CPOA CASE SUMMARIES – MAY 2024

CONSTITUTIONAL LAW/POLICE CONDUCT

A. Defendant's presence in high crime area and seemingly odd behavior after spotting police did not justify reasonable suspicion of criminal activity, so officers' ensuing detention and search were unconstitutional.

People v. Flores, 15 Cal. 5th 1032 (2024)

Facts: In May 2019, around 10:00 p.m., Los Angeles Police Department Officer Daniel Guy and his partner, Michael Marino, were on patrol in an area known for narcotics and gang activity. As the officers drove by a cul-de-sac, they saw Marlon Flores standing alone in the street beside a Nissan parked at a red curb. Flores looked at the officers, walked around the back of the car, then ducked behind it. The officers pulled up and parked behind the Nissan. Officer Marino's body camera recorded the interaction between the officers and Flores. The officers parked the patrol car but stayed inside. Flores stood and seemed to stretch with one arm. He disappeared from sight, then seconds later, raised his head, then dropped back out of view. The officers approached him on foot, using a flashlight. Flores was bent over and facing away from the officers with both hands near his right shoe. When Marino directed his flashlight on Flores, Flores remained bent over and moving his hands near his feet. One of the officers told Flores to stand up, but Flores remained bent over. When Marino walked up behind Flores, Guy came around the Nissan and approached from the other side. Marino again directed Flores to stand. The officer then said, 'Hey, hurry up,' and Flores straightened. Flores was placed in handcuffs.

Officer Guy testified that he detained Flores because he believed Flores acted "suspicious[ly]" by "attempting to conceal himself from the police" and then "pretend[ing] to tie his shoe." Guy suspected Flores was "loitering for the use or sales of narcotics," based on the area and Flores's behavior upon seeing the police. During a pat-down search, the Nissan's "blinkers activated" as if the officer had "hit the key fob." Officer Guy pointed his flashlight into the car and saw what looked like a drug pipe. In response to the officer's inquiries, Flores said that the Nissan was his and his wallet, and identification, were in the driver's side door pocket. Guy retrieved the wallet, looked inside, and found a folded dollar bill containing suspected methamphetamine. Officers also recovered a revolver from a backpack.

The trial court denied Flores's motion to suppress the evidence seized. Flores then entered a plea of no contest to one count of carrying a loaded firearm. After the Second District Court of Appeal affirmed, the Supreme Court of California granted review to determine whether Flores's detention was justified.

Held: The California Supreme Court explained that "the Fourth Amendment permits an officer to initiate a brief investigative … stop when [the officer] has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'[Citations.]" (*Kansas v. Glover* (2020) 589 U.S. 376, 380–381.) The California Supreme Court explained that it is settled that a person may decline to engage in a consensual encounter with police. Such "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention

or seizure." (*Florida v. Bostick* (1991) 501 U.S. 429, 437.) However, "the *manner* in which a person avoids police contact" may be "considered by police officers in the field or by courts assessing reasonable cause for" a detention. (*People v. Souza* (1994) 9 Cal.4th 224, 234.) The United States Supreme Court has "recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124.) The Court here added that repeated or inordinate attempts to avoid an officer may be particularly noteworthy.

The Court suggested that Flores's apparent pretext of tying his shoe, combined with his repeatedly ducking down behind the car, could reasonably be construed as odd and noteworthy behavior, particularly when done in reaction to the sight of a uniformed police officer. The Court explained, however, that "[a] mere deviation from perceived social convention does not automatically signal criminal behavior. The particular conduct relied upon must, when considered in the totality of circumstances, support a reasonable suspicion that the person to be detained is, or is about to be, engaged in activity 'relating to crime'" (citing *In re Tony C.* (1978) 21 Cal.3d 888, 893.) The Court noted that Officer Guy did not see Flores engage in any conduct suggesting he was there to buy or sell drugs or was otherwise involved in illegal conduct. The California Supreme Court found that the facts here contrasted with other cases in which the Court had upheld investigative detentions. Here, unlike *Wardlow* and *Souza*, there was no headlong flight. The Court stated that Flores's disinclination to engage with the officers did not carry the same salience as headlong flight in the totality of the circumstances analysis. The other factors discussed by *Souza*—early morning hour and multiple persons all engaged in evasive conduct—were likewise absent. And, unlike *People v. Brown* (2015) 61 Cal.4th 968, there was no contemporary citizen request for assistance due to criminal activity in the location where Flores was seen.

