CPOA CASE SUMMARIES – JULY 2022

CONSTITUTIONAL LAW

A. Arizona Department of Corrections order prohibiting mail with sexually explicit material did not violate the First Amendment because it was connected to legitimate penal interests and there were no viable alternatives.

Prison Legal News v. Ryan, 39 F.4th 1121 (9th Cir. 2022)

Facts: In 2010, the Arizona Department of Corrections ("Department") issued Order 914, which in part prohibits inmates from sending, receiving, or possessing "sexually explicit material."[1] The order included a list of examples of prohibited content, including a list item in section 1.2.17 that banned content that "may" cause sexual arousal or be suggestive of sex. The Department maintained that inmates often used sexually explicit images to harass prison staff, particularly female employees. The Department also said that such materials undermined its rehabilitative goals for inmates, especially those convicted of sex crimes.

Inmates at more than 3,000 prisons, including those operated by the Department, subscribe to *Prison Legal News*, a monthly journal for prison inmates. In 2014, the Department refused to deliver several issues of *Prison Legal News* for containing sexually explicit material. The Department later reversed that decision except with respect to one article in one issue. In 2017, the Department invoked the order to redact articles in three other issues for similar reasons.

The journal's publisher (also named Prison Legal News ("PLN")) sued the Department under 42 U.S.C. section 1983, arguing in part that Order 914 violated the First Amendment on its face. The District Court granted summary judgment to PLN and entered a permanent injunction requiring the Department to amend its order and allow distribution of the issues that had been censored. The Department appealed.

Held: The Ninth Circuit Court of Appeals explained that in *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court established the highly deferential four-factor framework by which courts review the constitutionality of prison rules generally that impinge on inmates' constitutional rights. The Ninth Circuit had expressed those factors as follows: "(1) [W]hether there is a valid, rational connection between the policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) whether the impact of accommodating the asserted constitutional right will have a significant negative impact on prison guards, other inmates and the allocation of prison resources generally; and (4) whether the policy is an 'exaggerated response' to the jail's concerns." (*Mauro v. Arpaio*, 188 F.3d 1054, 1058-59 (9th Cir. 1999) (en banc).) In accord with *Turner*, the Ninth Circuit has held that restrictions on certain classes of incoming mail violate the First Amendment when they bear no rational connection, or are an exaggerated response, to legitimate penological interests.[2]

[1] See *Jones v. Slade*, 23 F.4th 1124, 1130-31 (9th Cir. 2022) (describing Order 914).

[2] See *Prison Legal News v. Lehman*, 397 F.3d 692, 699-701 (9th Cir. 2005); *Morrison v. Hall*, 261 F.3d 896, 898, 904-05 (9th Cir. 2001); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149-51 (9th Cir. 2001); *Crofton v. Roe*, 170 F.3d 957, 959-61 (9th Cir. 1999).

The Court of Appeals first considered PLN's facial challenge to Order 914. The Court explained that the first *Turner* factor consists of three sub-requirements. First, the governmental objective underlying the policy must be legitimate. Second, the rule must be neutral. And third, the rule must be rationally related to the government's objective. See *Mauro*, 188 F.3d at 159. (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)). The Court held, and the parties did not dispute, that the penological interests in jail security and rehabilitation were legitimate and the order was neutral. However, the Court held that properly construed, the order banned only content that graphically depicted nudity or sex acts. And so interpreted, the order was rationally related to its purposes of protecting the safety of guards and reducing sexual harassment. Because PLN failed to point to viable alternatives, the order's prohibition on sexually explicit materials was not an exaggerated response to prison concerns.

However, the Ninth Circuit also determined that one aspect of the order swept more broadly than could be explained by the Department's penological objectives: section 1.2.17's ban on content that "may" cause sexual arousal or be suggestive of sex. The Court found that provision was not rationally related to the Department's interests. The Court explained there was no apparent connection between restricting all content that "may" cause sexual arousal or be suggestive of sex—in the subjective judgment of the prison employee reviewing incoming mail—and the penological interests at stake. Nor did any record evidence support such a connection.

In sum, the Ninth Circuit affirmed in part and reversed in part the District Court's summary judgment in favor of PLN; and vacated in part the District Court's permanent injunction requiring distribution of certain previously censored issues of *Prison Legal News*' monthly journal.

B. Plaintiff's action for excessive force against sheriff's deputy was not necessarily barred by her resisting arrest violation because liability for the actions may be based on two separate events.

Lemos v. Cty. of Sonoma, 40 F.4th 1002 (9th Cir. 2022)

Facts: In June 2015, Sonoma County Sheriff's Deputy Marcus Holton was on patrol in Petaluma, when he heard raised voices and a reference to a "fight" coming from a pickup truck with a large trailer stopped in the road in front of a house. During his investigation, Deputy Holton walked to the passenger's side of the truck to speak with the passenger. The passenger was leaning out the truck window talking to her mother and two sisters standing nearby, including her sister Gabrielle Lemos ("Lemos"). When Deputy Holton asked the passenger if everything was ok, the four women began yelling at him. Eventually after further discussion, Deputy Holton opened the truck door to see if the passenger was injured, at which point Lemos stepped between him and the door, pointed her finger at him, and shouted, "You're not allowed to do that!" Deputy Holton told Lemos to step back and pushed her hand away. After Lemos's mother moved Lemos away, Deputy Holton closed the door.

