearances and preserve public safety . . . . This report concludes that pretrial services programs—if properly implemented and embraced by the courts, probation, and the jails—could address jail overcrowding and improve the efficiency, equitability, and transparency of pretrial release decision making."

The key word in this summary: "realignment." Therein lies the problem.

While the report presents a good-on-paper solution to jail overcrowding, the author's overall argument adds nothing novel to corrections in California. Many California counties have long-established pretrial detention programs. Other counties implemented programs out of necessity after the passage of Realignment, AB 109, in 2011. The author's suggestion that courts, probation, and jails "properly" implement and embrace pretrial services programs are a lost cause without first actively addressing the many consequences of realignment and how it has impacted the state's approach to pretrial detention and jail population caps.

Public Safety Realignment, AB 109, was implemented by Governor Jerry Brown in 2011 in an effort to ease prison overcrowding by removing inmates from state prisons and placing them in county jails. AB 109 has been touted as effective in easing California's prison population, though it did so at the expense of county jails and their personnel, as well as the public. The law created vastly more problems than it fixed. The county jail population has exploded to unmanageable levels, and the volatility of the environment is amplified by the presence of more violent, serious offenders that should instead be the responsibility of the state. These are factors that county personnel were never trained to address, nor were they provided with the adequate resources to deal with them. This has exasperated the turbulent state inside California's county jails, contributing to the current jail overcrowding crisis and the subsequent early releases of more lower-level criminals than ever. Even serious criminals are frequently released as a result of Realignment—they make the cut as "lower-level" criminals when compared to the inmates released from state prisons serving harder time for more severe offenses.

The original purpose of county jails has been to hold criminals before trial, or to detain very minor criminals for terms of less than one year. They were never designed to house hardened criminals with extensive sentences. Counties are now overburdened with violent inmates from state prisons, resulting in early releases of those that meet the requirements as low-level or non-violent. The author's argument that low-level, non-violent criminals awaiting their trials should be released under specific guidelines ignores the fact that the state is already releasing these criminals in record numbers under AB 109 guidelines. They may not be formally released under a specific "pretrial services program" as the author suggests that they should be, but they are not awaiting their trial from a jail cell either.

Another purpose of jail is to incarcerate criminals convicted of crimes for the sentences prescribed by law. There is nothing more counterproductive to justice and public safety than the systematic early release of convicted criminals. This only rewards their behavior, disregards the effect their crimes have on victims and the community, and substantiates the belief among criminals that they can commit crimes with few consequences.

There are several examples of heinous crimes committed by criminals released from prison under Realignment—crimes that were made possible by its very existence. On July 9, 2015, 34-year-old Oscar Saenz was arrested and charged with murder within hours of the stabbing death of Brittany Lynn Dutra, a 21-year-old mother of two from Merced County. Saenz had been in and out of jail in the county more than half a dozen times since 2012, including multiple stints under AB 109. His criminal history included numerous felony drug convictions, discharging a firearm at an occupied vehicle, committing a felony while out on bail, resisting arrest, and weapons possession. Does any part of that rap sheet indicate a low-level, non-violent offender?

Days later on July 15 in Burbank, 27-year-old Lonnie Garcia, who had been released from prison under AB 109 supervision about a month prior, was arrested for the July 10 home invasion robbery of an 89-year-old woman, who was left with a fractured clavicle, broken nose, and bruises all over her body. That evening, Garcia knocked on the front door of the elderly woman's home, forced his way inside, tied a sheet around her neck, knocked her to the ground, threatened to shoot her, and ransacked her home. His criminal record included two burglary convictions, one in 2010 and another in 2012, as well as a conviction for possession of a controlled substance for sale. When asked for a statement regarding the incident, Burbank Police Sgt. Claudio Losacco responded, "If it wasn't for AB 109, the gentleman would still be in custody."

These are just two examples of crimes committed by AB 109 probationers that have occurred in recent weeks. If extrapolated to account for the last three years of AB 109, one can only surmise the number of innocent people that have fallen victim under this measure by convicted criminals who should have never had the freedom to victimize them in the first place.

AB 109 is at the root of this issue. So, rather than conjure up already-established and already-employed methods for dealing with the implications of AB 109, which is just another attempt to skirt the actual issue, AB 109 simply needs to be dealt with directly and gutted or, ideally, repealed. Yet another policy calling for the early release of criminals is not the solution California needs.

