



# Advisory

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## SUPREME COURT DECISION NARROWS EXCLUSIONARY RULE

In a 7-2 decision June 16, the United States Supreme Court held that evidence need not be excluded from a criminal trial if it was obtained by a search that was legal under precedents in effect at the time but subsequently overruled. Willie Gene Davis claimed his conviction for being an ex-felon in possession of a firearm was invalid because the discovery of a gun in his jacket by Alabama police during a traffic stop was the result of an illegal search. The search was considered legal under the precedents in force at the time, but it became illegal after a 2009 Supreme Court ruling in another case (**Arizona v. Gant**). Typically, when the Supreme Court announces changes in search and seizure law, those changes must be applied retroactively to cases on direct appeal.

The Criminal Justice Legal Foundation joined the case of **Davis v. United States** to encourage a precedent-setting decision creating an exception to the exclusionary

rule for incriminating evidence discovered by a search that was considered proper at the time it was conducted. The Court's June 16 decision created that exception.

In the majority opinion, Associate Justice Samuel Alito wrote, "It is one thing for the criminal 'to go free because the constable has blundered.' . . . It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs."

"The purpose of the exclusionary rule is to deter police from conducting illegal searches by prohibiting the fruits of such searches to be used as evidence," said CJLF Legal Director Kent Scheidegger. "That purpose is not served when, at the time of the search, it was authorized by precedent and the police did nothing wrong. The only result in such circumstances is that a guilty, and possibly dan-

gerous, criminal goes free," he added.

The case involves an April 27, 2007 traffic stop for excessive noise in Greenville, Alabama. The driver appeared to be under the influence and, after failing sobriety tests, was arrested. Willie Gene Davis was a passenger in the car. When an officer asked Davis for his name, Davis, who smelled of alcohol and was slurring his speech, stated that he was "Ernest Harris." Noticing that Davis was fidgeting with his jacket pockets, the officer asked him to keep his jacket on and exit the car. As Davis got out, he zipped his jacket pocket and left the jacket on the seat. After a bystander told the officer that the passenger's name was actually Willie Gene Davis, the officer arrested him for providing a false name to a law enforcement officer. The officer then searched the vehicle and found a revolver in Davis's jacket pocket. Both suspects were handcuffed

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## CJLF ELECTS NEW CHAIRMAN



**Rick Richmond**  
Jenner & Block

Southern California Attorney Rick Richmond was elected Chairman of the Criminal Justice Legal Foundation Board of Trustees at its 29th annual meeting on June 2. The meeting, which was hosted by outgoing Chairman William Shaw and CJLF Trustee William Bloomfield, was held at the Los Angeles Country Club.

Richmond, who is Managing Partner of the Los Angeles office of Jenner & Block, has served on the Foundation Board since 2004. He also serves as a director of the Los Angeles Area Council of the Boy Scouts of America and on the Advisory Board of the Los Angeles chapter of the Federalist Society.

In addition to the election of a new Chairman, the Trustees elected Michael Horner, President of Tom Sawyer Camps, as Vice Chairman and re-elected Mary Rudolph as Secretary/Treasurer, and Michael Rushford as President & CEO.

In other action, Christina Hurn, President of St. Thomas Beverage, Inc., was elected to her first term on the Foundation's Board.

The luncheon portion of the meeting featured an address by San Diego District Attorney Bonnie Dumanis, who focused on the devastating impact that the Governor's so-called Public Safety Realignment Law (AB109) will have on local law enforcement and crime rates.



**Christina Hurn**  
St. Thomas Beverage, Inc.



**Bonnie Dumanis**  
San Diego District Attorney

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# NOMINATION OF BERKELEY PROFESSOR TO NINTH CIRCUIT BLOCKED

In February 2010, President Obama nominated Berkeley Law Professor Goodwin Liu to the Federal Ninth Circuit Court of Appeals.