The women continued protesting and arguing. Another deputy responded to Deputy Holton's call for backup. Deputy Holton separated the mother from her daughters to explain his investigating purpose while the other deputy attempted to speak to the daughters, who were argumentative. The mother twice returned to where her daughters were standing. Five minutes after the initial encounter at the truck door, the mother told Lemos to go inside the house. Lemos started doing so, walking past Deputy Holton and ignoring his orders to stop. The deputy ran after Lemos and grabbed her wrist to handcuff her, but she pulled away. He then tackled her and Lemos was injured. Deputy Holton arrested Lemos.

Lemos brought a 42 U.S.C. section 1983 action against defendants Deputy Holton, Sonoma County Sheriff Steve Freitas, and Sonoma County, alleging that Deputy Holton used excessive force in arresting her. However, in a criminal proceeding, a jury convicted Lemos of willfully resisting, delaying, or obstructing a peace officer, in violation of Penal Code section 148(a)(1). Once the criminal proceedings concluded, the District Court lifted its stay on the civil proceedings for the Section 1983 action. The District Court granted summary judgment to the defendants, holding that Lemos's claim was barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), because Lemos was convicted of willfully resisting, delaying, or obstructing the deputy during the same interaction in violation of Penal Code section 148(a)(1). Under *Heck*, a Section 1983 action may not proceed if its success would "necessarily require the plaintiff to prove the unlawfulness of his conviction." *Id.* at 486. A divided Ninth Circuit Court of Appeals affirmed, but the Court voted to rehear the case en banc.

Held: The *en banc* Ninth Circuit Court of Appeals reversed the District Court's summary judgment for the defendants. The Court explained that the preclusion doctrine established in *Heck* requires a court to "consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Id.* at 487.

The *en banc* court held that because the record did not show that Lemos's Section 1983 action necessarily rested on the same event as her criminal conviction, success in the former would not necessarily imply the invalidity of the latter. The Court explained that *Heck* would bar Lemos from bringing an excessive-force claim under Section 1983 if that claim were based on force used during the conduct that was the basis for her Section 148(a)(1) conviction. Crucially, the criminal jury was told that it could find Lemos guilty based on any one of four acts she committed during the course of her interaction with Deputy Holton. Because the jury returned a general verdict, it is not known which act it thought constituted an offense. Although any of the four acts could be the basis for the guilty verdict, Lemos's Section 1983 action was based on an allegation that Deputy Holton used excessive force during only the last one. The Court held that if Lemos were to prevail in her civil action, it would not *necessarily* mean that her conviction was invalid; and the action was therefore not barred by *Heck*. Accordingly, the *en banc* court remanded for further proceedings.

Two judges dissented, and would affirm the District Court's application of the *Heck* bar to Lemos's Section 1983 claim. The dissent maintained that the majority's reason wrongfully presupposed that an uninterrupted interaction with no temporal or spatial break between a Section 1983

plaintiff's unlawful conduct and an officer's alleged excessive force can be broken down into distinct isolated events to avoid the application of the *Heck* bar.

C. Trial court erred in denying defendant's motion to suppress where objective facts demonstrated that the police's true reason for traffic stop was to search for drugs and they prolonged the stop to wait for the narcotics dog.

People v. Ayon, 80 Cal. App. 5th 926 (6th Dist. 2022)

Facts: In June 2018, Ernesto Ayon was driving at night in San Jose. Multiple law enforcement vehicles were behind him, including at least one plainclothes police officer, San Jose Police Department Officer Scott Williams. Officer Williams was assigned to the Department's Metro Unit, which specializes in narcotics investigations. After committing two minor traffic violations, Ayon was stopped by other police officers. Police looked into Ayon's car with flashlights, approached him, collected his driver's license and registration, and called the information into the police radio for a records check. The police radio dispatcher responded that Ayon's driver license was valid, there were no warrants or "wants" for him. At about the same time, Officer Williams, who had changed into a Department-approved uniform after the stop, approached Ayon's car and asked him to get out. Officer Williams began questioning Ayon.

Officer Williams asked Ayon for consent to search his car, but Ayon declined. After Ayon refused to consent to the search, the police used a narcotics dog handled by Officer Tony Diep to sniff around the outside of the car. After the dog alerted to the presence of drugs, the police searched the car, wherein they found cocaine, methamphetamine, currency, and a scale. The trial court denied Ayon's motion to suppress the fruits of the search, and he pleaded no contest to five drug-related counts. Ayon appealed from the denial of the motion to suppress.

Held: Ayon contended that the police unlawfully prolonged the traffic stop in violation of his Fourth Amendment rights. The Sixth District Court of Appeals explained that a traffic stop begins once the vehicle is pulled over for investigation of the traffic violation. (*People v. McDaniel* (2021) 12 Cal.5th 97, 130.) Because the traffic violation is the purpose of the stop, the stop "may 'last no longer than is necessary to effectuate th[at] purpose.' [Citation.]" (*Rodriguez v. United States* (2015) 575 U.S. 348, 354.) "A seizure justified only by a police-observed traffic violation[…] 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation. [Citation.]." (*Id.* at pp. 350-351.) "There is no set time limit for a permissible investigative stop; the question is whether the police diligently pursued a means of investigation reasonably designed to confirm or dispel their suspicions quickly." (*People v. Russell* (3rd Dist. 2000) 81 Cal.App.4th 96, 102.)

The Sixth District viewed timestamped body camera video footage from Officer Burnett, who was one of the officers who first stopped Ayon, and Officer Williams. The Court determined that the relevant time frame started from the point at which the car was first pulled over and ended once the dog alerted to the presence of drugs in the car. The issue was whether police diligently pursued their investigation of the traffic infractions during that time. The Court concluded that they did not.