The Supreme Court stated that an articulable and reasonable suspicion that a person is engaging in criminal activity is required to escalate a consensual encounter to a coercive detention. The fact that Flores was present in a known narcotics area, where the officer had arrested someone for drug-related crimes the night before, did not tip the scales in favor of detention. The Court held that the record, considered in its totality, failed to support a reasonable suspicion that Flores was loitering for the purpose of committing a narcotics offense (as the officer suspected) or was otherwise engaged in "'criminal activity.'" (*Glover, supra*, 589 U.S. at p. 380.) Accordingly, the California Supreme Court reversed the judgment of the Court of Appeal and remanded the matter with directions to permit Flores to withdraw his no contest plea and grant his suppression motion.

For a more detailed discussion of this case, please see Client Alert Vol. 39, No. 9, available at www.jones-mayer.com.

B. An officer's non-compliance with department policy governing inventory searches is part of the totality of circumstances properly considered in determining whether a search satisfies the requirements of the inventory-search exception to the warrant requirement.

United States v. Anderson, 101 F.4th 586 (9th Cir. 2024)

Facts: At two o'clock in the morning, a San Bernardino County Sheriff's Department ("SBCSD") deputy noticed Jonathan Anderson's truck traveling in a high-crime area with a partially obstructed

license plate, and turned on his overhead lights to initiate a traffic stop. Anderson then drove evasively before stopping and getting out of the truck. Thinking Anderson was trying to flee, the deputy confronted him at gunpoint. A second deputy arrived and handcuffed Anderson. Dispatch confirmed that Anderson's license was expired and informed the deputies that Anderson was a career criminal. Anderson repeatedly told the deputies that they could not search his truck. The deputies said that they had to tow and inventory his truck because he did not have a valid license. The deputies refused Anderson's request to have a friend come retrieve his truck. During the purported inventory search, a loaded handgun under Anderson's driver's seat was found, and the deputies arrested Anderson for being a felon in possession of a firearm.

SBCSD has a standard procedure governing impounding and inventorying vehicles. Among other things, the SBCSD Manual directs that deputies "shall[] [c]omplete two (2) CHP 180 forms . . . , including an inventory of *any* personal property contained within the vehicle." (Emphasis added.) The form has a separate section entitled: "REMARKS (list property, tools, vehicle damage, arrests)." The second deputy stayed at the scene to complete the CHP 180 Form after the first deputy transported Anderson to jail. Despite the existence of various items of Anderson's personal property in addition to the gun contained in the truck, the "REMARKS" section the deputy completed referred only to the handgun, stating, "…Upon inventory search firearm located…." SBCSD's procedure does not allow personal property to be inventoried by photographs. The deputy took photographs of the inside of the truck that showed some, but not all, of Anderson's personal property, and the police report documented other items in the truck, but neither was referenced or incorporated into the vehicle inventory form.

Anderson was charged with unlawful possession of a firearm and ammunition. His motion to suppress the firearm and ammunition evidence was denied by the District Court. Anderson entered a conditional guilty plea reserving his right to appeal the suppression order, and the District Court sentenced him to 77 months' imprisonment and three years' supervised release. He appealed.

Held: The *en banc* Ninth Circuit Court of Appeals initially explained that inventory searches of impounded vehicles is a "well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). The inventory-search exception applies "where the process is aimed at securing or protecting the car and its contents." *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976). The "purpose of [an inventory] search is *to* '*produce an inventory*' of the items in the car, in order 'to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.'" *United States v. Johnson*, 889 F.3d 1120, 1125 (9th Cir. 2018) (emphasis added) (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)). The Court stated that a standard inventory procedure goes a long way in determining the reasonableness of a search. *Id.* at pp. 3-4. However, officers relying on a standard procedure to justify a search must not "act[] in bad faith or for the sole purpose of investigation." *Bertine*, 479 U.S. at 372; see also *Johnson*, *supra*, at p. 1125 ("[T]he purpose of the [inventory] search must be non-investigative; it must be 'conducted on the basis of something *other* than suspicion of evidence of criminal activity.'" (quoting *United States v. Torres*, 828 F.3d 1113, 1118 (9th Cir. 2016"[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Wells*, 495 U.S. at 4.

