CRIMINAL JUSTICE LEGAL FOUNDATION

CJLF Advisory

Volume 32, No. 2 Summer 2014

CJLF WINS HIGH COURT DECISION IN KENTUCKY MURDER CASE

In a divided April 23 decision, the U. S. Supreme Court reversed a ruling of the U. S. Court of Appeals for the Sixth Circuit and reinstated the death sentence of a habitual sex offender who had pled guilty to the rape and murder of a 16-year-old girl.

At issue, in **White v. Woodall**, was the trial judge's refusal to instruct the sentencing jury to avoid any inference regarding the defendant's refusal to testify. The Sixth Circuit held in July 2012 that this refusal violated the defendant's constitutional rights. In an earlier review, the Kentucky Supreme Court had upheld the trial judge's ruling and affirmed the sentence.

At the invitation of the Kentucky Attorney General, the Criminal Justice Legal Foundation joined this case to encourage a decision overturning the Sixth Circuit's ruling. "The federal appeals court took it upon itself to take a jury instruction, required in the *guilt phase* of a trial, and announce that it was also required in the sentencing phase, creating a new rule of law and overturning the death sentence of a brutal murderer," said the Foundation's Legal Director Kent Scheidegger. "As this decision makes clear, the federal courts of appeals do not have the authority to impose new rules on the states, and they must defer to the judgments of the state courts on unsettled questions of law," he added.

In the court's majority opinion, Justice Antonin Scalia stated that the Act of Congress governing these cases "does not require state courts to extend [Supreme Court] precedent or license federal courts to treat failure to do so as error," *citing* Mr. Scheidegger's 1998 law review article.

The crime occurred on the evening of January 25, 1997. That evening, Sarah Hansen drove her parents' minivan to a nearby convenience store to rent a movie to watch with her parents and boyfriend.

Sarah Hansen

Murdered at the age of 16 by Robert Woodall who had recently been released from prison for sexual abuse.

Sarah was a high school cheerleader, an honor student, and a medal-winning swimmer. Robert Keith Woodall was in the convenience store when Sarah arrived. Woodall had recently been released from prison for sexual abuse and had previously abused his two young cousins.

When Sarah failed to return home after several hours, her parents called the local police. A short time later officers found the van near a lake 1.5 miles from the store. The van's interior was bloody and a blood-stained box cutter was found nearby. Police followed a bloody trail to the lake and found Sarah's unclothed body floating in the water. Her throat had been cut and there were multiple bruises all over her body.

When police learned that Woodall had been at the convenience store, they questioned him. While he initially gave conflicting statements, when confronted with the evidence he agreed to plead guilty to the kidnapping, rape, and murder of Sarah Hansen. The evidence included a match of Woodall's DNA on Sarah's body, his fingerprints on and in the van, his shoe prints where Sarah's body was thrown into the lake, and Sarah's blood found on his muddy jeans and sweatshirt.

At the sentencing hearing, Woodall's attorney cross-examined several of the

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JUSTICE CAROL CORRIGAN ADDRESSES ATTENDEES AT ANNUAL MEETING

The Criminal Justice Legal Foundation's Board of Trustees held its 32nd annual meeting in Los Angeles on June 12. Among the guests were California Court of Appeal Justice Patricia Benke, newly re-elected San Bernardino County District Attorney Mike Ramos, and newly elected Sacramento County District Attorney Anne Marie Schubert. The meeting, which was hosted by CJLF Chairman Rick Richmond, Managing Partner of Jenner & Block in Los Angeles, featured a luncheon address by California Supreme Court Justice Carol Corrigan, who after brief remarks, engaged in a lively give-and-take discussion with the audience. At an earlier closed session, the Board re-elected several Trustees to successive terms and adopted the budget for the Foundation's 2014-2015 fiscal year.

Justice Carol Corrigan

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MEASURE TO REDUCE SENTENCES ON CALIFORNIA'S NOVEMBER BALLOT

On November 4, 2014, voters will decide the fate of a ballot measure which will have a direct impact on public safety in California.

Proposition 47 is called the *California Safe Neighborhoods and Schools Act*. Its proponents are San Francisco District Attorney George Gascón and former San Diego Police Chief William Lansdowne.

Major contributors include Atlantic Advocacy Fund (New York), the George Soros-sponsored Open Society Policy Center (Washington, DC), and California contributors B. Wayne Hughes, Jr. and M. Quinn Delaney. The campaign has received over $1.3 million in contributions with more than $800,000 coming from out of state.