The Court noted that after stopping Ayon and looking into his car with flashlights, the police approached him, collected his driver's license and registration, and called the information into the police radio for a records check. This took two minutes and 30 seconds. The police radio dispatcher responded to the records request at three minutes and 32 seconds into the stop. Ayon's driver license was valid, there were no "wants" for him, and there was no evidence that anything transmitted by the dispatcher would have justified further investigation.[3]

The Court observed, however, that no officer began writing a traffic citation. Instead, the body camera video showed that Officer Williams completely ignored the police radio response to the records check. After the radio response to the records check, over the following 12 minutes, nothing in the body camera footage nor elsewhere in the record showed officers doing anything to address the traffic infractions. Officer Diep arrived with the narcotics dog at about 12 minutes and 45 seconds into the stop, after which Officer Williams briefed Officer Diep. The dog sniff test began around 15 and a half minutes into the stop. At 18 minutes and 45 seconds into the stop, Officer Diep had completed the dog sniff and reported back to Officer Williams to tell him the dog had alerted. Accordingly, the record showed that over 18 minutes had elapsed from the start of the stop before police had established probable cause to search the vehicle.

The Court noted Officer Williams admitted he never did anything after he requested consent to search the car to investigate the traffic infractions. Moreover, nothing Ayon said to Officer Williams prolonged the length of the investigation into the traffic infractions. Officer Burnett was in charge of conducting the records check. After receiving the response to the records check, Officer Burnett spent much of the stop standing next to Officer Williams watching him question Ayon. The videos showed multiple other officers standing or walking around the area throughout the stop. Apart from the officer who initially contacted Ayon, there was no evidence any of these officers did anything to investigate the traffic infractions. The Court held that the police did not "diligently pursue[] a means of investigation reasonably designed to confirm or dispel their suspicions quickly." (*Russell*, *supra*, 81 Cal.App.4th at p. 102.) The police thus unlawfully prolonged the traffic stop.

The Sixth District accordingly reversed the judgment, vacated the conviction, and remanded.

D. Officer's continuation of a traffic stop to request defendant's documents did not violate the Fourth Amendment because that request fell within the stop's mission.

United States v. Nault, 41 F.4th 1073 (9th Cir. 2022)

Facts: In March 2018, Havre Police Department Officer Jordan Chroniger was informed by a drug task force that a vehicle of interest, registered to a woman named Joei Ross who had an outstanding warrant for failure to appear, was at a gas station parking lot in Havre, Montana. The officer was told that the vehicle was frequently driven by defendant Shane Nault and Ross. At the parking lot, the officer saw Ross's truck idling and a figure visible in the driver's seat. Officer Chroniger pulled his car directly behind the truck, then approached on foot. He could not tell whether the person in

[3] The Court observed that typical inquiries involved in a traffic stop include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (*Rodriguez, supra*, 575 U.S. at p. 355.)

the driver's seat was male or female because the windows were tinted. After reaching the driver's side door, Officer Chroniger identified the driver as Nault.

Officer Chroniger immediately informed Nault that the truck's plates were connected to a warrant for Ross and asked for her whereabouts. Around twenty seconds after initiating contact, Officer Chroniger asked for Nault's license, registration, and proof of insurance. Nault did not have his license, and spent the next two minutes looking for the truck's registration and proof of insurance. While Nault was looking, Officer Chroniger noticed Nault was excessively sweating, "fidgety," and "his pupils were constricted." The officer thought Nault may have been "under the influence of something." Just over a minute after initiating contact, Officer Chroniger asked Nault whether he had been drinking, was nervous, or had taken any illegal drugs. Although Nault denied being under the influence, Officer Chroniger began to conduct a DUI investigation. Officer Chroniger testified that he patted Nault down for officer safety and discovered a marijuana pipe. Officer Chroniger then administered a series of field sobriety tests, which showed signs of impairment. Officer Chroniger arrested Nault and took him into custody.

Task force agents arranged for a canine sniff, which alerted to the driver's side door. An agent applied for a search warrant, which a judge issued. Task force officers searched the truck and found, among other items, a pistol and more than 500 grams of methamphetamine.

Nault moved to suppress the evidence, arguing that the vehicle stop and resulting canine sniff were unlawful and that the items found in Nault's vehicle were the fruit of the poisonous tree. The District Court denied the motion. Nault pled guilty to possession with intent to distribute methamphetamine and felon in possession of a firearm, but reserved the right to appeal the denial of the motions. Nault appealed.

Held: The Ninth Circuit Court of Appeals stated that "[l]ike a *Terry*[4] stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. United States*, 575 U.S. 348, 354 (2015). An officer's inquiries during a traffic stop are constitutionally permissible if they are "(1) part of the stop's 'mission' or (2) supported by independent reasonable suspicion." *United States v. Landeros*, 913 F.3d 862, 868 (9th Cir. 2019).

On appeal, Nault argued that Officer Chroniger unconstitutionally prolonged the vehicle stop when he asked for Nault to provide his license, registration, and proof of insurance because the suspicion that motivated the stop ended once Officer Chroniger determined that Ross, the subject of the outstanding warrant, was not in the vehicle. The government contended that the stop was supported by independent reasonable suspicion because the officer began to suspect that Nault was intoxicated shortly after initiating contact.