Marissa Cohen
Public Policy Director

B O X S C O R E

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

Glossip v. Gross: 6/29/15. A 5-4 U. S. Supreme Court decision to reject the claim of three condemned murderers that Oklahoma's execution process is unconstitutional because it might cause pain. One of the murderers in this case hired a contract killer to beat a man to death with a baseball bat. Another bent his 9-month-old daughter backwards, killing her because her crying interrupted his video game. The third stabbed a female food service supervisor to death while he was serving a 130-year prison sentence for multiple armed robberies. CJLF joined the case to argue that the Constitution does not guarantee a pain-free execution, but lethal injection only requires a level of anesthesia to prevent extreme pain. The Foundation also argued that when murderers challenge an execution method as unconstitutional they are required to present an alternative method that does comply with the Constitution. The Court's decision adopted both of these points. **WIN**

Ohio v. Clark: 6/18/15. Unanimous U. S. Supreme Court decision to reinstate an Ohio child abuser's conviction. The Ohio Supreme Court had held that allowing the teachers who discovered the victim's injuries to testify about what the child told them violated the criminal's constitutional right to confront the witnesses against him. The case involved the 2010 conviction of Darius Clark for the beating of his girlfriend's three-year-old son and two-year-old daughter. When preschool teachers noticed bruises on the little boy's face, they asked him who hurt him. When he responded that Clark had hit him, they reported the incident to child protective services who located the boy and his sister and took them to a hospital where other injuries to both children were discovered. On appeal, Clark won a decision announcing that the testimony of the teachers at this trial was unconstitutional. When the state appealed that ruling, CJLF joined the case to argue that a statement made to a first responder, whether a policeman or someone else, is not the same as a statement taken by an investigator building a case against a known suspect. The statement to the investigator is "testimonial" as that term is used by the Supreme Court, and the statement to the first responder, or in this case, a teacher, is not. The Supreme Court's decision agreed. **WIN**

Elonis v. United States: 6/1/15. U. S. Supreme Court ruling overturning the conviction of a Pennsylvania man who posted threats on Facebook to brutally murder his estranged wife and a female FBI agent. In 2010, after his wife left him, and he was fired from his job for sexually harassing a female employee, Anthony Elonis began posting threats to murder his wife on his Facebook page, including a statement that he would not stop until "your body is a mess, soaked in blood and dying from all the little cuts." After Elonis refused an interview with a female FBI agent, he posted about slitting her throat. Following his conviction in 2011 for transmitting threats, Elonis appealed, arguing that his conviction was unconstitutional because it was not proven that he specifically intended to threaten his victims. CJLF joined the Supreme Court review of the case to argue that, while there was no high court precedent on this issue, nine of the eleven federal circuit courts have held that the transmission of threats is a general intent crime, requiring only that a reasonable person would recognize his statements as threats. The Court's ruling held that the criminal transmission of threats requires a state of mind somewhere above negligence. The Court did not address whether recklessness would be sufficient, either under the statute or the First Amendment. If it is, the law would be largely unchanged, as a practical matter. Because the key issues remain undecided, we count this as a draw. **DRAW**

Winchell & Alexander v. Beard: 6/2/15. CJLF lawsuit filed in Sacramento Superior Court on behalf of two families to end the *nine-year delay* in the executions of five of their loved ones' murderers. Initially, the California Attorney General responded with a brief asking to have the case dismissed. Representing the California Department of Corrections and Rehabilitation, Attorney General Kamala Harris argued that the agency had limitless discretion to take as long as it chooses to come up with an execution protocol for the murderers on California's death row. The Attorney General also argued that the families of murder victims did not have a legal right (standing) to compel the government to carry out the sentences for the murderers of their loved ones. On February 9, Superior Court Judge Shellyanne Chang *rejected* the state's petition in a decision finding that the state is obligated to adopt an execution protocol in a reasonable period of time and that victims' families have standing to seek a court order to force compliance. The Attorney General's petition to have the judge's decision overturned was *denied* by the Court of Appeal in early March. In May, to *avoid a public trial* on what we would demonstrate was intentional delay, the Attorney General requested a settlement. In June, the state agreed to develop and announce a new single-drug protocol within *four months*. If it fails, the judge can *order* compliance. **WIN**