Opponents include California State Sheriffs Association, California District Attorneys Association, California Peace Officers Association, California Police Chiefs Association, and Crime Victims United.

Official ballot title and summary.

Criminal Sentences. Misdemeanor Penalties. Initiative Statute.

"Requires misdemeanor sentence instead of felony for petty theft, receiving stolen property, and forging/writing bad checks when value or amount involved is $950 or less. Requires misdemeanor sentence instead of felony for certain drug possession offenses. Allows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder or child molestation or is a registered sex offender. Requires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk. Applies savings to mental health and drug treatment programs, K-12 schools, and crime victims."

The state Legislative Analyst's Office (LAO) estimates, "Net state criminal justice system savings that could reach the low hundreds of millions of dollars annually, which would be spent on truancy prevention, mental health and substance abuse treatment, and victim services. Net county criminal justice system savings that could reach the low hundreds of millions of dollars annually."

Analysis.

Most property crimes, including auto theft, commercial burglary, and grand theft are felonies under current law; but due to Realignment, criminals convicted of these crimes who do not have a previous conviction for a violent or serious crime cannot be sentenced to state prison and can only be incarcerated in county jail or sentenced to rehabilitation programs and probation.

Proposition 47 would redefine these and several other types of property crimes, which currently can be charged as felonies, as misdemeanors. This would reduce the consequences for criminals who steal or receive items valued at less than $950, as well as criminals who write bad checks or commit forgery for less than $950. The theft of a gun by a gang member, for example, could no longer be charged as a felony or result in a prison sentence. The measure will also eliminate felony possession of dangerous drugs such as crack cocaine and PCP, even by previously convicted drug dealers, converting this crime to a misdemeanor. Defendants convicted of these crimes would receive shorter county jail sentences, if any, and less supervision, regardless of the number of previous convictions for similar crimes.

Criminals currently serving prison sentences for these crimes could apply for resentencing and release. Proponents estimate that 10,000 criminals currently serving prison sentences could obtain release under this measure. Criminals who have already served sentences for these crimes could apply to change their prior convictions from felonies to misdemeanors.

The LAO estimate of savings in state prisons, local jails, and supervision ignores the thousands of new and more serious crimes which will certainly be committed by criminals released from prison or receiving reduced sentences under this law. Similar savings in state prison costs predicted by the LAO for Realignment turned out to be entirely inaccurate. In 2014, three years after Realignment became law, the state corrections budget increased by $2 billion, and is likely to increase by $3 billion in 2015. The state prison population is also increasing, as so-called low-level criminals left in communities have been convicted of violent and serious crimes which require prison sentences.

Releasing 10,000 additional habitual felons from state prison, converting an estimated 40,000 new felonies into misdemeanors annually, and sharply reducing the confinement and supervision for these criminals will fuel significant increases in all types of crime and drive up the cost to re-arrest, convict, and sentence the majority of habitual criminals who are neither interested in nor going to benefit from rehabilitation and treatment programs.

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Advisory layout design by Irma H. Abella

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.

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 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 Appeals 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. **DRAW**

White v. Woodall: 4/23/14. A 6-3 U. S. Supreme Court decision to reverse a 2012 federal appeals court ruling which had improperly held the murderer's death sentence unconstitutional. Undisputed evidence, including a DNA match, proved that on the evening of January 25, 1997, Woodall kidnapped high school cheerleader Sarah Hansen from a convenience store and took her to a nearby lake where he raped and beat her before slitting her throat. After Woodall pled guilty to the crimes, the sentencing jury heard testimony from 14 witnesses supporting a life sentence, but Woodall did not take the stand. Following his conviction and sentence, Woodall won a federal court ruling overturning his death sentence, announcing that the judge had violated his rights by failing to tell the jury to ignore his decision not to testify. When the Supreme Court agreed to hear the case, CJLF accepted the Kentucky Attorney General's invitation to file argument. The Foundation argued that there is no Supreme Court precedent requiring a "no adverse inference" instruction at a sentencing hearing and, as such, the claim was properly denied by the state courts. The brief noted that the federal appeals court had exceeded its authority in order to void Woodall's sentence. The Supreme Court's decision overturning the lower court cited CJLF Legal Director Kent Scheidegger for providing the key argument. **WIN**