Assuming without deciding that Officer Chroniger lacked reasonable suspicion that Nault was intoxicated until he first asked Nault whether he had been drinking, the Ninth Circuit held that even if the officer's request came *before* he developed independent suspicion, the officer's continuation of the stop to request Nault's documents did not violate the Fourth Amendment because that request fell within the mission of the stop. The Circuit Court stated that the

[4] *Terry v. Ohio*, 392 U.S. 1 (1968).

circumstances of the officer's encounter with Nault implicated the same vehicle safety purpose discussed in *Rodriguez*, under which a routine document check would remain part of the officer's mission even when the suspicion that justified a stop was based on an outstanding warrant rather than a traffic violation. The Court explained that because the mission of the officer's stop encompassed his routine request for documents, Nault was lawfully detained when Officer Chroniger began noticing signs of impairment, at which point his continued detention was supported by independent reasonable suspicion of a DUI, and that the evidence acquired during the subsequent investigation and search of the truck—additional signs of intoxication from the officer's field sobriety tests, and a positive alert from the dog sniff—was not tainted. The Court of Appeals concluded that this evidence, combined with evidence from a controlled methamphetamine buy from Nault out of the same truck a month earlier, amounted to probable cause that amply supported the subsequently issued search warrant. The Ninth Circuit thus determined that the District Court correctly denied the motion to suppress, and accordingly, affirmed.

E. Three-tiered registry for sex offenders convicted in adult court based on the age of the offender does not violate the Equal Protection Clause.

Legg v. Dep't of Justice, 81 Cal. App. 5th 504 (3rd Dist. 2022)

Facts: In November 2011, Robert Henry Legg pleaded guilty to committing a lewd act upon a 14- or 15-year-old child under Penal Code section 288(c). Under the Sex Offender Registration Act, this conviction required him to register as a sex offender for life. (Former Penal Code section 290, subds. (b), (c); Stats. 2007, ch. 579, Section 8, p. 4811.)

In October 2017, the Legislature enacted, and the Governor signed, Senate Bill No. 384 (2017–2018 Reg. Sess.), which established a three-tiered registry for sex offenders convicted in adult court, requiring an offender to register for a minimum of 10 or 20 years for certain offenses and for life for others, depending on the offender's designated tier.[5] Under Section 290 as amended by Senate Bill No. 384, Legg's conviction under Section 288, subdivision (c)(1) remained subject to mandatory lifetime registration, while a Section 288, subdivision (a) offender is now only subject to a minimum 20-year registration period. (Section 290(c), (d)(2)A), (d)(3)(C)(ix).)

In May 2021, Legg filed a petition for writ of mandate in the trial court, claiming that his lifetime registration requirement denied him equal protection of laws in light of the disparate sex offender registration requirements of Section 288, subdivision (a) and subdivision (c)(1) under the new tiered registration system as set forth in Section 290 as amended. The trial court denied his petition. Legg appealed.

Held: The United States and California Constitutions prohibit denial of equal protection of the laws.[6] The Third District Court of Appeal explained that equal protection clause requires the state to treat all persons similarly situated alike. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.)

[5] See Stats. 2017, ch. 541, Section 4; Stats. 2018, ch. 423, Section 52.
[6] U.S. Const., 14th Amend.; Cal Const., art. 1, Section 7(a).

In relevant part, Section 288, subdivision (a) criminalizes "willfully and lewdly commit[ting] any lewd or lascivious act … upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." Section 288, subdivision (c)(1) provides in part: "A person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year."

The Court stated that a defendant's age can provide a meaningful distinction between offense categories for equal protection purposes. Section 288, subdivision (a) requires that the victim be 13 years old or younger, and it does not require that the offender be any specific age. On the other hand, Section 288, subdivision (c)(1) requires that the victim be 14 or 15 years old and that the defendant be at least 10 years older than the victim. The Court observed that "[t]he Legislature could have properly concluded that it was necessary to specifically prohibit sexual conduct between a 14 or 15 year old and an adult at least 10 years older and to include mandatory sex offender registration based upon a conviction for the offense, because of the potential for predatory behavior resulting from the significant age difference between the adult and the minor." (*People v. Cavallaro* (6th Dist. 2009) 178 Cal.App.4th 103, 114.) Thus, while the Court recognized that the Section 288, subdivisions (a) and (c)(1) share similarities in the prohibited conduct and intent, the Court found the age differential required by subdivision (c)(1) to be a meaningful distinction demonstrating that persons violating the two statutes are not similarly situated.

F. A state official violates First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page because of the nature of their comments.

Garnier v. O'Connor-Ratcliff, 2022 U.S. App. LEXIS 20719 (9th Cir. July 27, 2022)

Facts: Michelle O'Connor-Ratcliff and T.J. Zane successfully ran for election to the Poway Unified School District ("PUSD" or the "District") Board of Trustees in November 2014, positions they still held as of the time of this case. O'Connor-Ratcliff and Zane (together, "the Trustees") created public Facebook pages to promote their political campaigns. In 2016, O'Connor-Ratcliff also created a public Twitter page related to her activities as a PUSD trustee. Although before assuming office, the Trustees originally used their social media pages to promote their campaigns, they continued to use those pages to post content related to PUSD business and the activities of the Board after winning their elections. Each Trustee's listed "Government Official" as their description on Facebook.

Two parents of children in the School District, Christopher and Kimberly Garnier, frequently left comments critical of the Trustees and the Board on the Trustees' pages, sometimes posting the same long criticisms repeatedly. The Garniers' social media comments did not use profanity or threaten physical harm, and almost all of their comments related to PUSD. The Trustees deleted or hid the Garniers' repetitive comments initially. Around October 2017, O'Connor-Ratcliff

blocked both the Garniers from her Facebook page and blocked Christopher Garnier from her Twitter page. Zane likewise blocked the Garniers from his Facebook page.