Four years earlier, following President Bush's nomination of Third Circuit Court of Appeals Judge Samuel Alito to the Supreme Court, Professor Liu authored a paper, *Judge Alito and the Death Penalty*, criticizing Judge Alito's votes or opinions on five of the ten death penalty cases that came before him during his term on the Third Circuit. In the five cases selected by Professor Liu, Judge Alito voted to deny the convicted murderers' claims in opinions which Professor Liu believed to "... show a disturbing tendency to tolerate serious errors in capital proceedings. They reveal troubling perspectives on federalism, race, and due process of law, and they have worrisome implications for the protection of individual liberties in the war on terror."

A later analysis by CJLF Legal Director Kent Scheidegger examined all ten death penalty cases. He concluded that Professor Liu's judgments in capital cases and reflected the professor's apparent willingness to "seize on every excuse to reverse a capital sentence and brush aside every reason to affirm one."

Prior to the March 2010 Senate Judiciary Committee hearing on Professor Liu's nomination, CJLF helped organize opposition by 42 of California's District Attorneys. In their letter to the Senators on the Committee, the District Attorneys noted:

"Under no circumstances should any ju-

dicial nominee be confirmed to the Ninth Circuit who would take that court even further in the wrong direction. Regrettably, the President has sent to the Senate just such a nominee. The paper written by Goodwin Liu in opposition to the nomination of Justice Samuel Alito shows that he would vote to reverse nearly every death sentence. He exaggerates minor issues in jury instructions that no one at trial thought were problems, while simultaneously brushing off the brutal facts of heinous crimes as inconsequential. He jumps to the conclusion that prosecutors are guilty of racism on scant evidence and despite the considered judgment of the state trial court to the contrary. The paper and its implications are discussed more fully in the letter of the Criminal Justice Legal Foundation submitted to the committee in this matter."

The Foundation also spoke out in the Washington Post, National Review, and the San Francisco Chronicle about the danger of adding another activist to the Ninth Circuit.

Last summer, after Liu's nomination passed out of the Judiciary Committee on a party line vote, the Senate sent the nomination back to the White House without a vote. President Obama renominated Liu in September, but the Senate again failed to schedule a vote. In January, the President renominated Liu a third time but in May, the Senate could not muster the votes to confirm him. On May 25, Liu withdrew his nomination.



CJLF is on the Web. An overview of CJLF reports on Foundation cases and the legal arguments filed, press releases, and a listing of publications are available on CJLF's website: <http://www.cjlf.org>

Persons interested in our work can communicate with CJLF via e-mail at: <http://www.cjlf.org/contact.htm>

Also, check out our blog, **Crime & Consequences** (<http://www.crimeandconsequences.com>), offering a fresh perspective on crime and law.



# THE BEST FEDERAL APPEALS COURT FOR CRIMINALS

SCOTUSblog, a popular blog that tracks the Supreme Court of the United States, has compiled statistics for the U. S. Supreme Court term which ended in June.

From the data, CJLF Legal Director Kent Scheidegger selected the criminal cases where the Supreme Court reviewed an earlier ruling from a federal court of appeals. From this subset, a scorecard was created for the federal circuits based upon the percentage of rulings from each circuit overturned by the Supreme Court.

In the full set compiled by SCOTUSblog, including civil cases, the Ninth Circuit is doing better than in prior years. In the criminal cases, though, the Ninth remains dismal. For cases decided on the merits with an opinion, reversals of the circuits line up as follows:

FEDERAL CIRCUIT	RULINGS REVIEWED	RULINGS OVERTURNED	PERCENTAGE
First Circuit	2	0	0%
Third Circuit	2	1	50%
Fourth Circuit	1	0	0%
Sixth Circuit	3	2	67%
Seventh Circuit	2	1	50%
Eighth Circuit	1	1	100%
<b>Ninth Circuit</b>	<b>8</b>	<b>8</b>	<b>100%</b>
Eleventh Circuit	2	1	50%

There were no criminal cases this term from the Second, Fifth, Tenth, or D.C. Circuits. One Ninth Circuit federal case was “affirmed by an equally divided court,” which in legal effect is the same as if the Supreme Court had not taken up the case at all.