The *en banc* court determined that because an officer's subjective motivations have constitutional significance in this context, an officer's degree of compliance with the governing procedure is relevant in determining whether the officer acted in furtherance of administrative purposes or solely for investigatory purposes under the guise of conducting an inventory. The *en banc* court held that an officer's compliance (or as was the case here, non-compliance) with department policy governing inventory searches is part of the totality of circumstances properly considered in determining whether a search satisfies the requirements of the inventory-search exception to the warrant requirement.

The *en banc* court concluded that based on the circumstances presented here, the deputies who searched Anderson's truck acted solely for investigatory reasons, and that the warrantless search therefore violated the Fourth Amendment. The Court explained that the deputies failed to inventory all of Anderson's personal property in the vehicle as mandated by SBCSD's standard procedure, only choosing to record the firearm used as evidence against Anderson. The inventory report did not otherwise record the omitted property. Moreover, the deputies' identification of the firearm and ammunition taken from Anderson's truck as "evidence" on the crime report indicated that these items "were seized and treated specifically as evidence of a crime—not as property held for safekeeping." *Johnson*, 889 F.3d at 1128. The Court observed that the photographs the deputies took of the inside of the truck did not record all the property found in the truck and were part of the separate investigative police report, which was not referenced in the inventory report. The *en banc* Court deemed this relevant in assessing the deputies' motivation because it indicated that the photographs were treated as evidence. Accordingly, the *en banc* Ninth Circuit Court of Appeals reversed the District Court's denial of Anderson's motion to suppress.

C. Pursuant to the automobile exception, office had probable cause to search juvenile driver's vehicle after seeing unsmoked marijuana blunt on passenger's lap that appeared to be a usable amount in an open container.

In re Randy C., 101 Cal. App. 5th 933 (1st Dist. 2024)

Facts: Around 11:00 p.m. on November 10, 2022, San Pablo Police Officer Dugonjic conducted a traffic stop on a black BMW with tinted windows that appeared to be in violation of Vehicle Code section 26708(a). Officer Dugonjic contacted defendant Randy C. ("minor"), the driver of the BMW, who stated that he was 17 years old, the car belonged to his girlfriend, and he did not have a driver's license. Minor could not produce government-issued identification when asked. Officer Dugonjic noticed the smell of unburnt marijuana coming from inside the vehicle, and observed a passenger who appeared to have a "marijuana blunt" on his lap. The marijuana appeared to be a usable amount and was not in a closed container, nor did it appear burned or smoked. The passenger was determined by another officer to be 22 years old, an adult.

Officer Dugonjic conducted a patdown of minor outside the BMW without finding identification and "ran" minor's name and did not find a match. According to the police report, Officer Dugonjic searched the car's front passenger compartment to try to find identification for minor or the passenger. In doing so, Officer Dugonjic found a handgun in the glove compartment. Minor attempted to flee on foot but was apprehended. Officer Dugonjic then searched the entire vehicle,

including the trunk, where he found an AR-15 firearm with no serial number.

In November 2022, a wardship petition was filed alleging minor committed several firearm violations. Minor moved to suppress evidence, arguing there was no probable cause to search the vehicle he was driving. The juvenile court denied his motion. Following this ruling, minor admitted multiple felony offenses and the juvenile court issued an order declaring wardship over him. The juvenile court committed minor to juvenile hall. Minor appealed, seeking reversal of his motion to suppress.

Held: The First District Court of Appeal observed that warrantless searches are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. (See *Katz v. United States* (1967) 389 U.S. 347, 357; *People v. Lopez* (2019) 8 Cal.5th 353, 359.) Under the automobile exception, "an officer may search a vehicle without a warrant so long as the officer has probable cause to believe the vehicle contains contraband or evidence of a crime." (*People v. Hall* (1st Dist. 2020) 57 Cal.App.5th 946, 951.) Probable cause exists when the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found. (*Id.*) "[W]here probable cause to search a vehicle under the automobile exception exists, '"a law enforcement officer may search the vehicle 'irrespective of whether [the offense] is an infraction and not an arrestable offense.'"'" (*People v. Castro* (2nd Dist. 2022) 86 Cal.App.5th 314, 321.)