Jennings v. Stephens: 1/14/15. U. S. Supreme Court ruling allowing a condemned cop killer to raise on appeal an allegation challenging his conviction on federal habeas corpus even though it had been rejected by a lower court. The case involved the conviction of Robert Lee Jennings for murdering a Houston police officer during a 1988 robbery. After his conviction and sentence had been upheld by the state's highest court on direct appeal, Jennings raised allegations challenging the competence of his trial attorney before a federal district court on habeas corpus. The court denied one of his allegations, but accepted others. When the federal appeals court refused to hear the denied allegation on appeal, the Supreme Court agreed to review that holding. CJLF joined the case seeking a decision requiring that all allegations included in a claim of ineffective assistance of counsel be considered together as one claim on appeal, even if a lower court denies some of them. A decision requiring this would have simplified and shortened the post-conviction review of death penalty cases. In its ruling, the court chose not to confront the "claim" issue, but allowed the defendant to raise his rejected allegation. **DRAW**

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Jones v. Davis: Federal Ninth Circuit Court of Appeals case to review a federal judge's 2014 ruling that overturned the death sentence of rapist/murderer Ernest Dewayne Jones because delays in enforcing the law in California means that executing murderers "will serve no retributive or deterrent purpose and will be arbitrary." Jones was convicted and sentenced to death for the 1992 rape and murder of his girlfriend's mother. Substantial evidence, including a DNA match of his sperm in the victim's body, confirmed his guilt. Jones had been convicted of raping another woman six years earlier. CJLF has joined the appeal of the judge's ruling to argue that much of the delay in death penalty cases is the result of repeated and lengthy reviews by the federal courts and cannot be blamed on the state. The Foundation also argues that the judge's ruling, announcing that delay in enforcing the death penalty is grounds for overturning a death sentence, creates a new rule of law on habeas corpus, which violates U. S. Supreme Court precedent (won by CJLF).

Connecticut v. Santiago: Connecticut Supreme Court case to consider a condemned murderer's challenge to an April 2012 law, which prospectively abolishes the death penalty but allows the execution of murderers already on the state's death row and of those who committed capital murder before the law's enactment. Eduardo Santiago was sentenced to death in 2005 for a contract killing. He argues that by abolishing the death penalty, the state Legislature has affirmed that it serves no penological interest and therefore must apply it retroactively. CJLF was asked to join the case by Dr. William Petit, who survived the brutal 2007 home invasion robbery, which resulted in the sexual assault and murder of his wife and two daughters. The two habitual felons convicted of these crimes, Joshua Komisarjevsky and Steven Hayes, are currently on death row. CJLF argues that adoption of this law was the result of a legislative compromise involving several lawmakers who would only vote for it if the sentences for current death row inmates were retained. A decision adopting Santiago's position would infringe on the fundamental purpose of the legislative branch, which is to pass laws through compromise.

HCRC v. U. S. Department of Justice: Two U. S. Ninth Circuit Court of Appeals cases to review an order by a district judge in Oakland, blocking the fast-track process for federal appeals of state death penalty cases enacted by Congress and signed into law by President Clinton in 1996. The judge also denied a request by Marc Klaas, whose daughter was murdered in 1993 by a habitual felon later sentenced to death for the crime, to be included as a party in the case to argue against further delay of the fast-track process. On appeal, CJLF is arguing to have the judge's order on the fast-track process overturned. The Foundation's brief notes that the Congressional act creating the process specifies that challenges to the Attorney General's decisions under this law are to be heard exclusively by the federal court of appeals for the D.C. Circuit, which means the federal judge in Oakland had no authority to hear the case. CJLF also points out that federal law requires that states which might be affected by the case must be included as parties, yet no state was included. In a separate brief, the Foundation is representing Mr. Klaas to argue that he has a right to intervene as a party in the case to assure that his interest in ending the delay in reviewing the conviction and sentence of his daughter's murderer is considered. The Foundation's brief notes that there is ample Ninth Circuit precedent supporting Mr. Klaas's right to be heard in this case. A favorable decision in this issue would be a major victory for crime victims.

BOXSCORE *continued from page 5*

Hall v. Florida: 5/27/14. U. S. Supreme Court decision announcing that, when determining the IQ of a murder defendant who claims he is ineligible for the death penalty because he is mentally retarded, states should not use a rigid cutoff score that does not account for a margin of error. The case involved a murderer's claim that the IQ requirement for mental retardation should be expanded from a score of below 70 to a range of 67 to 75. In 1981, Freddie Lee Hall, and an accomplice, kidnapped a 21-year-old pregnant woman from a grocery store parking lot and drove her into the woods where she was raped, beaten, and shot to death. After two decades of appeals upholding Hall's conviction and sentence, the Supreme Court decided in another case that executing the mentally retarded was unconstitutional. At that time, the Florida Legislature had already adopted a nationally accepted standard, which included an IQ below 70 to qualify. Hall, whose lowest admissible IQ score was 71, asked the Supreme Court to broaden the range to include him. When the Supreme Court agreed to hear Hall's appeal, CJLF accepted the Florida Attorney General's request to join the case. CJLF argued that standards for mental retardation should be left up to the states. Otherwise, well-deserved sentences for clearly guilty murderers will be held up for years as these issues are endlessly reviewed. **LOSS**

