



Advisory

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COURT CHALLENGE TO INFORMANT TESTIMONY REJECTED

A 7-2 decision by the United States Supreme Court has upheld the use of testimony from a jailhouse informant to impeach statements made on the witness stand by a criminal defendant. The Court's holding in **Kansas v. Ventris** overturned a 2008 Kansas Supreme Court ruling, which had announced that the testimony of a jailhouse informant was not admissible at trial "for any reason."

The Criminal Justice Legal Foundation filed a "friend of the court" brief in the case arguing that the Kansas decision misinterpreted U. S. Supreme Court precedent to improperly exclude evidence.

In the Court's majority opinion, Associate Justice Antonin Scalia wrote, "Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are 'outweighed by the need to prevent perjury and to assure the integrity of the trial process,'" quoting a 1976 opinion by Justice Lewis Powell.

"In some cases, the testimony of a jailhouse informant provides the jury with independent evidence that supports the testimony of other witnesses," said Associate Attorney Lauren Altdoerffer, who authored the CJLF brief. "A confession recorded by an informant wearing a wire, or the videotaped conversation between a defendant and an informant, would have also been barred if the Kansas ruling had been upheld," she added.

The case involved the robbery and murder of a Montgomery County, Kansas, man. In January 2004, Donnie Ray Ventris and his live-in girlfriend, Rhonda Theel, devised a plan to rob Ernest Hicks, an acquaintance Theel claimed always carried a lot of cash.

The pair were driven to Hicks' home by a witness who later testified that he saw both Ventris and Theel enter the

house. After one or both of them shot and killed Hicks, Ventris and Theel left the scene with Hicks' wallet, approximately \$300, his cell phone, and pickup truck. At trial, both Ventris and Theel accused the other of killing Hicks.

In rebuttal to Ventris's testimony, his cellmate, Johnnie Doser, testified that Ventris told him that he "and his girlfriend, Rhonda, had went to rob somebody and that it went sour. He'd shot this man in the head and chest. That he took his keys, his wallet, about \$350, and took a vehicle." Doser admitted that police placed him in Hicks' cell and told him to keep his ears open. The defense unsuccessfully objected to the testimony as unconstitutional.

After an instruction from the judge, warning them to consider the testimony of both Theel and Doser with caution, the

jury found Ventris not guilty of the murder, but convicted him of aggravated robbery and burglary. Ventris was sentenced

Use of his confession to cellmate upheld in trial.



Donnie Ray Ventris

to 23.4 years. In 2008, the Kansas Supreme Court ruled that Doser's testimony was unconstitutional because he had been planted in the cell by police after Ventris *continued on last page*

LUNCHEON FEATURES NINTH CIRCUIT JUDGE MILAN SMITH



Judge Milan D. Smith, Jr.
Ninth Circuit Court of Appeals

The Foundation held its first meeting of 2009 in Los Angeles on March 17. The luncheon at The California Club was hosted by CJLF Trustee Jerry Hawk, President of Hoffman Associates, Inc., and featured an address by Ninth Circuit Court of Appeals Judge Milan D. Smith, Jr. Judge Smith, a former CJLF Board Member, discussed his experiences on the Court since his appointment in 2006 and his concerns about recent changes in rules governing federal habeas corpus review of capital cases.

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VIEWPOINT

SHOULD *Miranda* HAVE AN ENGLISH ACCENT?

You know your **Miranda** rights. Criminals know them. We have heard them countless times on television and in the movies. “You have the right to remain silent, anything you say can be used against you . . .” In the United Kingdom, things are different. There, after a suspect is warned that he has the right to remain silent, he is told: “it may harm your defense if you do not mention, when questioned, something which you may later rely on in court.” British police officers have given these warnings to suspects during interrogation since 1994. As a result, there has been a decrease in the number of suspects refusing to answer questions during interrogation.

This summer our Foundation will submit a law review article proposing that states consider revising their *Miranda* warnings so that they mirror those in the United Kingdom. This change would encourage suspects to disclose important information during the early stages of an investigation, instead of waiting until trial, saving both time and money in the investigation and prosecution of criminals.