The Garniers sued under 42 U.S.C. section 1983, seeking damages and declaratory and injunctive relief. The Garniers asserted that that the Trustees' social media pages constituted public forums and that, by blocking them from the pages, the Trustees violated the Garniers' First Amendment rights. The Trustees moved for summary judgment. The District Court granted the Trustees qualified immunity as to the Garniers' damages claims but otherwise permitted the case to proceed. After a bench trial, the District Court agreed with the Garniers that their First Amendment rights had been violated. The Trustees appealed, challenging the judgment.

Held: The Ninth Circuit Court of Appeals stated that the Garniers' claims presented an issue of first impression in the Circuit: whether a state official violates the First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page because of the nature of their comments.

The Court concluded that the Trustees' use of their social media pages qualified as state action under Section 1983, and that the Trustees were state actors.[7] The Trustees identified themselves on their Facebook pages as "government official[s]," and listed their official titles in prominent places on both their Facebook and Twitter pages. The content of the Trustees' pages was primarily about providing information to the public about the PUSD Board's official activities and soliciting input from the public on policy issues relevant to Board decisions. The Trustees regularly posted about school board meetings, surveys related to school district policy decisions, the superintendent hiring process, budget planning, and public safety issues.

Next, the Ninth Circuit considered whether the Trustees violated the First Amendment in blocking the Garniers on the Trustees' social media sites. The Court determined that the interactive portions of the Trustees' Facebook pages were designated public forums, as was O'Connor-Ratcliff's Twitter page. The Court of Appeals found that the Trustees' decision to block the Garniers from the designated public forums did not advance a significant governmental interest. The Court found that the Garniers' comments did not, as the Trustees asserted, have the effect of "pushing down anything" that they posted or meaningfully distracting from the "streamlined, bulletin board" appearance the Trustees said they wanted for their social media pages. The Court concluded that there was no evidence that the Garniers' repetitive comments "actually disturb[ed] or imped[ed]" the Trustees' posts or prevented other viewers of the Trustees' accounts from engaging in discussion. *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010) (en banc).

Even if the Garniers' comments did interfere with the Trustees' interests in facilitating discussion or avoiding disruption on their social media pages, the Ninth Circuit concluded that the Trustees' decision to block the Garniers "burden[ed] substantially more speech than is necessary" and therefore was not narrowly tailored.[8] The Court explained that blocking the Garniers did not stop them from leaving only long, repetitive comments. The blocking prevented them from leaving any comments, no matter how short, relevant, or non-duplicative they might be.

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[7] See *Kirtley v. Rainey*, 326 F.3d 1088, 1092, 1094-95 (9th Cir. 2003) for Ninth Circuit tests used to identify state action.

[8] *Id.*, 491 U.S. at 799.

Accordingly, the Ninth Circuit Court of Appeals affirmed the District Court's bench trial judgment in favor of plaintiffs.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 13, available at www.jones-mayer.com.

EMPLOYMENT

A. City was entitled to nonsuit for retaliation claim where plaintiff failed to present substantial evidence demonstrating that she had been subject to any adverse employment action.

Francis v. City of L.A., 81 Cal. App. 5th 532 (2nd Dist. 2022)

Facts: Jennifer Francis worked as a criminalist and DNA analyst with the Los Angeles Police Department ("LAPD") in its serology DNA unit. In late 2004, the cold case unit detective handling the case, Cliff Shepard, requested Francis to work on the 1986 murder case of Sherri Rasmussen. After analyzing a swab of a bite mark from Rasmussen's arm, Francis detected a DNA profile of a female other than Rasmussen. In early 2005, Francis raised the possibility to Shepard of investigating a female coworker of Rasmussen. Shepard replied, "'This is a male/female burglary.'" Shepard, apparently mistaking Francis' intended target for investigation, told Francis that Rasmussen's husband had an "on-again, off-again relationship" with a female LAPD detective. Shepard told Francis, however, that the female detective was not related to Rasmussen's murder. In June 2009, the female detective was arrested for Rasmussen's murder. Francis told her supervisor that she did not want to work on the case against the female detective, expressing concern that her testimony would reveal her 2005 conversations with Shepard and she was afraid of repercussions by the LAPD against her. Francis's supervisor reported to his supervisor about Francis's concerns and about Francis's trouble sleeping and focusing. Francis was ordered to see a psychologist with the LAPD's behavioral science services ("BSS"), which she did. Francis perceived various issues over the next few years. Francis requested another supervisor three times, but she was denied three times. Francis accepted an offer to work in another unit in July 2012, and her 2016 requests to transfer to the toxicology and then back to the serology unit were both granted.

Francis sued her employer, the City of Los Angeles (the "City"), for violating Labor Code section 1102.5 on a theory of whistleblower retaliation. After Francis rested, the City moved for nonsuit. Among other grounds, the City argued that Francis failed to prove that the City had retaliated against her or that she suffered an adverse employment action. After the trial court denied the City's motion for nonsuit, a jury found in favor of the City. Francis appealed.

Held: Francis argued on appeal that the trial court made various errors. The City contended that Francis failed to establish a necessary element of her Section 1102.5 whistleblower retaliation claim as a matter of law, that nonsuit should therefore have been granted, and that any such trial court errors were harmless. The Second District Court of Appeal agreed with the City, and affirmed.