More important than the reversal rate is the number of unanimous reversals. When the Supreme Court is close to evenly divided, that indicates the question was close and reasonable judges could go either way. When not a single one of the nine justices of diverse viewpoints thinks a decision was correct, that is an indication that the court below them is seriously out of the mainstream.

Nine federal court of appeals decisions in criminal or habeas cases were reversed unanimously this term, and the Ninth racked up a stunning six of them, twice as many as all other circuits put together. All but one are cases where the Ninth wrongly granted habeas corpus to a state prisoner. For its state-prisoner habeas cases, the Ninth got a grand total of two votes to affirm in six cases, a vote total of 50-2 to reverse.

This is a very disturbing record. The Ninth is a clear and present danger to public safety and the rule of law. The United States Senate must carefully examine any nominees for this trainwreck of a court to assure that any new members will be working to improve its abysmal record in criminal cases.

## CJLF OPPOSES DOUBLE MURDERER’S BID FOR HABEAS REVIEW

This fall the United States Supreme Court will review an October 2009 ruling by the Eleventh Circuit Court of Appeals which held that an Alabama murderer’s claims against his trial lawyers were defaulted because he had missed the state’s deadline for raising them. At issue in **Maples v. Thomas** is whether state rules can bar habeas corpus review when the defendant’s legal counsel fail to meet their obligation to file the claims on time.

The Criminal Justice Legal Foundation has joined the case to encourage a decision upholding the Eleventh Circuit’s ruling.

“While there are cases which justify a waiver of a state’s deadline, such as credible evidence of innocence, this is not one of them,” said CJLF Legal Director Kent Scheidegger. “There is no question that Cory Maples gunned down two people in order to steal the money and car of one of the victims. He was properly convicted and received the sentence he deserved,” he added.

The case involves Maples’ conviction and death sentence for the murders of Stacy Terry and Barry Robinson. In the early evening on July 7, 1995, Maples and Terry got together at Terry’s sister’s house in Morgan County, Alabama, to drink some beer.



Cory Maples

According to Maples’ confession, after having 6 or 7 beers, he and Terry took a ride in Terry’s new maroon Camaro, ending up at a pool hall where they continued to drink beer and played a few games. They left and drove around some more in Terry’s new car and returned to the pool hall where they met Barry Robinson, a mutual friend. At about midnight, the trio left in Terry’s Camaro. When they arrived at Maples’ home, Maples went inside and retrieved his father’s .22 caliber semi-automatic rifle. He then exited the home through a back door, walked to the car, and shot each man twice in the head. Maples then pulled Terry out from behind the wheel, replaced the gun in his father’s bedroom, took the money from Terry’s wallet, and drove off in the Camaro. Maples then stopped on a nearby bridge and threw Barry’s body into the creek.

On August 1, after a tip that Maples and the Camaro had been spotted at a motel in Nashville, Tennessee, Maples was arrested. He made a full, detailed confession to police the next day.

Facing Maples’ confession and a mountain of additional incriminating evidence, his trial attorneys argued that, while Maples was

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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.