Our **Miranda** rule “overprotects” the Fifth Amendment privilege against self-incrimination by excluding from evidence any statement given by a suspect in custody who has not received his warnings. The rule has gone so far as to prohibit a prosecutor from commenting at trial on the fact that the defendant did not tell police about his alibi during his initial interrogation. For example, a prosecutor cannot ask, “So, if all you had to do to prove your innocence was tell police that you were in Montana on the day of the murder, why didn’t you tell them?” This type of comment is not allowed, according to the Supreme Court’s decision in **Doyle v. Ohio**, because there is no evidentiary value in an accused’s post-arrest silence. The Court reasoned, “[s]ilence in the wake of [the **Miranda**] warnings could be nothing more than the arrestee’s exercise of his **Miranda** rights.” If we were to reform our **Miranda** warnings so that they mirror the United Kingdom’s, the accused’s post-arrest silence takes on an entirely different meaning and could have evidentiary value.

The Fifth Amendment protects against compelled self-incrimination, and **Miranda** warnings were designed to assure this protection by informing the suspect of his rights. The specific warnings are not in the Constitution. The Supreme Court only adopted the language to “appris[e] accused persons of their right of silence and assur[e] continuous opportunity to exercise it.” States have always been free to draft other warnings so long as they are consistent with **Miranda**’s goal.

Adopting Britain’s warnings would do this. The warnings would inform a suspect that he has the right to remain silent; but, if he decides to testify at trial, his post-arrest silence could be used to impeach his credibility. The new warnings both “appris[e]” him of this right, and “assur[e]” that he can exercise it. The warnings also inform him that choosing silence now, and offering a new defense at trial, allows the prosecutor to comment on the fact that he never mentioned his alibi during questioning.

The U. S. Supreme Court has come close to allowing this type of comment in the past. While **Doyle v. Ohio** prohibited it when the accused had been given **Miranda** warnings, **Harris v. New York** allowed use of voluntary, but unwarned statements for impeachment if a defendant took the stand. Later cases have allowed a prosecutor comment to rebut the defense that the government has not allowed the defendant to explain his actions, or a judge to instruct a jury to follow its “natural and irresistible impulses” when determining a defendant’s credibility.

If it is “natural and irresistible” to infer that a defendant lied on the stand because he failed to mention his alibi earlier, then shouldn’t our warnings tell him that? A study released in 2000 by Britain’s Home Office found that, since the United Kingdom revised its warnings, fewer career criminals rely on a right to silence during police interrogation. They also found a reduction in the number of defenses that are brought up for the first time at trial. Defenses emerge sooner, and instead of favoring the defendant, the United Kingdom’s right to silence provides police with more information at an early stage. The warnings level the playing field and they should be adopted here.

Lauren J. Altdorffer
 Associate Attorney

Advisory layout design by Irma H. Abella

CJLF CHALLENGES RULING BY NINTH CIRCUIT VOIDING RAPE CONVICTION

In a case to be argued next fall, the United States Supreme Court will hear Nevada's appeal of a Ninth Circuit ruling which overturned the conviction of a child rapist. At issue in **McDaniel v. Brown**, is a federal district judge's decision to brush aside the Nevada Supreme Court's affirmation of the conviction. The judge based his ruling on a re-evaluation of testimonial evidence while excluding the DNA testing which identified the defendant as the rapist. The high court accepted the Nevada Attorney General's appeal after a divided panel of the Ninth Circuit upheld the district court judge's ruling last year.

The Criminal Justice Legal Foundation has joined the case to encourage a decision to overturn the lower federal courts and reinstate Brown's conviction.

"The federal court rulings in this case demonstrates precisely why Congress passed laws to limit the scope of review on habeas corpus," said the Foundation's Legal Director Kent Scheidegger.

The case involves the conviction of Troy Don Brown for the 1994 sexual assault of a nine-year-old girl. Evidence introduced at trial indicates that in the early evening of January 28, the victim's mother, Pam, was invited to join Troy Brown's brother, Trent, and sister-in-law, Raquel, for a drink at CG's, a bar near the Carlin, Nevada, trailer court where Pam and her family lived. Because Pam's husband worked the night shift, her oldest daughter, who was nine, was to babysit her four-year-old sister and Trent & Raquel's two children in their home across the street.

After Trent and Raquel returned from the bar, Raquel walked the victim and her sister to their trailer. When they arrived, the nine-year-old girl tried to telephone her mother at CG's, but the line was busy. She then called the Peacock Bar, and Troy answered the phone. After she told Troy that she was home alone with her little sister, he agreed to go to CG's and find Pam. By the time he got there, Pam and her daughter had already spoken over the phone. A short time later, Troy and Pam returned to the Peacock Bar and had drinks and played pool. Pam later stated that the last time she saw Troy at the bar was between 11:00

p.m. and midnight and that he had been drinking heavily.