The Second District Court of Appeal explained that to prove a claim of retaliation under the relevant version of Section 1102.5(b),[9] the plaintiff "must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment." (*McRae v. Department of Corrections & Rehabilitation* (1st Dist. 2006) 142 Cal.App.4th 377, 386.) "Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment."[10] The Court noted that the fact that an employee is displeased by an employer's action does not elevate that act to a materially adverse employment action. (See *McRae, supra*, 142 Cal.App.4th at p. 386.) The City argued that Francis failed to present substantial evidence of an adverse employment action.

Here, it was undisputed that the City never terminated Francis's employment, demoted her, suspended her, or denied her any pay. Francis did not offer evidence of any negative performance reviews. To the contrary, in January 2013, the LAPD issued a commendation report recommending that Francis receive a police meritorious service medal based on her work in the Rasmussen murder investigation and her testimony in the female detective's trial, which Francis acknowledged was the highest honor that she could receive as a civilian employee. Francis argued there was a stigma attached to being sent to BSS therapy, but the Court found no evidence of such. The Second District concluded that whether the actions Francis relied on were viewed separately or collectively, they did not constitute substantial evidence of adverse employment actions that materially affected the terms, conditions, or privileges of Francis's employment. The evidence was therefore insufficient to permit a jury to find in her favor. Accordingly, the trial court erred in failing to grant the City's motion for nonsuit.

PUBLIC RECORDS

A. Personnel records relating to investigation against a peace officer were not subject to disclosure under Penal Code section 832.7 because the officer was not provided with an opportunity to appeal the findings.

Wyatt v. Kern High Sch. Dist., 80 Cal. App. 5th 1116 (5th Dist. 2022)

Facts: Kern High School District ("KHSD") maintains a police department. Jerald Wyatt was previously employed by KHSD as a peace officer in the KHSD police department. While Wyatt was employed by KHSD, an internal affairs ("IA") investigation was opened into certain

[9] The relevant version provided: "An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Labor Code, former Section 1102.5(b); Stats. 2003, ch. 484, Section 2, p. 3518.)

[10] *Patten v. Grant Joint Union High School Dist.*, 134 Cal.App.4th 1378, 1387 (3rd Dist. 2005), disapproved on another point in *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal.5th 703, 718, fn. 2 (2022).

allegations involving Wyatt. However, by the time the IA investigation was completed at the end of June 2017, KHSD no longer considered Wyatt an active KHSD employee.[11]

In early 2019, KHSD received several record requests pursuant to the California Public Records Act (Government Code, section 6250 et seq.) ("CPRA") from various news agencies and others. The CPRA requests sought information concerning KHSD officer involved events including records pertaining to, among other things, sustained findings of dishonesty-related misconduct by an officer. In April 2019, KHSD notified Wyatt by letter that that it had received CPRA requests related to the investigation and discipline of peace officers employed by the KHSD police department "pursuant to [Senate Bill] 1421." The letter stated that KHSD had identified documents from his personnel file responsive to the CPRA requests, and that KHSD would produce the documents unless Wyatt provided a court order precluding their production.

Prior to January 1, 2019, access to such records was only permitted through a *Pitchess*[12] motion. With the passage of Senate Bill No. 1421[13] in 2018 ("2018 amendments"), Penal Code sections 832.7 and 832.8 were amended to allow disclosure of such records pursuant to a CPRA request under specified circumstances.[14]

Wyatt petitioned the Kern County Superior Court for a writ of mandate, temporary restraining order, and preliminary injunction seeking to enjoin KHSD from disclosing the records, arguing in part that the records did not relate to "sustained" findings as defined in Penal Code section 832.8(b), because Wyatt was never notified of the findings or afforded an opportunity for an administrative appeal as required by statute. The trial court granted Wyatt's petition, ordered the issuance of a writ of mandate, and issued an injunction prohibiting disclosure of the subject records. KHSD appealed.

Held: The Fifth District Court of Appeal explained that the issue here was whether the subject records related to "sustained" findings under the 2018 amendments to Penal Code sections 832.7 and 832.8, which would render the records subject to disclosure under the CPRA.

In 2018, the California Legislature passed Senate Bill 1421 to amend section 832.7. When the CPRA requests were made in 2019, the version of Penal Code section 832.7 in effect at that time provided in relevant part that peace officer personnel records "relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency of dishonesty by a peace officer" shall be made available for public inspection pursuant to the California Public Records Act. (See Section 832.7(b)(1)(C), Section 832.7(b)(1).) "'Sustained' means a final determination by an investigating agency, commission, board, hearing officer, or arbitrator, as applicable, *following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code*, that the actions of the peace officer or custodial officer were found to violate law or departmental policy." (Penal Code section 832.8(b), italics

[11] The Court here noted that Wyatt's true employment status with KHSD at or about the time of the IA investigation was apparently disputed and the subject of separate litigation. The Court expressed no opinion on whether a separation of employment occurred due to constructive termination, resignation, or otherwise, as the Court deemed the issue immaterial to the questions to be resolved on appeal.

[12] *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974).

[13] 2017–2018 Reg. Sess.

[14] Penal Code, former Section 832.7(b)(1); Stats. 2018, ch. 988, section 2.

added.) Government Code section 3304 provides: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required … without providing the public safety officer with an opportunity for administrative appeal." (Section 3304(b).)

The Fifth District observed that the findings made as part of the IA investigation were described in an IA findings document as "sustained findings," yet KHSD never notified Wyatt that the IA findings had been made, and Wyatt was not provided an opportunity for an administrative appeal pursuant to Government Code section 3304 or 3304.5.