Kansas v. Cheever: 12/11/13. Unanimous U. S. Supreme Court decision to overturn a Kansas court ruling, which held that the Constitution prohibited a prosecution expert from testifying in rebuttal to a cop killer's expert on a mental defense claim. In 2005, drug dealer Scott Cheever shot and killed a Kansas county sheriff who was serving an arrest warrant. Cheever shot at several other officers before he surrendered. At trial, a pharmacist testified that Cheever was too high on drugs to have intended to kill the sheriff. Over Cheever's objection, the prosecution introduced an expert who testified that Cheever knew what he was doing on the day of the murder. The Kansas Supreme Court later overturned Cheever's conviction and death sentence, finding that, with the exception of a claim of mental illness, the Constitution did not allow a compelled examination by a prosecution expert to rebut defense experts on other mental defenses, such as intoxication. CJLF joined the state Attorney General's appeal to argue that the Kansas court's holding was not supported by the Constitution or any Supreme Court precedent. **WIN**

Cook v. FDA: 7/23/13. Unanimous decision by a three-judge panel of the U. S. Court of Appeals for the D. C. Circuit, which overturned a federal district judge's March 2012 ruling that ordered the FDA to confiscate existing stocks of the execution drug sodium thiopental from state departments of corrections. In a lawsuit brought by 25 condemned murderers facing execution in Arizona, California, and Tennessee, the District Court held that the drug, which is widely used for executions, was illegally obtained from its foreign manufacturer and had to be confiscated. On November 12, 2012, the Foundation filed an *amicus curiae* brief with the Court of Appeals, arguing that the district judge's order, which affects many states who were not parties in the case, violates federal rules and the rights of affected states and ignores a fundamental requirement of due process. The court's opinion cited and thanked the Criminal Justice Legal Foundation for providing a key argument that it *utilized* in its decision. **WIN**

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Case Report

A Summary of Foundation Cases Currently Before the Courts

Jennings v. Stephens: U. S. Supreme Court case to review a procedural issue that has caused confusion in criminal cases. The case involves the conviction and sentencing of Robert Jennings for killing a Houston police officer during the robbery of a bookstore in 1988. The conviction and sentence were affirmed in 1993 by the state's highest criminal court. Over the next 20 years, Jennings filed state and federal habeas corpus petitions raising numerous claims, including claims that his trial attorney was ineffective for several reasons. In 2012, a federal district court judge denied an allegation against the attorney regarding closing argument, but upheld another regarding a failure to present mitigating evidence. In 2014, the federal Court of Appeals rejected Jennings' mitigating evidence claim, but refused to hear the closing argument claim, noting that he had not filed the necessary paperwork in a timely manner. When the U. S. Supreme Court agreed to hear Jennings' appeal, our Foundation decided to join the case in support of neither party. In our brief, we ask the Supreme Court to require that all allegations included in an ineffective assistance of counsel claim be considered together as one claim and require federal Court of Appeals to review every allegation, including those rejected by a lower court. If the Supreme Court agrees, it will open the door to a simplified and faster post-conviction review process.

Elonis v. United States: U. S. Supreme Court case to hear the appeal of a Pennsylvania man convicted of violating a federal law which makes it a crime to transmit threatening statements across state lines. The case involves the October 2011 conviction of Anthony Elonis for using Facebook to transmit threats to the lives of his estranged wife and a female FBI agent. In 2010, Elonis' wife left with their two young children. Later, Elonis began having trouble at his job. A female employee he supervised reported him for undressing himself at her desk while she was working. Elonis was later fired after posting a photo depicting him preparing to slit the woman's throat, with the caption: "I wish." Elonis then began posting statements threatening to murder his estranged wife, including one post where he states, "I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts." When the FBI was notified, a female agent was assigned to monitor Elonis' Facebook page. Eventually the agent and a colleague visited Elonis for an interview, which he refused. Later that day he posted that he wanted to slit the agent's throat. After his conviction, Elonis argued unsuccessfully on appeal that his Facebook postings served as therapy for him and that they represented expression protected by the First Amendment. He also raised a Ninth Circuit ruling, asserting that the law required that intent to threaten be proven. In the Supreme Court appeal, CJLF will argue that the First Amendment does not protect threats that a reasonable person would believe are true and that, under this federal law, proof of specific intent is not required for a conviction.

HCRC v. U. S. Department of Justice: Ninth Circuit Court of Appeals case 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. In the District Court, Mark Klaas, whose daughter was murdered in 1993 by a habitual felon later sentenced to death for the crime, sought to be included as a party in the case to argue against further delay of the fast-track process. The Court denied his request and ruled in favor of a group of death penalty defense attorneys who had filed the suit to halt the process. On appeal, CJLF, representing Mr. Klaas, argues 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 death 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.