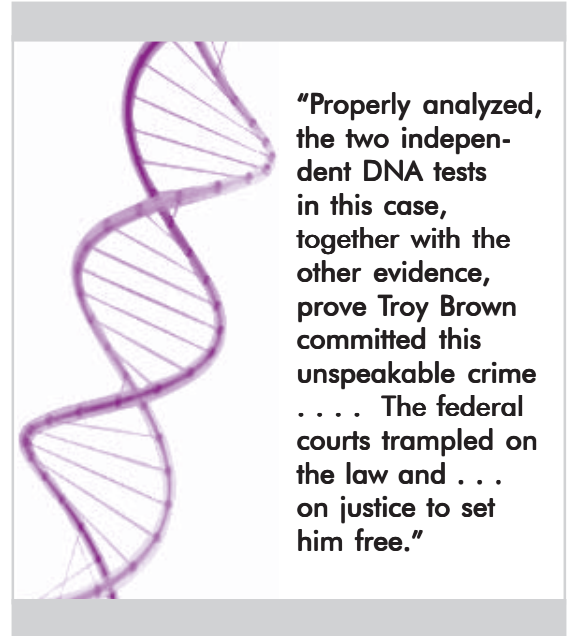
Just before 1:00 a.m., Pam received a call at the Peacock Bar from her daughter, who said that a man had hurt her. Pam quickly returned home to find the girl covered in blood from the waist down. Doctors later reported that she had been penetrated both vaginally and anally and had lost 15% of her blood. DNA samples were taken, and the victim talked with a female police officer who specialized in interviewing children. She described her attacker, identifying a black jacket, dark jeans, and cowboy boots, but after noting that the light was out, made conflicting statements regarding his face and hair. She also said he smelled of beer and vomit.

Following the interview, the victim was hospitalized for 12 days as she underwent extensive surgery for her injuries.

Later that morning, a police officer visited Troy's trailer and questioned him about the assault. He denied involvement.

The following week Troy voluntarily went in for additional questioning and, although he again denied involvement, he was arrested.

At trial, the bartender who was on duty at the Peacock Bar at the time of the assault recalled that Troy left no later than 12:20 a.m. An off-duty bartender who had remained in the bar after her shift ended believed that he left at 1:30 a.m. Several witnesses, including Brown, stated that he was wearing a black satin jacket, dark jeans, and cowboy boots. A couple picking up their children at the trailer court testified that they saw a man staggering near the victim's trailer shortly after 1:00 a.m. wearing a black satin jacket and dark jeans. Another witness recalled Brown returning to his trailer, which was a short distance from the victim's trailer, at 1:32 a.m. A forensic expert testified that DNA found on the victim's underwear matched a sample taken from Brown. The odds against this match happening at random were 3 million to 1. At the time of the as-



sault, the population of the town of Carlin was approximately 2,100.

Brown testified that, after consuming 20 drinks, he was very intoxicated when he left the Peacock Bar, and he vomited several times while walking to his trailer. He also stated that while he could not remember what time he got home, when he did arrive, he washed his jacket and pants because he needed them for a trip the next day.

The jury convicted Brown of the sexual assault. After the verdict, Brown's family convinced the judge to allow a second DNA test on a different sample, performed by an independent lab. That test also matched Brown, with 10,000 to 1 odds against the match happening at random. After noting that this second test also confirmed his guilt, the judge told Brown that it would make a "big difference" in his sentence if he admitted that he had assaulted the girl. After Brown again declared his innocence, the judge sentenced him to life in prison with the possibility of parole, plus 20 years.

Brown made several claims on appeal, including that there was insufficient evidence to support his conviction and that the sentencing judge abused his discretion by punishing him more harshly because he

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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.