The Court of Appeal concluded from the plain text of Penal Code sections 832.7 and 832.8, as amended by Senate Bill 1421, that protection of peace officer privacy in their personnel files and related records remained an important purpose of the legislation. The Fifth District stated that the California Supreme Court's statement in the 2006 case *Copley Press, Inc. v. Superior Court*[15] stating that "competing policy considerations … may favor confidentiality, such as … protecting … peace officers from publication of frivolous or unwarranted charges, and maintaining confidence in law enforcement agencies by avoiding premature disclosure of groundless claims of police misconduct" remained a valid concern under Senate Bill 1421.[16] The Court expressed that the alleged "sustained" findings contained in the IA findings document d[id] not fit precisely within the plain language of Senate Bill 1421 since Wyatt was never provided notice and an opportunity to challenge the findings by way of an administrative appeal.

Moreover, SB 1421's legislative history did not reveal whether the Legislature considered the situation where alleged "sustained" findings were made by a law enforcement employer following a peace officer's separation of employment through resignation, constructive termination, or otherwise. The Court explained that for such circumstances not addressed by the Legislature in Senate Bill 1421, it was for the Legislature, not the courts, to make the relevant policy determinations necessary to achieve the appropriate balance between protecting a peace officer's privacy interest while at the same time providing public disclosure of allegations or sustained findings related to officer conduct and misconduct. (*Becerra, supra,* 44 Cal.App.5th at p. 917; *Copley Press, supra*, 39 Cal.4th at p. 1299.) The Fifth District concluded that the subject IA records were not subject to disclosure under the 2018 amendments to Penal Code sections 832.7 and 832.8, and affirmed in part on this basis.[17]

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 12, available at www.jones-mayer.com.

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[15] 39 Cal.4th 1272 (2006).

[16] *Id.* at p. 1298, fn. Omitted.

[17] In 2021, the Legislature made additional amendments to Penal Code section 832.7. Subdivision (b)(3) now provides, in relevant part: "Records that shall be released pursuant to this subdivision also include records relating to an incident specified in paragraph (1) in which the peace officer or custodial officer resigned before the law enforcement agency or oversight agency concluded its investigation into the alleged incident." (Penal Code section 832.7(b)(3).) The Fifth District did not address whether a different result would obtain under current Penal Code section 832.7. Given the change in the law, however, the Court determined that the judgment and writ issued by the trial court must be modified to limit the injunction to CPRA requests received prior to January 1, 2022, the effective date of the 2021 amendments.

MISCELLANEOUS

A. Prosecutors can show that two gang members separate committed crimes on different occasions to prove a "pattern of criminal gang activity" for the Penal Code section 186.22 gang enhancement.

People v. Clark, 81 Cal. App. 5th 133 (4th Dist. 2022)

Facts: A jury found defendant Kejuan Darcell Clark guilty of rape, forced oral copulation, false imprisonment, first-degree burglary, and robbery in concert inside an inhabited dwelling charges arising from events in July 2015. Defendant was a member of a subset of the Sex Cash Money street gang. The jury found true the allegations that, among other things, the false imprisonment, burglary, and robbery violations were committed in association with a criminal street gang with the specific intent to assist criminal conduct by gang members (Penal Code section 186.22(b)(1)(C)). Defendant admitted suffering a prior strike conviction and committing the charged felony offenses while released from custody prior to the judgment becoming final on the primary offense. The trial court sentenced defendant to prison for a determinate term of 20 years plus an indeterminate term of 90 years to life.

Held: Defendant contended on appeal that the gang enhancement must be reversed because the evidence did not satisfy the new legal requirements for gang enhancements (Penal Code section 186.22(b)) of Assembly Bill No. 333 (2021–2022 Reg. Sess.). Specifically, defendant contended the revised law requires that predicate offenses be committed in concert with other gang members. Assembly Bill 333 was passed after the trial. The Fourth Court of Appeal Court of Appeal noted (and the People did not dispute) that the bill's changes at issue here have been held to apply retroactively. (*People v. Sek* (2nd Dist. 2022) 74 Cal.App.5th 657, 667; *People v. E.H.* (4th Dist. 2022) 75 Cal.App.5th 467, 478.)

The Court explained that "'criminal street gang' means an ongoing, organized association or group of three or more persons … whose members collectively engage in, or have engaged in, a pattern of criminal gang activity." (Section 186.22(f).) "'[P]attern of criminal gang activity' means the commission of, …, or conviction of, two or more of the following offenses, … [and] the offenses were committed on separate occasions or by two or more members." (Section 186.22(e)(1).) The Court stated that given that multiple members of the gang must be involved in the pattern of criminal gang activity, the plain meaning of the phrase "the offenses were committed on separate occasions or by two or more members" means there are two options for establishing the requisite pattern: (1) prove two different gang members separately committed crimes on two occasions; or (2) prove two different gang members committed a crime together on a single occasion.[18]

Here, one of the predicate offenses was an attempted residential burglary committed by defendant in April 2014. The other predicate offense was an October 2014 robbery committed by another

[18] The Court acknowledged that there were cases that disagreed with the foregoing interpretation, pointing to two Second District cases. (See *People v. Delgado*, 74 Cal.App.5th 1067 (2nd Dist. 2022) and *People v. Lopez*, 73 Cal.App.5th 327 (2nd Dist. 2021).)

member of the Sex Cash Money gang. Thus, there was evidence that two members of Sex Cash Money committed crimes on separate occasions. The Fourth District concluded beyond a reasonable doubt that the jury would have found that members of Sex Cash Money collectively had engaged in a pattern of criminal gang activity. The Court accordingly affirmed.