- Davis v. United States:** 6/16/11. U. S. Supreme Court decision rejecting a criminal's claim that his conviction as an ex-felon in possession of a firearm was invalid because the police search that uncovered his gun violated the Exclusionary Rule. The gun was found in Willie Gene Davis's jacket pocket during a search after a traffic stop. Davis had left his jacket in the car when police asked him to step out. While the search was legal at the time, during Davis's appeal a new Supreme Court decision changed search rules to prohibit searching belongings left in a vehicle during a traffic stop. After the appeals court upheld Davis's conviction because the police had followed the law at the time of the search, the Supreme Court agreed to hear his appeal. CJLF joined the case to encourage a decision finding that searches such as this one should fall under the "good faith" exception established by **United States v. Leon**, a high court decision CJLF helped win in 1984. The Court's holding adopted that reasoning. **WIN**
- Brown v. Plata:** 5/23/11. U. S. Supreme Court ruling upholding the January 2010 order by a panel of three federal judges that requires California to lower its prison population by 27% (currently 33,500 inmates), within two years to remedy overcrowding, which was determined to violate inmates' constitutional rights. CJLF had joined the case to argue that the release order was invalid because the selection of three notorious pro-defendant judges as panel members by the Chief Judge of the Ninth Circuit guaranteed the result, and that once on the panel, the judges manipulated the process to prevent any objective review of the inmates' claims. **LOSS**
- Cullen v. Pinholster:** 4/4/11. U. S. Supreme Court decision utilizing CJLF arguments to reinstate the death sentence of a habitual criminal who killed a man during a home burglary in Los Angeles. In 1984, Scott Pinholster was convicted on strong evidence, including his own incriminating statements, and sentenced to death. Over the next 25 years, six courts reviewed his claim that his defense attorney had failed to adequately present evidence of his mental health problems. In 2009, after a three-judge panel of the Ninth Circuit reviewing the case on habeas corpus rejected the claim, a larger en banc panel accepted it and overturned Pinholster's death sentence. The en banc panel, after reviewing a third psychiatric evaluation not presented in state court, ruled that the California Supreme Court's denial of Pinholster's claim was unreasonable. CJLF joined the high court appeal of that ruling to argue that the Ninth Circuit violated federal law, which prohibits federal courts reviewing a state court decision on habeas corpus from considering evidence never presented to the state court. The court's decision adopted that reasoning. **WIN**
- Tolentino v. New York:** 3/29/11. U. S. Supreme Court announcement that it would not reconsider a New York Court of Appeals decision which denied a defendant's claim that police access to his criminal record during a traffic stop amounted to an illegal search. Last fall, the high court announced it would hear Jose Tolentino's claim that because police illegally stopped his car for excessive noise in 2005, they could not introduce his record, which indicated that he was driving on a suspended license and had at least 10 prior suspensions. While the legality of the traffic stop was never determined, the New York court held that the government's own records do not fall under the protection of the Exclusionary Rule and cannot be excluded from trial. Before the Supreme Court, CJLF argued that the rules governing traffic stops do not prevent police from learning a driver's identity and checking his or her criminal record. After reviewing briefs and hearing oral argument, the Court determined that it would not disturb the lower court's holding. **DRAW**
- Walker v. Martin:** 2/23/11. Unanimous U. S. Supreme Court decision *utilizing CJLF arguments* to reverse a 2009 Ninth Circuit ruling that had found California's deadline for filing state habeas corpus petitions inadequate. Charles Martin was convicted on strong evidence and sentenced to life in prison for the 1986 stabbing murder of a Sacramento man. After years of successive attempts to overturn his conviction, Martin's final petition raising new claims was dismissed by both state and federal courts for violating a state rule which requires claims to be filed in a timely manner. In 2009, the Ninth Circuit overturned the lower courts' decisions and granted additional review of Martin's claims. CJLF joined the appeal of that ruling to argue that federal courts should not be allowed to ignore state procedural rules, so long as the defendant had adequate notice of the rule and a reasonable opportunity to comply with it. **WIN**
- Premo v. Moore:** 1/19/11. Unanimous U. S. Supreme Court decision reinstating the conviction of an Oregon murderer. The decision *utilized CJLF arguments* to unanimously overturn a 2009 Ninth Circuit ruling which had announced that the murderer's lawyer was ineffective. Randy Moore admitted to kidnapping a man and then killing him with a gunshot to the temple, but claimed that the single-action revolver went off accidentally. His defense attorney negotiated a plea deal which spared Moore from the possibility of a death sentence. Years later, the Ninth Circuit invalidated the conviction, ruling that the defense attorney should have sought to have the confession excluded. CJLF joined the state's appeal to argue that the Ninth Circuit ruling ignored key facts and violated limits on its authority. **WIN**

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# “BOXSCORE”

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**Harrington v. Richter:** 1/19/11. Unanimous U. S. Supreme Court decision *utilizing CJLF arguments* to reverse a 2009 Ninth Circuit ruling that overturned the robbery/murder conviction of a Sacramento man. After his conviction on strong evidence, Joshua Richter claimed that his attorney had been ineffective. This claim was reviewed and summarily rejected by the California Supreme Court, the Federal District Court, and a three-judge Ninth Circuit panel. An en banc eleven-judge Ninth Circuit panel overturned all three courts, finding California’s high court decision unreasonable. In the U. S. Supreme Court, CJLF argued that the California court’s judgment was reasonable and entitled to deference. The high court ruling noted this, protecting thousands of convictions nationwide.