Kansas v. Ventris: 4/29/09. U. S. Supreme Court decision (*utilizing CJLF arguments*) to overturn a state court ruling which had announced that the testimony of a jailhouse informant was unconstitutional. The case involved the 2004 conviction of Donnie Ray Ventris for a robbery which resulted in the victim's death. At trial, after Ventris took the stand and denied killing the victim, his cellmate testified that Ventris admitted the crime to him. In 2008, the Kansas Supreme Court ruled that the cellmate's testimony could not be admitted "for any reason." CJLF joined the high court appeal of that ruling to argue that the Kansas court had gone beyond the requirements of Supreme Court precedent. The Court held that the state may use a cellmate's testimony to impeach a defendant's statements at trial, so long as the cellmate does not coerce the defendant into talking. **WIN**

Cone v. Bell: 4/28/09. U. S. Supreme Court ruling allowing additional delay of the execution of double-murderer Gary Cone. Cone was convicted 27 years ago, on overwhelming evidence, of beating an elderly Memphis couple to death during a two-day crime spree. His attorney was unable to convince the jury that Cone had suffered a drug-induced mental breakdown at the time of the murders. On appeal, Cone's claim of attorney incompetence was reviewed and denied in the state courts. On federal habeas corpus, Cone claimed that prosecutors withheld evidence of his drug use at the sentencing hearing, which could have encouraged sympathy from the jury. After years of review, the Sixth Circuit Court of Appeals rejected the claim as both defaulted and meritless. CJLF joined the Supreme Court appeal to encourage a decision affirming the lower court ruling and Cone's sentence. The Court's 7-2 ruling sent the case back for further review. **LOSS**

Philip Morris USA v. Williams: 3/31/09. U. S. Supreme Court decision to dismiss a case it had accepted. The high court had intended to consider a state court's use of independent state grounds to prevent federal court review of a ruling on a constitutional claim of a litigant. While the case involved a lawsuit against a tobacco company, the Oregon court's decision to throw out a claim on the ground that it had not been properly made in the trial court raised an issue which has caused great mischief in criminal cases, particularly by the Ninth Circuit. Vague Supreme Court decisions on what constitutes a valid state rule has left this area of law so confused that some federal courts regularly ignore state rules in order to overturn convictions and sentences. CJLF joined the case to encourage a decision which clearly defined what constitutes a valid independent state ground. The Court dropped the case without deciding the matter. **DRAW**

Rivera v. Illinois: 3/31/09. U. S. Supreme Court decision which preserved the murder conviction of a Chicago street gang member but declined to address the question of whether the trial judge committed an error in denying the defense lawyer's challenge of a juror. The juror in question was a black woman, and the judge originally suspected that the defense challenge was due to her race. Later, after the defense attorney stated that he didn't want another woman on the jury, which is gender bias, the judge seated her. The Illinois Supreme Court held that the judge had erred, because his original suspicion of bias was due to race rather than gender. The court went on to find that the error was harmless and upheld the conviction. CJLF joined the U. S. Supreme Court review of that ruling to argue that the trial judge had committed no error. **DRAW**

Arizona v. Johnson: 1/26/09. U. S. Supreme Court decision upholding the authority of a police officer to pat down a suspicious passenger for weapons during a traffic stop. The case involved an evening stop in a gang-infested neighborhood. When an officer noticed the backseat passenger was dressed head to toe in the colors of a local gang and had a police scanner sticking out of his pocket, she decided to pat him down for weapons. The frisk uncovered a handgun and drugs. Last summer, the U. S. Supreme Court agreed to review a state appeals court ruling that found the search was unlawful and overturned the criminal's conviction for being a felon in possession of a firearm and drugs. CJLF joined the case to argue that the appeals court misinterpreted precedent, which gives police officers the authority to pat down a person confronted in the line of duty if there is a reasonable suspicion that the person might be armed. **WIN**

Oregon v. Ice: 1/14/09. U. S. Supreme Court decision upholding a judge's authority to require a defendant, convicted of multiple felonies, to serve the sentences for each crime consecutively. The case involved an apartment manager, convicted for twice using his pass key to burglarize a resident's unit and molest her 11-year-old daughter. Ice was convicted of six felonies, and the judge required that he serve the sentences for four crimes consecutively. The Oregon Supreme Court later overturned the sentence, ruling that earlier U. S. Supreme Court decisions barred the judge from finding the facts required by state law before the sentences could be made consecutive. CJLF joined the case to argue that the Oregon court improperly extended a rule, created to prevent a judge from punishing a defendant more severely than a jury's conviction allows, to also prevent a judge from simply requiring a criminal to serve a sentence for each crime the jury finds him guilty of committing. **WIN**

Hedgpeth v. Pulido: 12/2/08. U. S. Supreme Court decision overturning a 2007 Ninth Circuit ruling, which voided the conviction of a California murderer. Michael Pulido was convicted on strong evidence of killing a gas station cashier during a 1992 robbery. Fifteen years after his conviction, the Ninth Circuit sidestepped federal rules to invalidate Pulido's conviction due to a minor trial error previously deemed harmless by the state Supreme Court. CJLF joined the state's appeal to argue that the Ninth Circuit ruling was improper and should be overturned. **WIN**