Santiago v. State: 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 currently 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 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.

BOXSCORE *continued from page 3*

Salinas v. Texas: 6/17/13. U. S. Supreme Court decision utilizing CJLF arguments to reject a Texas murderer's claim that his incriminating behavior during a voluntary interview with police should have been excluded from his trial. The case involved the 1992 shotgun murders of two brothers in Houston. After police learned that Genovevo Salinas may have been involved, they visited his parents' home, where he also lived. During the visit, Salinas's father turned over his shotgun to the police, and Salinas agreed to go to the police station for a voluntary interview. After an hour of answering questions, when asked if the shells found at the murder scene would match the shotgun, Salinas stared at the floor and would not answer. Testing later revealed that the shells were a match, and a witness came forward telling police that Salinas admitted to the murders. At trial, the jury learned that Salinas had refused to answer the shotgun question. Following his conviction, Salinas appealed, arguing that informing the jury of his silence violated the Fifth Amendment. CJLF joined the Supreme Court review of this case to argue that a suspect's behavior during a voluntary interview is evidence which should not be kept from the jury. The Court's 5-4 decision agreed. **WIN**

TOTAL	**4 Wins**	**1 Loss**	**1 Draw**

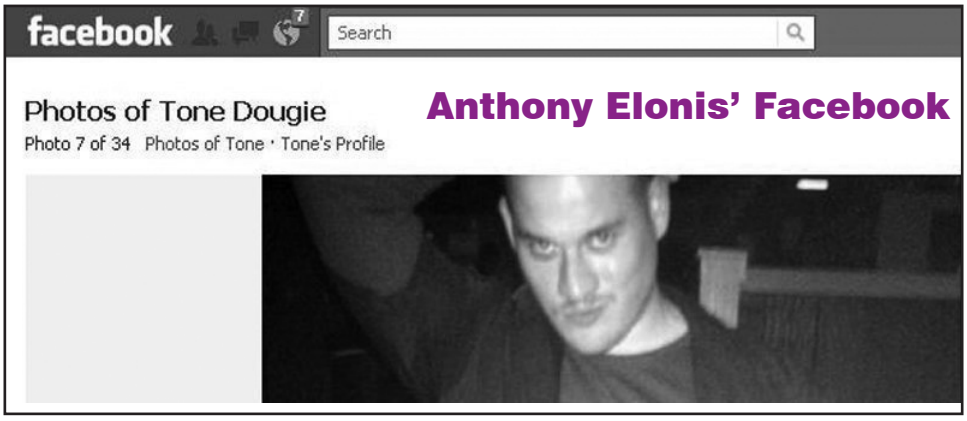
HIGH COURT TO REVIEW CONVICTION FOR MAKING THREATS ON "FB"

The U. S. Supreme Court has agreed to hear the appeal of a Pennsylvania man who claims that his conviction for posting threats on Facebook is unconstitutional.

The question before the court is whether the posting of threats to specific people over a widely viewed website is considered protected expression under the First Amendment unless the prosecutor proves that the accused had specific intent to threaten the targeted individuals.

CJLF will join the case of **Elonis v. United States** to encourage a decision which says "no." A general intent to publish statements any reasonable person would regard as a threat is sufficient to place the statement outside the protection of the First Amendment.

The case involves the 2011 conviction of Anthony Elonis for violating federal law which makes it a crime to transmit threatening communications across state lines. According to court records, in Fall 2010, Elonis was working as an administrator at Dorney Park & Wildwater Kingdom in Allentown, PA. A few months earlier, his wife Tara left him, taking their two young children. After that, he began having problems at work. One of the employees Elonis supervised filed five sexual harassment reports against him. One night, while she was working in the office alone, Elonis walked in and began undressing in front of her. She immediately left and reported the incident. Elonis was later fired after posting a picture on Facebook of himself holding a knife to her throat with the caption, "I wish."



A short time later, Elonis began posting threats against Tara. In one post, he wrote, "I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts." After Tara received a court protection order against Elonis, he posted more statements threatening to kill her and statements that he was going to "initiate the most heinous school shooting ever," in order to make a name for himself.

After these threats, FBI Agent Denise Stevens began to monitor his posts. After documenting his threats to the water park employees, his wife, and a kindergarten class, Stevens and another agent visited Elonis at home, but he refused an interview. Later that day he posted, "Little agent lady stood so close. Took all the strength I had not to turn the b**ch ghost. Pull my knife, flick my wrist, and slit her throat."