B. Assembly Bill 333's amendment to "criminal street gang" definition applied to the voter-enacted gang-murder special circumstance enhancement.

People v. Lee, 81 Cal. App. 5th 232 (2nd Dist. 2022)

Facts: Defendants Derion Davon Lee, Charod Robinson, and Pernell Barnes were convicted of first-degree murder and other charges arising from two shootings that occurred in December 2016 and January 2017 between their gang and a rival gang. The jury also found true special circumstance allegations including for gang-murder (Penal Code section 190.2(a)(22)), as well as gang allegations (Section 186.22(b)) and gang-related firearm allegations (Section 12022.53(b)-(d), (e)(1)). Defendants appealed. While their appeal was pending, Assembly Bill No. 333 (2021–2022 Reg. Sess.) (Stats. 2021, ch. 699, Sections 1–5) became effective on January 1, 2022. Assembly Bill 333 expressed concern that former Section 186.22 sometimes applied to "social networks of residents in neighborhoods" who were "often mischaracterized as gangs despite their lack of basic organizational requirements." (Stats. 2021, ch. 699, Section 2(d)(8).) To address this concern, Assembly Bill 333, among other things, amended Section 186.22 to require proof of additional elements to establish a gang enhancement.[19]

Held: The Second District Court of Appeal explained that Assembly Bill 333's amendments to Section 186.22 apply retroactively to cases in which the judgments of conviction have not become final prior to the effective date of Assembly Bill 333, as in the case here. (See *People v. Lopez*, 73 Cal.App.5th 327, 343–344 (2nd Dist. 2021); *People v. Figueroa*, 20 Cal.App.4th 65, 68, 70–71 (2nd Dist. 1993).) "[P]ursuant to the new legislation, imposition of a gang enhancement [now] requires proof of the following additional requirements with respect to predicate offenses: (1) the offenses must have 'commonly benefited a criminal street gang' where the 'common benefit … is more than reputational'; (2) the last predicate offense must have occurred within three years of the date of the currently charged offense; (3) the predicate offenses must be committed on separate occasions or by two or more gang members, as opposed to persons; and (4) the charged offense cannot be used as a predicate offense." (*Lopez, supra*, 73 Cal.App.5th at p. 345, quoting Section 186.22, subd. (e)(1)–(2).)

[19] The Second District noted that Assembly Bill 333 modified the definition of a "criminal street gang" to "an *ongoing, organized association or group* of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated criminal acts], having a common name or common identifying sign or symbol, and whose members *collectively* engage in, or have engaged in, a pattern of criminal gang activity." (Current Section 186.22(f), italics added.) Assembly Bill 333 also redefined "'pattern of criminal gang activity'" to mean "the commission of … two or more [enumerated criminal acts], provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense is alleged to have been committed, the offenses were committed on separate occasions or by two or more members, *the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational*." (Current Section 186.22(e)(1), italics added.)

The Second District noted that consistent with current Section 186.22, however, the prosecution did not introduce evidence that those predicate offenses commonly benefited defendants' gang, or that the common benefit of either crime was more than reputational. Nor was the jury instructed to determine this additional element under Section 186.22; it instead was instructed, consistent with *former* Section 186.22 that it need not find either predicate offense gang related. Thus, the Court of Appeal could not conclude beyond a reasonable doubt that the omission of the new elements in Section 186.22 did not contribute to the jury's verdict. The Court vacated the true findings under Section 186.22, and remanded to give the People the opportunity to prove the applicability of the enhancements under the amended law.

The parties, and the Court, agreed that the Section 186.22 amendments should be applied retroactively to the gang enhancement and gang-related firearm enhancements, and those enhancements should be reversed. The Attorney General argued against reversing the gang-murder special circumstance finding under Section 190.2(a)(22). Section 190.2(a)(22) was enacted by the voters as section 11 of Proposition 21 on the March 7, 2000 ballot. According to the Attorney General, however, the voters did not intend to permit any future amendment of Section 186.22(f) (which defines criminal street gang) to be incorporated into the gang-murder special circumstance. However, the Second District found nothing to suggest that the electorate intended to impose a time-specific incorporation of the term "criminal street gang" in the gang-murder special-circumstance statute. The Court concluded that the term "criminal street gang" as incorporated in the gang-murder special-circumstance statute was "intended to conform at all times" and "remain permanently parallel" to Section 186.22. The Court stated that the express reliance by both the firearm enhancement statutes and gang-murder special-circumstance statutes (i.e., Section 190.2(a)(22))[20] on the definition of a criminal street gang in Section 186.22 meant that the defendants were entitled to the benefit of this change in the law as to every special circumstance and sentence enhancement finding under Sections 12022.53, subdivisions (b)/(e)(1), (c)/(e)(1), and (d)/(e)(1), and 190.2(a)(22). (*Lopez*, *supra*, 73 Cal.App.5th at p. 347.)

Accordingly, the Second District Court of Appeal affirmed the convictions, vacated the gang enhancement allegation findings, gang-related firearm enhancements findings, and gang-murder special-circumstance findings. The Court struck the sentences imposed under these findings, and remanded so the People had could retry these allegations under the current law.

[20] Section 190.2(a)(22) requires proof beyond a reasonable doubt that the defendant "intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang."