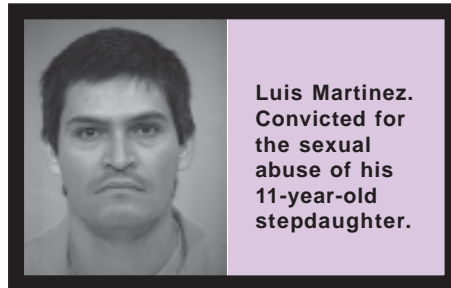


CHILD MOLESTER SEEKS TO EXPAND THE RIGHT TO COUNSEL

The United States Supreme Court has agreed to review an Arizona child molester's claim that his conviction should be overturned because his state-appointed appeals lawyer failed to attack the effectiveness of his trial attorney. At issue in the case of **Martinez v. Ryan** is whether a defendant has a constitutional right to counsel on collateral review.

The Criminal Justice Legal Foundation has joined the case to encourage a decision rejecting the defendant's claim.

"The Supreme Court has, on several occasions, noted that defendants are not constitutionally entitled to counsel for further reviews of their case after the first appeal. Martinez had a lawyer for his direct appeal and his claims were rejected. A decision to expand the right to counsel to include these additional reviews would cre-



Luis Martinez.
Convicted for
the sexual
abuse of his
11-year-old
stepdaughter.

ate an entire new class of time-consuming and expensive claims subject to federal court review," said CJLF Legal Director Kent Scheidegger.

Luis Martinez was convicted of sexually abusing his 11-year-old stepdaughter twice on a July morning in 1999. Evidence at trial included the victim's videotaped description of the assaults to a social

worker and a DNA match of Martinez's semen on her nightgown.

Following his conviction, Martinez's claims challenging his trial and sentencing were rejected by the state courts on direct appeal, and his appointed lawyer reported that she could find no worthy claims to raise on state collateral review which, like habeas corpus, is a second round of appeals to consider claims involving a defendant's constitutional rights.

Later, represented by a different lawyer, Martinez claimed that his appellate lawyer was ineffective because she did not find flaws in the performance of his trial lawyer. This claim was reviewed and rejected by two state courts, the Federal District Court, and the Federal Court of Appeals.

continued on page 3

CRIMINAL CLAIMS EYEWITNESS TESTIMONY IS UNCONSTITUTIONAL

The United States Supreme Court has agreed to consider a habitual thief's claim that the testimony of an eyewitness at his trial violated his right to due process. At issue in **New Hampshire v. Perry** is whether the current constitutional protection against the introduction of evidence derived through misconduct or deception should be extended to other evidence that a defendant claims is unreliable.

"With few exceptions, the Constitution leaves questions about the reliability of relevant criminal evidence to the states," said Criminal Justice Legal Foundation Legal Director Kent Scheidegger. "A decision to constitutionalize the rules of evidence would allow thousands of clearly guilty criminals to delay justice and waste tax dollars while they drag their evidence claims through the federal courts," he added.

This case involves the conviction of Barion Perry for burglarizing a car in an apartment parking lot in Nashua, New Hampshire. It was Perry's fourth conviction for a theft-related felony.

At around 3:00 a.m. on August 15, 2008, police responded to the call of an apartment resident reporting that a tall black man was attempting to break into cars. When Officer Nicole Clay arrived at the brightly lit parking lot, she heard the sound of a metal baseball bat hitting the pavement and saw Perry carrying two car stereo amplifiers. Perry told the officer that he had found the amplifiers. A short time later, an apartment resident approached the pair and reported that a neighbor told him that someone had broken into his car. The man identified the amplifiers as his. When a second officer arrived, Officer Clay asked him to stay with Perry in the parking lot, while she and the car owner went to the third floor apartment of the neighbor, Nubia Blandon. Mrs. Blandon said that her husband had called the police after they had seen a tall black man carrying a baseball bat wandering around the parking lot looking into cars. Blandon said she saw the man open the trunk of her neighbor's car and remove some items. When Officer Clay asked if she could iden-

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The Criminal Justice Legal Foundation is a nonprofit, public interest law foundation representing the interests of law-abiding citizens in court. CJLF is an independent corporation supported by tax-deductible contributions from the general public and is qualified under IRC 501(c)(3). CJLF does not engage in any form of political or lobbying activity. The Advisory is published by the Criminal Justice Legal Foundation, Michael Rushford, Editor, Post Office Box 1199, Sacramento, California 95812, (916) 446-0345.

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FIGHT TO UPHOLD “STOLEN VALOR ACT”



Xavier Alvarez



The United States Supreme Court has agreed to review a Federal Ninth Circuit ruling which overturned the “Stolen Valor Act,” a law adopted by Congress which makes it a crime for a person to falsely claim to have been awarded medals for heroism or exceptional service by the U. S. Military.

At issue in the case of **United States v. Alvarez** is whether intentionally lying about receiving military medals is protected under the First Amendment’s right to freedom of speech.

An August 2010 decision by a divided Ninth Circuit panel overturned the conviction of a man who falsely claimed to have received the Medal of Honor, ruling that the law was overly broad and criminalized constitutionally protected speech. The Court’s 2-1 decision, authored by Judge Milan D. Smith, Jr., states, “As presently drafted, the Act is facially invalid under the First Amendment, and was unconstitutionally applied to make a criminal out of a man who was proven to be nothing more than a liar”

The Criminal Justice Legal Foundation has filed argument in the case to encourage a precedent-setting decision overturning the Ninth Circuit’s ruling. The Legion of Valor, an organization of soldiers, sailors, and aviators awarded the Medal of Honor, Navy Cross, Distinguished Service Cross, and the Air Force Cross, has agreed to join the Foundation as *co-amicus*.

The case involves the 2008 conviction of Xavier Alvarez for violating the Stolen Valor Act, a federal law which punishes as a misdemeanor those who falsely claim to have been awarded “any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces.” The law provides a fine and/or imprisonment for up to six months for those convicted. The prison term increases to one year for those falsely claiming to have received the Medal of Honor, Navy Cross, Distinguished Service Cross, Air Force Cross, Silver Star, or Purple Heart.

A year earlier, Alvarez, who was a member of a Pomona area water board, announced during a public meeting that he was a retired Marine who received the Congressional Medal of Honor for heroism. A tape recording of his statement was sent to the FBI, which found that Alvarez had never served in any branch of the military nor received any medal.

Following his conviction, Alvarez appealed, arguing that Congress did not have the authority to make lying about receiving a medal a crime. Following the Ninth Circuit’s ruling in favor of Alvarez, federal prosecutors appealed to the U. S. Supreme Court.

In a scholarly *amicus curiae* (friend of the court) brief, the Foundation argues that earlier Supreme Court decisions have recognized exceptions to the Constitution’s protection of free speech. Slander, libel, and fraud are not protected. The CJLF brief notes that those who lie about receiving awards for valor diminish the value of those who were legitimately recognized for heroism and for those who sacrificed their lives in the service of their country.

Watch for updates on this important case in future issues of the *Advisory*.

Advisory layout design by Irma H. Abella

DELAYING JUSTICE IN CALIFORNIA

Since February 2006, a series of federal and state court rulings, the bureaucratic process, and a lack of leadership by two California Attorney Generals have prevented the execution of any of the 718 condemned murderers on California's death row. Last fall, we reported that a federal district judge had issued a stay of execution for rapist/murderer Albert Greenwood Brown, who claims that California's lethal injection process does not comply with United States Supreme Court requirements. Over the past year, District Judge Jeremy Fogel, who had issued the stay, toured the newly remodeled execution chamber at San Quentin, and then took a leave of absence from the bench. This resulted in the reassignment of Brown's case to District Judge Richard Seeborg, who was appointed just two years ago by President Obama.

On November 3, Judge Seeborg announced a leisurely briefing schedule agreed upon by Brown's attorneys and the California Attorney General. Arguments will not be due until September 2012. At that time, Seeborg will schedule a hearing, hear arguments, and issue his ruling. Following the ruling, the losing party will appeal to the Ninth Circuit Court of Appeals, and, if unsuccessful there, to the United States Supreme Court. While some reporters have predicted that these events could postpone executions in California until 2013, the process could drag on even longer. As we have seen over the past five years, neither the Governor, the Attorney General, nor the federal district judges who have been involved in the process to date, seem to have an interest in actually enforcing California's death penalty.

Death penalty opponents, who are currently circulating an initiative to abolish it, tell us that delays (amounting to 30 years in Brown's case) are necessary to assure that innocent people are not executed. This is a remarkable statement considering that the delay

of Brown's execution over the past five years has had nothing at all to do with his innocence or guilt. The delay in the cases of Brown and another rapist/murderer, Michael Morales, has been the result of lawsuits supported by death penalty opponents claiming that the state's lethal injection process is unconstitutional.

California's moratorium on executions started with Judge Fogel's 2006 stay in the Morales case in response to that claim. That stay was extended in 2007 when the U. S. Supreme Court agreed to hear the death penalty case of **Baze v. Rees**, which involved a challenge to a similar lethal injection process used in Kentucky.

After the Supreme Court's April 2008 decision, announcing that the process was not unconstitutional, other states began using it again to execute their worst murderers while the moratorium in California continued.

Had Dan Lungren or George Deukmejian been serving as Attorney General in April 2008, rather than Jerry Brown, it is likely that a motion to lift Judge Fogel's stay would have been immediately filed and promptly appealed, probably resulting in Morales's execution by Thanksgiving of that year. California voters rewarded Attorney General Brown for sitting on his hands by electing him Governor last year, and electing another recognized death penalty opponent as his replacement for Attorney General. It should be noted that during their campaigns both Governor Brown and Attorney General Harris promised that (although both were personally opposed), if elected, they would enforce the death penalty. Anyone who actually believed this is galactically naive.

There is no reason for any further delay of executions in California. Last February, the Ninth Circuit upheld Arizona's lethal injection process. Arizona has executed four murderers since then. On November 16, the Ninth Circuit rejected a murderer's claim that Idaho's lethal injection process was improper, and two days later double-murderer Paul Rhoades was put to death. Both states use a lethal injection process similar to California's. The only stay of execution in force today for a California murderer is for Albert Brown and that stay only applies to his case.

Roughly 12 murderers currently on California's death row have completed all of their appeals and post-conviction review. The only step left in the process is for a District Attorney, responsible for one of these murderers' convictions, to request a Superior Court Judge to set an execution date. When the date is set, the murderer will ask a federal judge for a stay. And, rather than rely on Attorney General Harris, the District Attorney (joined by our Foundation) can respond quickly to seek a ruling rejecting a stay based on California's execution process, citing recent Ninth Circuit precedent in support. Any court ruling granting a stay would be immediately appealed. Within weeks, the case could be before the U. S. Supreme Court, which has refused to delay the executions of 23 murderers so far this year.

Michael Rushford
President & CEO

“CHILD MOLESTER SEEKS”

continued from front page

When the Supreme Court agreed to consider Martinez's appeal, the Foundation joined the case. CJLF's scholarly *amicus curiae* (friend of the court) brief, argued that because there is no constitutional right to a government-paid lawyer for collateral review, a defendant does not have the right to challenge the effectiveness of a lawyer hired or appointed for those types of post-conviction proceedings.

“While American courts have procedures available to reexamine convictions that have already been affirmed once, the vast majority of petitions in such cases are completely without merit,” said Scheidegger. “As far back as 1953, Justice Robert Jackson noted that looking for petitions with merit was like searching for a needle in a haystack. The situation has only gotten worse since then. Existing law already provides an exception for strong cases of actual innocence. Absent such a claim, creating a constitutional right to counsel for these petitions and then further litigating whether that attorney was effective would add years of unnecessary review and new layers of litigation at a huge cost for very little benefit.”



CRIMINAL JUSTICE BALLOT MEASURES

There are currently ten proposed ballot measures in California pertaining to crime and public safety that have been submitted to the Attorney General for chapter and summary or have been cleared for circulation to begin gathering signatures. Four of these involve the decriminalization of marijuana. The initiatives cleared for circulation must each collect the signatures of 504,760 registered voters by the deadline to qualify for the November statewide ballot.

Initiatives Pending at the Attorney General's Office:

- The “**California Taxpayer Protection Act of 2012**” would appropriate 35 million dollars annually from the General Fund, beginning with the 2013-2014 fiscal year. These funds would be used by the state Department of Justice to finance investigations and intelligence to combat transnational gangs and restore the Bureau of Narcotic Enforcement and the Bureau of Investigations and Intelligence, until the spending authorization ends on January 1, 2033.
- “**The Local Taxpayers, Public Safety and Local Services Protection Act of 2012**,” responds to the Governor’s 2011 realignment legislation. It would require the state of California to provide ongoing, guaranteed State funding to counties and local governments to pay for the cost of providing extra jail, probation, and public safety services for criminals that have been transferred to the counties by realignment legislation signed into law in April 2011.
- The “**Californians Against Sexual Exploitation Act**” or the “**CASE ACT**” would combat human trafficking by strengthening sex offender registration requirements to better prevent online sex offenses and recognize trafficked individuals as victims not criminals. The CASE ACT details the ways in which a person can be guilty of human trafficking and the punishments for each stated crime.
- The “**Three Strikes Reform Act of 2012**” would amend California’s “Three Strikes” sentencing law to limit the third-strike sentence of 25-years-to-life to criminals who are convicted of three violent or serious crimes. Current law allows a 25-to-life sentence for criminals convicted of any third felony who have two previous convictions of violent or serious crimes. Under this law, a criminal with two violent or serious priors who commits a third felony considered nonserious, such as auto theft, commercial burglary, or drug dealing, would receive double the sentence normally provided for that third felony. The new law provides an exception for criminals whose priors include rape, murder, or child molestation. In such cases a conviction of any third felony would still permit a 25-to-life sentence. The law would apply retroactively, allowing resentencing for criminals sentenced for a third strike under the current “Three Strikes” law.
- The “**California Cannabis Hemp & Health Act of 2012**” establishes that no person or corporate entity will be subject to any penalties or denied any right or privilege for possession, cultivation, transportation, distribution, or consumption of cannabis hemp marijuana. California law enforcement personnel or funds could not be used to assist in the enforcement of Federal cannabis hemp marijuana laws. Those currently charged with or convicted of a nonviolent cannabis hemp marijuana offense that would no longer be illegal will be immediately released from prison, jail, parole, and probation, and all cannabis hemp marijuana criminal records cleared, expunged, and deleted.

Initiatives Cleared for Circulation:

- The “**Marijuana Legalization**” initiative would decriminalize marijuana sales, distribution, possession, use, cultivation, processing, and transportation by *persons 21 years of age* or older. Pending court actions inconsistent with its provisions would be dismissed. The initiative directs state and local officials to not cooperate with the enforcement of Federal laws that are inconsistent with its provisions. The deadline to collect signatures is March 26, 2012.
- A second “**Marijuana Legalization**” initiative would establish that it is not a crime or public offense for an *adult 19 years of age* or older to use, possess, share, cultivate, transport, process, distribute, sell, or engage in other cannabis-related activities. A new state commission named the California Cannabis Commission would be created. Signatures must be collected by April 19, 2012.
- The “**Reduced Marijuana Penalties**” initiative, which must collect signatures by April 5, 2012, limits the punishment for possession, cultivation, sale, or transportation of two ounces or less of marijuana to a \$250 fine or community service. If the violator is less than 21 years of age, the punishment would be limited to six months in county jail and/or a \$500 fine. The proponent for the “Reduced Marijuana Penalties” initiative is Bill Zimmerman, a political consultant who was also behind Proposition 215, adopted in 1996 to authorize the use of “medical marijuana” in California, and Proposition 36, adopted in 2000 allowing drug offenders to choose between jail time or substance-abuse treatment.
- The “**Referendum to Overturn Law that Prohibits the Required Use of Federal Electronic Employment-Verification Systems**” would repeal Assembly Bill 1236, which was signed into law by Governor Brown in October 2011. AB 1236 prohibits the state or any city, county, or special district from requiring any employer to use an electronic employment verification system (E-verify) to determine the immigration status of a prospective employee, except as required by Federal law or as a condition of receiving Federal funds. The initiative’s deadline to collect signatures is January 7, 2012.
- The “**Death Penalty Repeal**” initiative, which had previously been self-titled “*The Savings, Accountability and Full Enforcement for California Act*,” would repeal the death penalty as the maximum punishment for defendants found guilty of aggravated first-degree murder and replace it with life imprisonment without the possibility of parole. It would apply retroactively to murderers already sentenced to death. Those found guilty of murder would be required to work every day while in prison, and their wages would be applied to any victim restitution, fines, or orders against them. Signatures must be collected by March 19, 2012. The proponent for this measure is Jeanne Woodford, Executive Director of Death Penalty Focus, an anti-death penalty group. Contributors include: The ACLU (\$41,770), Google Executive Robert Alan Esutace (\$125,000), Chicago Billionaire Nicholas Pritzker (\$500,000), and Netflix CEO Reed Hastings (\$125,000).



Holiday Wishes from the CJLF Staff



Top row: Wendy Kelly, Kent Scheidegger, Josette Andrews.
Bottom row: Michael Rushford, Irma Abella, Jessica Hull, Michelle Herson.

“EYEWITNESS TESTIMONY”

continued from front page

tify the man, Blandon went to a window and pointed to Perry, who was standing in the lot with the other officer. Prior to trial, Blandon was unable to identify Perry’s face from a photo lineup, but her husband did pick him out. At trial, Perry challenged the testimony of Blandon, arguing her identification of him was unreliable and therefore violated the 14th Amendment (the Due Process Clause) of the Constitution. The judge disagreed, allowing the testimony to be admitted along with the circumstances surrounding Blandon’s identification and the fact that she was unable to pick out Perry from a photo lineup.

Following Perry’s conviction, his claims regarding his identification by Blandon were reviewed and rejected by the New Hampshire Supreme Court on direct appeal.

Earlier this year, the U. S. Supreme Court accepted Perry’s appeal for review. In addition to Perry’s attorneys, organizations who have filed argument encouraging a decision to overturn his conviction and federalize state evidence rules include the American Psychological Association, the National Association of Criminal Defense Lawyers, and the Innocence Network.

CJLF has submitted a scholarly *amicus curiae* (friend of the court) brief opposing Perry’s claim, arguing that, except in cases where key evidence was either produced or covered up through police misconduct, the Constitution leaves rules governing the introduction of evidence to the states. The Foundation cites earlier Supreme Court precedent noting that efforts to federalize the rules of evidence for state trials amounted to an encroachment on the constitutional power of the states.

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Fall 2011

CONGRESSMAN DAN LUNGREN ADDRESSES CJLF FALL MEETING

The Criminal Justice Legal Foundation held its Fall 2011 meeting of its Board of Trustees in Sacramento on Monday, November 7. The luncheon address was delivered by California Congressman (former California Attorney General) Dan Lungren.

The Congressman discussed his current work on the House Judiciary Committee and the Committee on Homeland Security, as well as his successful efforts as California's 29th Attorney General to resume enforcement of the death penalty, crack-down on sex offenders, and encourage reform of time-consuming federal habeas corpus review of death penalty cases.

Top left: Congressman Dan Lungren
Bottom left: CJLF Chairman Rick Richmond

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