In December 2010, Elonis was arrested and charged with five counts of transmitting threats. At trial, he argued that his postings were a form of therapy to help him deal with his emotional pain, and they were protected by the First Amendment. A jury felt otherwise, convicting him of threatening his wife and Agent Stevens. The court sentenced Elonis to 40 months in prison and three years of supervised release.

On appeal, Elonis continued to argue that his postings were protected speech and also cited a federal Ninth Circuit Court of Appeals ruling which held that specific intent to threaten was required for a conviction under federal law. After the U. S. Court of Appeals rejected his arguments on appeal, Elonis petitioned the Supreme Court to hear his claims. When the high court agreed to review his case this Fall, CJLF decided to submit argument. The Foundation will argue that there is no First Amendment protection for transmitting threats to injure

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Help us protect your rights. CJLF is fighting to prevent another 1970s style crime wave with seemingly endless reports of serial killings, out of control gang violence, and skyrocketing increases in burglaries and auto theft. We have fought Realignment since it became law and have led the effort to repeal it. We have drafted an initiative for 2016, which will break the bureaucratic log jam to enforcement of the death penalty. Our media efforts have focused the news on the policies that turn criminals loose in our communities. But, we cannot continue without your support. If you haven't made a tax-deductible contribution to CJLF this year, please do so today. Use our website (**www.cjlf.org**) for credit card gifts, or mark and return the card on the right along with your check. ***Thank you very much!***

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Summer 2014

"KENTUCKY MURDER CASE"

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prosecution witnesses and presented 14 witnesses who testified in support of a life sentence, but Woodall did not take the stand. Woodall's attorney requested the judge to give a "no adverse inference" instruction to the jury before they began deliberations. The judge declined, noting that Woodall's guilty plea removed any question of guilt and that his failure to testify was relevant to the issue of remorse for the crime or lack of it.

Both Woodall's conviction and sentence were upheld on direct appeal in the Kentucky Supreme Court. His state habeas corpus claims were reviewed and denied by the state circuit court and the state Supreme Court. In 2006, Woodall filed 30, mostly frivolous, claims on federal habeas corpus. They included unsupported claims that he was mentally retarded and that his lawyers should have introduced an insanity defense. A magistrate judge recommended that all of the claims be denied, but the Federal District Court accepted the "no adverse inference" instruction claim, a claim on jury selection, and one on the jury instruction on mitigation. The Sixth Circuit upheld the "no adverse inference" instruction claim and declined to decide the others. In its ruling, the court held that the Fifth Amendment's protection against self-incrimination extends to the sentencing hearing, even though the defendant pled guilty to the crimes. When the U. S. Supreme Court agreed to hear the state's appeal, the Kentucky Attorney General's Office invited CJLF to file argument in the case.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF Legal Director Kent Scheidegger argued that there is no Supreme Court precedent requiring a "no adverse inference" instruction claim at a sentencing hearing. Because of this, the Kentucky Supreme Court was well within its authority to decide this unresolved question in favor of affirming the sentence. By misusing the writ of habeas corpus to overturn an entirely reasonable decision of the state Supreme Court, the Sixth Circuit exceeded the limits that Congress placed on its authority. In its decision, the Supreme Court agreed.

"The limits on federal court authority enacted by Congress were designed specifically to prevent the kind of ruling that the Sixth Circuit handed down in this case," said Scheidegger. "This is a well-deserved sentence in a case with no question of guilt. It should have been carried out years ago," he added.

"MEASURE TO REDUCE SENTENCES"

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Conclusion.

Proposition 47 has been qualified for the ballot with the bulk of its funding coming from out-of-state criminal advocacy organizations opposed to the sentencing policies which have given California and the nation historically low crime rates over the past 15 years. While proponents claim to have broad law enforcement support, every law enforcement association and legitimate crime victims' group in the state opposes Proposition 47.

The proponents obviously believe that California's voting public is so gullible that they can pass off an initiative entitled *California Safe Neighborhoods and Schools Act* as a public safety initiative, rather than an initiative that releases thousands of known criminals from prison back into communities and sharply reduces the consequences for an estimated 40,000 new crimes each year. An honest name for Proposition 47 would be *California More Crime Act*.

"THREATS"

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or kill if a reasonable person would conclude that the threats are real. In addition, while the Ninth Circuit has ruled that specific intent is required, every other federal appeals court which has considered the issue has found that it is not required. A decision accepting the CJLF argument will protect enforcement of this important federal law and aid state efforts to enact similar laws to punish threatening communications.

Watch for a decision in this case in a future *Advisory*.

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