People v. Moffett: 5/5/14. California Supreme Court ruling that a California law, which allows murderers between the ages of 16 and 18 years old to be eligible for a sentence of life without the possibility of parole (LWOP), does not violate the U. S. Supreme Court's June 2012 decision in **Miller v. Alabama**. The case involves a criminal (a few days short of his 18th birthday) who committed an armed robbery along with an accomplice. During their attempted escape, the accomplice shot and killed a police officer. Andrew Moffett was convicted of the murder of Officer Larry Lasater, which is a death penalty offense for murderers over 18. Because of his age, he received a sentence of LWOP. During sentencing, the judge noted that she was exercising her discretion to give this sentence, rather than life with parole, due to the circumstances of the crime. While Moffett's case was on appeal, the U. S. Supreme Court, in **Miller v. Alabama**, abolished mandatory LWOP for murderers under 18. The state Court of Appeal overturned Moffett's sentence, announcing that it violated the "spirit" of **Miller**. When the California Supreme Court agreed to hear the state's appeal, CJLF filed an *amicus curiae* brief on behalf of Officer Lasater's wife, mother, and brother arguing to reinstate Moffett's sentence. The brief noted that the **Miller** ruling bars mandatory LWOP for murderers under the age of 18, while California law gives judges sentencing discretion. The state Supreme Court agreed, but due to **Miller**'s expanded factors that must be considered at sentencing, Moffett's case was sent back to the original trial judge for resentencing, and the judge resentenced Moffett to LWOP. **DRAW**

TOTAL	**3 Wins**	**1 Loss**	**3 Draws**

LEGISLATURE KILLS MOST PROP. 47 REFORM BILLS

Law enforcement in California cite the recently passed "Safe Neighborhoods and Schools Act" as a cause of increased crime.

The California Legislature failed to pass four of the five CJLF-supported bills introduced to correct serious problems with Proposition 47—last November's voter-adopted initiative that downgraded several crimes from felonies to misdemeanors, such as identity theft, possession of dangerous drugs, and gun theft. The initiative, which received 70% of its funding from out-of-state contributors, including the ACLU and liberal billionaire George Soros, has been cited by law enforcement officials for causing increased crime in most parts of the state.

All five of the key bills introduced by Democrats and Republicans to amend Proposition 47, or correct problems it created, passed out of their initial policy committees and three cleared their house of origin with bipartisan votes. Only one passed both houses and was signed by the Governor, but it was severely weakened with amendments.

Under Proposition 47, possessing date rape drugs was downgraded from a felony to a simple misdemeanor, punishable by no more than one year in county jail. To address this, **AB 46 (Lackey)** created the new felony of possession of date rape drugs with *intent to commit sexual assault*, punishable by a minimum of 16 months in prison. The bill passed unanimously out of the Assembly Public Safety Committee, but was later killed quietly in the Appropriations Committee. The bill, by the way, *did not require any appropriations*. A companion bill, **SB 333 (Galgiani)**, which also addressed possession of date rape drugs, passed out of the Senate and stalled in the Assembly Public Safety Committee, where it will officially die next year.

AB 150 (Melendez & Gray) would have restored the theft of a firearm to a felony, punishable by at least 16 months in prison. Proposition 47 downgraded the theft of a firearm valued at less than $950 from a felony to petty theft. The bill passed out of the Assembly Public Safety Committee, but died in the Appropriations Committee. Like **AB 46**, *the bill required no appropriations.*

AB 390 (Cooper) would have amended state law to address a consequence resulting from the adoption of Proposition 47. By downgrading several felony crimes to misdemeanors, the initiative spares a significant number of habitual criminals from the requirement of providing a DNA sample for the state's database. **AB 390** expanded the state's DNA Act to require that those convicted of crimes downgraded by Proposition 47 provide a DNA sample. The bill passed out of the Assembly and has been held in the Senate Public Safety Committee where it will probably die quietly next year.

AB 1104 (Rodriguez) was introduced to address another unintended consequence of Proposition 47, which denied police the opportunity to obtain search warrants for crimes downgraded to misdemeanors by the initiative. Many serious habitual felons regularly commit the drug possession and theft-related crimes which were converted to misdemeanors. **AB 1104** allowed the issuance of a search warrant for these downgraded crimes. The bill passed both houses of the Legislature and was signed into law, but not before heavy amendments. In the amended bill, warrants will only be allowed for suspected drug dealers. Authorization for warrants to search gun thieves, burglars, and identity thieves was cut out of the bill before it passed.

Law enforcement officials in Los Angeles, Fresno, Sacramento, Ventura, San Bernardino, and scores of other cities across the state are citing Proposition 47, billed as *The Safe Neighborhoods and Schools Act*, for causing increased crime, but the Legislature's leaders are clearly not listening.

CJLF will support additional legislation next year to amend this deceptive and dangerous law.

Help us protect your rights. CJLF is fighting to prevent another 1970's crime wave and endless reports of serial killings, out-of-control violence, and increases in burglaries and auto theft. We have been fighting Jerry Brown's Realignment since it passed and have led the effort to repeal it. We are working to fix Prop. 47, which is increasing crime across California, and we have won a court judgment requiring the state to take steps to end the moratorium on executions. Help us continue to fight for the safety of you and your loved ones by making your tax-deductible 2015 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!***

THIS IS MY CONTRIBUTION TO CJLF

Please fill out and mail with your check to:

Criminal Justice Legal Foundation
2131 L Street
Sacramento, CA 95816

Name: _____

Address: _____

_____

Type of Contribution (check one): ☐ Business ☐ Personal

If you itemize your deductions, your contributions to CJLF are TAX DEDUCTIBLE.
IRS I.D. Number: 94-2798865

I would like to receive CJLF bulletins via e-mail. My e-mail address is:

_____

Summer 2015

"BID TO SUPPRESS EVIDENCE REJECTED"

continued from front page

was also her pimp. She testified later that when she left, her children were unharmed.

The next day, Clark dropped off her son at his preschool. One of the child's teachers, Ramona Whitley, noticed that one of his eyes was bloodshot and that there were red marks and welts on his face. After Whitley pointed this out to the lead teacher Debra Jones, Jones asked the child "who did this?," to which he answered, "Dee Dee." "Dee" was the child's nickname for Darius Clark. To determine whether Dee Dee was an adult or another child, Jones asked, "is he big or little?," to which the child answered, "Dee is big."

Jones took the child to her supervisor's office, where they removed his shirt and found more injuries. The injuries were reported to the county child services agency which conducted an investigation. The next day both children were taken from the home of Clark's sister to a hospital where serious injuries were found on the 2-year-old child, including two black eyes and a burn on her cheek.

Following his conviction, Clark won an appellate court ruling which found the child's statements to the teachers were "testimonial," the requirement established by the Supreme Court for the constitutional right of confrontation to apply. Based upon this holding, the court concluded that the teachers' testimony was unconstitutional because the defense was unable to cross-examine the child. The Ohio Supreme Court later upheld

that ruling, finding that when the teachers questioned the child about possible abuse, they were acting as agents of state law enforcement because of the state's mandatory abuse reporting law.

When the U. S. Supreme Court agreed to consider the state's appeal, CJLF joined the case to encourage a decision reinstating Clark's conviction. In a scholarly *amicus curiae* (friend of the court) brief, the Foundation argued that the answers the child gave to the teachers were not barred by the Confrontation Clause because they do not resemble the kinds of statements historically considered to be subject to that provision. The teachers and not the child should be considered the witnesses in this case for the purpose of the constitutional right of confrontation. As such, the Constitution is satisfied by the defendant's ability to confront the teachers at trial. The CJLF argument noted that Supreme Court precedent in this area is confusing and more clarity is needed. A statement made to a first responder, whether a policeman or someone else, is not the same as a statement taken by an investigator building a case against a known suspect. The statement to the investigator is "testimonial" as that term is used by the Supreme Court, and the statement to the first responder is not.

For statements that are not "testimonial," the question of whether they are admissible is one to be decided by state courts and legislatures under the states' hearsay evidence rules. It is not a question for the federal courts.

The Court's decision will prevent the suppression of important evidence that a jury should be allowed to consider.

"It is critical to the fact-finding process for juries to hear the best available evidence," said Foundation Legal Director Kent Scheidegger. "In cases such as this, the statements of abused children are valid evidence, and excluding them would let abusers go free," he added.

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