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Bell v. Kelly: 11/17/08. U. S. Supreme Court order dropping its review of a federal court ruling upholding the death sentence of Virginia cop killer Edward Bell. In 2001, Bell, a drug dealer, was convicted on strong evidence of murdering a police sergeant by shooting him in the face. Earlier this year, the high court agreed to review Bell's appeal based upon his claim that the Virginia Supreme Court refused to consider evidence beneficial to his case. CJLF joined the case to argue that Bell's claim was false and that the federal courts erred in reviewing the new evidence because it did not support his allegation of lawyer incompetence. When the Supreme Court learned the truth, Bell's case and his last chance to avoid execution were rejected.

WIN

Indiana v. Edwards: 6/19/08. U. S. Supreme Court decision which *utilized* CJLF arguments to announce that states can refuse to allow a mentally ill defendant to act as his own attorney. The case involved the 2005 conviction of Ahmad Edwards, a thief who shot two people while attempting to escape. After his arrest, Edwards was treated in a mental hospital for several years. When doctors judged him fit for trial with the assistance of a lawyer, he asked the court to let him represent himself. The judge denied this, and Edwards was subsequently convicted of theft and attempted murder. On appeal, the Indiana Supreme Court overturned his conviction, ruling that federal law required the judge to let him represent himself. When the U. S. Supreme Court agreed to review the case, CJLF argued that the right of self-representation was not absolute and that states should retain the ability to deny mentally ill defendants from turning their trials into a mockery of justice. The Court agreed.

WIN

Boumediene v. Bush and Al Odah v. U. S.: 6/12/08. A 5-4 U. S. Supreme Court ruling granting constitutional rights to foreign-born terrorist suspects captured overseas and held by the U. S. Military. The suspected terrorists claimed that the Constitution gave them the right to sue the government on habeas corpus over their detention and that Congress did not have the authority to prohibit the courts from reviewing their claims. CJLF joined the cases to defend the interests of law-abiding Americans, arguing that habeas corpus was never intended to be available to prisoners of war, that the Constitution gives Congress the authority to determine the jurisdiction of the federal courts, and that foreign enemies are not entitled to the rights enjoyed by American citizens.

LOSS

People v. Superior Court (Humberto S.): 5/12/08. Unanimous California Supreme Court decision overturning a lower court ruling which had disqualified a Los Angeles Deputy District Attorney from a child molestation case because his efforts to protect the rights of the victim were labeled a conflict of interest. The case involved the prosecution of a juvenile for the continuous sexual abuse of his eight-year-old niece. When the prosecutor argued against turning over the victim's confidential medical records to the defense, the judge disqualified him. CJLF argued that it is often the prosecutor's duty to protect a victim's rights.

WIN

TOTAL

7 Wins

2 Losses

2 Draws

SEX OFFENDER CLAIMS CONFESSION IS ILLEGAL

The United States Supreme Court has agreed to review a decision by Maryland's highest court which overturned the conviction of a repeat sex offender. At issue in **Maryland v. Shatzer** is whether a confession made by an inmate three years after he refused to talk to investigators violates precedent which prohibits police from badgering a suspect.

In August 2003, a three-year-old boy described to a social worker an incident involving oral sex with his father. After she reported the conversation to the police, a detective interviewed the child. A few days later the detective met with the boy's father, Michael Shatzer, who was in prison for sexually abusing another child. The detective told Shatzer that he was a police officer and read him his **Miranda** rights, which Shatzer invoked, refusing to give a statement or answer any questions about the abuse of his son without a lawyer present. At that point, the detective told Shatzer to contact him when he had obtained an attorney and the interview ended. Because the three-year-old child was the only witness, the case was closed.

Three years later, after the victim, at age six, was better able to discuss the incident, the case was re-opened. In March 2006, a different detective, accompanied by the social worker, visited the prison to interview Shatzer. This time, after receiving his **Miranda** rights, he agreed to discuss the case. Shatzer initially denied abusing his son, but agreed to take a polygraph test. A week later, after again receiving a **Miranda** warning, Shatzer broke

down during the polygraph test, admitting the abuse, but also claiming "I didn't force him."