WIN

**United States v. Ghailani:** 7/13/10. Federal District Court decision rejecting the claim of a suspected terrorist, who President Obama decided to try in civilian court, that his detention by the military as an enemy combatant at Guantanamo Bay violated his constitutional right to a speedy trial. Ghailani, who has since been convicted of the 1998 bombings of two U. S. embassies killing 223 people, was joined by the Center for Constitutional Rights in arguing that because his rights were violated, he must be set free. At the invitation of the District Judge in this case, CJLF introduced argument noting that the suspected terrorist was a military prisoner being held for national security reasons before the government decided to give him a trial in civilian court. He had no speedy trial right during this period. The federal judge agreed.

WIN

TOTAL

6 Wins

1 Loss

1 Draw

## CASE REPORT *A Summary of Foundation Cases Currently Before the Courts*

**Missouri v. Frye/Lafler v. Cooper:** Two U. S. Supreme Court cases involving criminal defendants who claim that their convictions should be overturned because they may have been convicted on lesser charges had their defense attorneys not given them bad advice. In 2003 Anthony Cooper was charged with attempted murder for shooting a woman causing serious injury. A police officer witnessed the shooting. Prior to trial, the state offered Cooper a plea bargain carrying a shorter sentence than if he were convicted on all charges. His attorney advised against the deal. Cooper was later convicted by a jury and received the longer sentence. In 2007, Galin Frye was charged with driving with a suspended license, a felony because of his multiple prior convictions. Prior to trial, the prosecutor offered to allow Frye to plead guilty to a misdemeanor and serve 90 days in jail. Frye’s attorney did not report this offer to his client. Later, Frye pled guilty to the original felony charge and received 3 years in prison. In **Frye**, the state appellate court ruled in favor of the defendant. In **Cooper**, the state courts rejected the claim but a federal appellate court overturned the judgment. CJLF has joined the high court review of these cases to argue that, while a better attorney might have obtained a more favorable deal, neither criminal was unjustly convicted, and neither is entitled to a second chance for a better result.

**Maples v. Thomas:** U. S. Supreme Court review of a convicted Alabama murderer’s claim that he is entitled to federal habeas corpus review of his case even though he missed the state deadline for requesting review. Cory Maples was convicted on strong evidence of the 1995 execution-style murders of two acquaintances and the theft of one of the victim’s car. In 1997 he was convicted on all charges and sentenced to death. After his conviction and sentence were upheld by the state court of appeals and supreme court, attorneys from a New York law firm representing Maples pro bono argued on state collateral review that his trial attorney had been ineffective. Prior to the state court’s ruling denying these claims, the attorneys who had appeared in the court quit the firm, and the firm failed to inform the court of the change of attorneys. As a result, Maples did not receive notice of the ruling, and he missed the state deadline for filing an appeal, which also prevented review of his claims on federal habeas corpus. CJLF has joined the case to argue that Supreme Court precedent makes it clear that criminals are not entitled to counsel for state collateral review or federal habeas corpus. While Maples pro bono lawyers certainly failed him, absent compelling evidence that he is innocent, the post-conviction review of his case is over.

America’s economic crisis has resulted in cuts in law enforcement budgets all across America, and many states are reducing sentences and releasing criminals early to save money. With the support of the media, bleeding hearts in California have introduced legislation to abolish the death penalty even though 64% of Californians support its enforcement. CJLF is fighting to prevent a return to the soft-on-crime policies that caused a national violent crime wave in the 1970s. But we cannot meet this challenge without the help of our loyal supporters. If you haven’t made your tax-deductible contribution this year, please do so today. Use our website ([www.cjlf.org](http://www.cjlf.org)) for credit card gifts, or mark and return the card on the right with your check. *Thanks very much!*

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## “SUPREME COURT DECISION”

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and transported to the police station, and the car was impounded.