Prior to trial, Shatzer sought to exclude his incriminating statements, arguing that his request for an attorney years earlier prevented the use of his statements during the subsequent interviews. The trial court denied his motion, citing the length of time between the interviews, the fact that he was in prison the entire period, and his waiver of **Miranda** rights prior to his confession. Shatzer was convicted of the abuse and received an additional 15 years in prison.

In August 2008, the Maryland Court of Appeals overturned the conviction, ruling that the confession was taken in violation of **Edwards v. Arizona**, a 1981 Supreme Court decision barring police from initiating a second interview with a suspect held in jail overnight after he asked for an attorney.

When the Supreme Court agreed to hear the Maryland Attorney General's appeal of that ruling, CJLF joined the case. CJLF is encouraging a decision to overturn the lower court ruling and reinstate Shatzer's conviction. CJLF argues that the Maryland court incorrectly extended the prohibition against badgering announced in **Edwards**. The long lapse of time and the fact that Shatzer was in prison under a fixed sentence, so that he could not expect release in return for cooperation, makes this case different. A presumption he was badgered into waiving his rights is not justified.

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

FEDERAL JUDGE OVERTURNS PROPOSITION 9 PAROLE REFORMS

CJLF to Join Appeal

A March 26 Federal District Court ruling has overturned a provision of California's Proposition 9, a constitutional amendment adopted by voters last November to strengthen the rights of crime victims. One of the amendment's provisions abrogates a court ordered injunction—agreed upon in 2005 to settle a lawsuit brought by parolees and prisoners against the Governor, which dramatically increased the rights of criminals facing revocation of parole.

Most prison inmates become eligible for release on parole after a specific portion of their prison sentence has been served. Inmates who are paroled are required to sign an agreement which specifies the conditions they must abide by to avoid having their parole revoked. While the conditions vary depending on the crimes the parolee committed, typically he is required to regularly report to his parole officer, refrain from taking drugs and associating with known criminals, avoid firearms, and obey all laws. Parolees are also subject to warrantless searches by any law enforcement officer.

Prior to the injunction, parolees who failed to meet the conditions, often after an arrest for a new crime, were brought before a hearing officer where the evidence of the violation was presented, the parolee gave an explanation, and the hearing officer decided if parole should be revoked.

In 1973, the U. S. Supreme Court decision in **Gagnon v. Scarpelli** held that *some parolees* should be represented by an attorney at revocation hearings. The Court noted that, while the state is not constitutionally obliged to provide counsel in all cases, it should do so where the indigent probationer or parolee may have difficulty in presenting his version of disputed facts without the examination or cross-examination of witnesses or the presentation of complicated documentary evidence.

The 2005 injunction went beyond this requirement, ruling that *all parolees* are entitled to a state-appointed attorney, a probable cause hearing before the parole revocation hearing is held, the right to subpoena witnesses, and other specific procedural rights not afforded to parolees in other states. This transformed a relatively simple administrative process, for determining if a criminal on parole has committed a new crime, into a mini-trial where defense attorneys could order police officers and victims to testify and be cross-examined. Because of the increased cost, the complexity of the hearing process, and the impact these requirements had on crime victims, the proponents of Proposition 9 made the reform of this process a key part of the ballot initiative.

With Proposition 9, California voters adopted new rules for parole revocation hearings that closely complied with the **Scarpelli** decision and the processes utilized by other states. Specifically, Proposition 9 allows some

parolees to be provided with an attorney in complex cases or when the parolee is unable to speak on his own behalf. Written statements from police officers and victims will be admissible without requiring these witnesses to appear for cross-examination. The measure also prohibits the decisions of hearing officers from being influenced by the cost of sending the parolee back to prison.

The March 2009 ruling in **Valdivia v. Schwarzenegger** was announced by U. S. District Judge Lawrence Karlton, the same judge who issued the 2005 injunction to settle a class action lawsuit brought by convicted felons. In his ruling, Judge Karlton announced that his injunction remains in force despite the fact that it affords more rights to parolees than the Supreme Court requires and even though California voters adopted a constitutional amendment clearly overriding the Governor's agreement to the conditions of the injunction.

Attorneys for the state have appealed this ruling to the Federal Ninth Circuit, and the proponents of Proposition 9 have asked CJLF to submit an *amicus curiae* (friend of the court) brief encouraging a decision to overturn the lower court ruling. The Foundation has agreed to continue this fight to the U. S. Supreme Court if necessary.

“VOIDED RAPE CONVICTION”

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refused to admit his guilt. The Nevada Supreme Court upheld his claim and ordered a new sentencing hearing, but rejected the claim of insufficient evidence.

The second sentencing hearing resulted in Brown receiving two consecutive life terms, with the possibility of parole in 20 years. Brown then pursued his claim of ineffective assistance of counsel on state habeas corpus without success. In February 2004, Brown filed his petition in the Federal District Court. Two years later, after deciding the Nevada Supreme Court's decision was unreasonable, Judge Philip M. Pro accepted a written statement from another DNA analyst hired by Brown, who claimed that the trial expert's response to a question by the prosecutor and the defense's own post-trial test were faulty. Based on that statement, the judge announced that the DNA evidence could not be considered, leaving only the testimonial evidence, which he found insufficient to support Brown's conviction.

The Ninth Circuit affirmed that holding in a May 8, 2008 ruling.

In a scholarly *amicus curiae* (friend of the court) brief, CJLF argues that among the many errors in Judge Pro's decision, and the Ninth Circuit's later affirmance, were a failure to apply the correct standard in evaluating the Nevada Supreme Court's decision and a failure to limit its review to the evidence introduced at trial. Both of these errors violated established U. S. Supreme Court precedent and a 1996 Act of Congress.

“Properly analyzed, the two independent DNA tests in this case, together with the other evidence, prove that Troy Brown committed this unspeakable crime,” said Scheidegger. “The federal courts trampled on the law and trampled on justice to set him free.”

Maryland v. Shatzer: U. S. Supreme Court case involving a habitual sex offender found guilty of abusing his 3-year-old son. In 2003, while Michael Shatzer was in prison for molesting another child, his son told a social worker about an incident involving oral sex with his father. When a police investigator met with Shatzer in prison to question him, Shatzer invoked his **Miranda** rights and refused to discuss the matter without an attorney present. Because the 3-year-old victim was the only witness, the case was closed. Three years later, after Shatzer's son, then six, was more capable of describing the incident, the case was reopened and another detective visited Shatzer in prison. This time Shatzer waived his **Miranda** rights and admitted that he had molested his child. Following his failure to suppress the confession, Shatzer was convicted. Maryland's highest court overturned the conviction on appeal, citing a Supreme Court holding in **Edwards v. Arizona** which involved a second interrogation of a suspect the day after he had refused to answer questions. When the Supreme Court agreed to review that ruling, CJLF joined the case to argue that the **Edwards** decision did not apply because Shatzer was already a prison inmate with no expectation of being set free if he cooperated and because three years had lapsed between the two interviews.

Barnett v. California: California Supreme Court case to review a murderer's claim that a state law requires district attorneys to search for and turn over information (discovery) regarding a conviction and death sentence handed down 19 years ago. Max Lee Barnett, a habitual criminal, was convicted on strong evidence of the kidnap, torture, and murder of his one-time mining partner in a remote area of Butte County. In 1998, the state Supreme Court denied his claims of trial and sentencing error, and the U. S. Supreme Court refused his appeal. In 2004, a trial judge granted Barnett's request for discovery even though he did not have a case pending in that court. The judge ruled that he was required to grant the request under a law enacted by a *simple majority* of state legislators in 2002, which expanded the discovery rights of murderers sentenced to death. After an appeals court issued a ruling upholding

some of Barnett's requests, the California Supreme Court agreed to review it. CJLF has joined the case to argue that the law which expanded Barnett's rights violates a ballot initiative adopted by the voters in 1990. Proposition 115, the Crime Victims Justice Reform Act, requires that legislation changing the rules of criminal discovery must be passed by a *super majority* of the members of the Legislature. A victory in this case will help prevent the state's worst murderers from adding years of delay to their cases.

McDaniel v. Brown: U. S. Supreme Court case involving a Federal Ninth Circuit ruling overturning the conviction of a Nevada child rapist. In 1994, Troy Brown was convicted and sentenced to prison for the brutal rape of a nine-year-old girl in Carlin, Nevada. As a result of the rape, the little girl underwent vaginal reconstruction and was hospitalized for 12 days. Evidence introduced at trial included the testimony of witnesses who saw Brown in the vicinity of the victim's home at the time of the rape, the victim's description of her attacker, and two independent DNA tests of semen that matched Brown. On appeal, the Nevada Supreme Court rejected Brown's claim that the jury had found him guilty on insufficient evidence. Nine years later, on habeas corpus, a federal district court judge conducted his own review of the evidence and, after *rejecting the DNA evidence*, overturned the jury's verdict. After the Ninth Circuit upheld that ruling, the U. S. Supreme Court announced that it would consider Nevada's appeal. CJLF has joined the case to argue that the lower federal courts ignored Supreme Court precedent and an Act of Congress in order to overturn this child rapist's conviction. The federal standard of review is that *the conviction is valid unless no rational person could have found the defendant guilty beyond a reasonable doubt*, and the state court correctly applied an equivalent standard. CJLF is asking for a precedent-setting decision to overturn the Ninth Circuit ruling and reinstate Brown's conviction.

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Thanks to your loyal support, CJLF helped win five U.S. Supreme Court decisions benefitting law enforcement in recent months and is pressing the fight against politicians and judges who want to use California's budget crisis as an excuse to release thousands of habitual felons from prison. With only a fraction of the annual support given to the ACLU and other criminals' rights groups, when CJLF faces them in cases before the U.S. Supreme Court, we win 86% of the decisions. Please help us continue to defend your interests by making your tax-deductible 2009 contribution today. And don't forget to clip and return the card on your right along with your check, or call us (916-446-0345) to contribute with your credit card. *Thank you very much!*

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Spring 2009

CALIFORNIA DEATH PENALTY UPDATE

California's execution procedures have been posted for public review and comment, and a public hearing has been scheduled for June 30 in Sacramento to allow interested parties to make statements regarding the procedures. After comments, the procedures may be modified or adopted by the state Department of Corrections. Although California had the revised lethal injection procedures in place last year before the U. S. Supreme Court (by a 7-2 vote) upheld Kentucky's process in **Baze v.**

Rees, attorneys for Michael Morales—the next murderer scheduled for execution—won a ruling from a Marin County judge, announcing that the new procedures were adopted illegally because the state had not allowed for public comment. The ruling was later upheld by a state appeals panel.

The U. S. Supreme Court has already identified California's lethal injection process as more humane than Kentucky's. In her dissent in **Baze**, Justice Ginsburg indicated that she (and Justice Souter) preferred California's protocol, noting that due to "the importance of a window between the first and second drugs, other States have adopted safeguards not contained in Kentucky's protocol. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae*," and continues, "In California, a member of the IV team brushes the inmate's eyelashes, speaks to him, and shakes him at the halfway point and, again, at the completion of the sodium thiopental injection." This suggests that the two dissenting justices would join the majority to unanimously uphold California's protocol.

Morales was convicted 26 years ago, on

overwhelming evidence, of the rape and murder of 17-year-old Terri Winchell. At trial, several witnesses testified that he told them about his plan to kill Winchell. His own statements, the statements of others, and physical evidence confirmed that as the girl sat in the front seat of a car driven by his cousin, Morales reached from the back seat and attempted to strangle her with a belt. When the belt broke, he grabbed a hammer and beat her on the head as she screamed for help. He then dragged the unconscious or possibly dead girl to a nearby orchard, raped her, then stabbed her four times in the chest to finish her off.

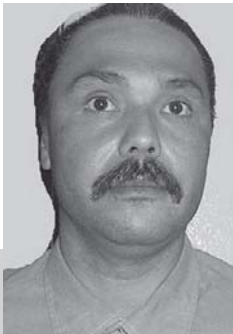
After the likely adoption of California's protocol this summer, Morales's execution date will be set and a petition will be filed by Morales's defense attorneys and anti-death penalty advocates seeking additional delay. But with no further available opportunity to challenge his guilt, sentence, or California's lethal injection process, the odds that any stay of execution granted by any court will survive to prevent the sentence from being carried out are small.

Murdered at the age of 17 by Michael Morales, who has been on death row longer than she lived.



Terri Winchell

Convicted 26 years ago of the rape and murder of Terri Winchell.



Michael Morales

"INFORMANT TESTIMONY"

continued from front page

was charged, which the court concluded violated his Sixth Amendment right to an attorney. When the U. S. Supreme Court agreed to hear the state's appeal, the CJLF joined the case. The Foundation argued for a decision to overturn the Kansas court's ruling, noting that it had established a blanket prohibition against incriminating statements to an informant by a defendant after he has been charged with a crime. The Foundation's brief pointed out that this prohibition went beyond U. S. Supreme Court precedent, which allows the testimony of a person who overhears a defendant's uncoerced, voluntary confession.

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