Before trial in Federal District Court, Davis moved to suppress the gun, arguing that the search of his jacket was illegal. He

conceded, however, that the search was considered legal under a precedent of the U. S. Court of Appeals for the Eleventh Circuit, which was controlling law at the time. After this motion was denied, Davis was

## “DOUBLE MURDERER’S BID”

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guilty of murder, it did not qualify him for a death sentence. The jury disagreed, convicting him of capital murder for which he was sentenced to death.

In September 2000, after Maples’ conviction and sentence were upheld by the Alabama Court of Appeal and the Alabama Supreme Court, two attorneys from the renowned international law firm of Sullivan & Cromwell agreed to represent him pro bono (for free) for his post-conviction review, along with an Alabama lawyer associated with the case. In 2001, the Sullivan & Cromwell attorneys filed a petition for post-conviction relief (the Alabama equivalent of habeas corpus) to attack the performance of Maples’ trial attorneys and a jury instruction he claimed was improper. Later, a partner from Sullivan & Cromwell also joined the defense team and an amended petition was filed with the Alabama court. In 2002, the two original attorneys left the firm, but the partner and the Alabama attorney continued to represent him. No one at these law firms notified the court of these changes in counsel. In May 2003, the court denied Maples’ claims and sent notification to the original two Sullivan & Cromwell attorneys.

On July 7, 2003, the deadline to appeal the Alabama court’s denial of Maples’ claims expired. The following month, the Alabama Attorney General notified Maples that he had missed the deadline. Learning this, Maples contacted his mother who subsequently notified Sullivan & Cromwell. Lawyers for the firm then petitioned for further review of Maples’ ineffective assistance of counsel claims, arguing that his case qualified as an exception to Alabama’s procedural default rule. The petition was denied by the state courts and both the federal district court and court of appeals, all holding that the procedural default applied to Maples’ case.

When the U. S. Supreme Court agreed to consider Maples’ appeal, CJLF joined the case. In a scholarly *amicus curiae* (friend of the court) brief the Foundation notes that although Maples’ appellate lawyers failed to file his appeal on time, his post-conviction claims were fully reviewed and rejected by an Alabama court. While the Supreme Court has recognized that an exception to a state’s procedural default rule can be made for a miscarriage of justice, this case does not remotely qualify. Maples does not dispute that he killed Terry and Robinson, and the death sentence is certainly appropriate for the cold-blooded murders of his two victims.

“Cory Maples has had all the legal process he is due,” said Scheidegger.

convicted of being a felon in possession of a firearm and was sentenced to prison.

While Davis’s case was pending on appeal in 2009, the U. S. Supreme Court announced its decision in **Arizona v. Gant**, which held that a police search of a vehicle without a warrant is only allowed if the suspect is unsecured and able to reach into the vehicle, or if it is reasonable to believe that evidence related to the crime might be found in the vehicle. This decision effectively overruled the Eleventh Circuit precedent relied on by the District Court.

The Court of Appeals ruled that while the search of the car was illegal under **Gant**, the exclusionary rule did not apply because the officer was following the law as it existed at the time of the search. As support for its holding, the Court of Appeals cited the Supreme Court’s 1984 decision in **United States v. Leon** (which CJLF helped to win), which provided an exception to the rule for officers acting in good faith reliance on a search warrant.

When the Supreme Court agreed to hear Davis’ appeal of that holding, the Foundation joined the case. In a scholarly *amicus curiae* (friend of the court) brief, CJLF argued that the rule excluding valid evidence should be limited to cases where its purpose is served. That purpose is to deter police from conducting unlawful searches. The defendant’s argument that the Court needed to suppress evidence in cases such as this in order to be able to review and reconsider precedents was based on multiple misconceptions. The Foundation encouraged a decision to uphold the Court of Appeals’ correct finding that, in the circumstances of this case, the evidence should be admissible. The Supreme Court’s holding followed that reasoning.

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