Health and Safety Code section 11362.3(a)(4) states that no one is permitted to "[p]ossess an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle … ." (Section 11362.3(a)(4).) Section 11357 makes it unlawful for a person under 21 years of age, such as minor, to possess any amount of recreational marijuana. Minor challenged the juvenile court's finding that the marijuana blunt on his passenger's lap was an "open container" within the meaning of Section 11362.3(a)(4), which provided probable cause for Officer Dugonjic to search the BMW's passenger compartment. The Court explained that Section 11362.3 does not define the phrase "open container or open package," but the plain and commonsense meaning of an "open container" was one in which there is no barrier to accessing the marijuana contained inside. (*People v. Johnson* (3rd Dist. 2020) 50 Cal.App.5th 620, 633 [concluding a knotted plastic baggie is not "open" because the knot "presents a barrier to accessing the content"].) Here, the Court stated that the paper wrapping enclosing the marijuana presented no barrier to accessing the marijuana. As Officer Dugonjic explained, paper wrapping holds the marijuana so that it can be smoked, thereby facilitating its consumption.

The Court of Appeal explained that "[S]ection 11362.1, added by Proposition 64, '"fundamentally changed the probable cause determination by specifying *lawfully possessed cannabis* is 'not contraband' and *lawful conduct* under the statute may not 'constitute the basis for detention, search or arrest.' [Citations.]" [Citation.] But this applies only to activities "deemed lawful" by Proposition 64.'" (*Castro, supra*, 86 Cal.App.5th at pp. 320–321.) The Court stated that the question raised here was whether the *unlawful* possession of marijuana provided probable cause to search the BMW driven by minor.

The First District concluded that Officer Dugonjic had probable cause to search the BMW that minor was driving based on the officer's observation of the unburned marijuana blunt—a usable

amount of marijuana in an open container in violation of Section 11362.3(a)(4)—in his passenger's possession. This open container of marijuana was contraband that, along with the smell of unburnt marijuana emanating from the vehicle, provided probable cause to believe minor or his passenger may also have possessed additional marijuana in violation of section 11357 and/or section 11362.3, subdivision (a)(4). (*Castro, supra*, 86 Cal.App.5th at pp. 320–321.) Accordingly, the First District Court of Appeal affirmed.

D. In civil forfeiture cases involving personal property, the Due Process Clause requires a timely forfeiture hearing but does not require a separate preliminary hearing.

Culley v. Marshall, 144 S. Ct. 1142 (2024)

Facts: Halima Culley loaned her car to her son, who was pulled over in February 2019 by Alabama police officers and arrested for possession of marijuana. Also in February 2019, Lena Sutton loaned her car to a friend, who was stopped by Alabama police and arrested for trafficking methamphetamine. In both cases, the cars were seized under an Alabama civil forfeiture law (Ala. Code section 20-2-93(b)(1), (c)) that permitted seizure of a car "incident to an arrest" so long as the State then "promptly" initiated a forfeiture case. The State of Alabama filed forfeiture complaints against Culley's and Sutton's cars just 10 and 13 days, respectively, after their seizure.

While their forfeiture proceedings were pending, Culley and Sutton each filed purported class-action complaints in federal court seeking money damages under 42 U. S. C. section 1983, claiming that state officials violated their due process rights by retaining their cars during the forfeiture process without holding preliminary hearings. The District Court for the Southern District of Alabama dismissed Culley's complaint, and the District Court for the Northern District of Alabama similarly entered summary judgment against Sutton. In a consolidated appeal, the Eleventh Circuit Court of Appeals affirmed the dismissal of their claims, holding that a timely forfeiture hearing affords claimants due process and that no separate preliminary hearing is constitutionally required. The United States Supreme Court granted certiorari due to a conflict in the Courts of Appeals over whether the Constitution requires a preliminary hearing in civil forfeiture cases

Held: The Supreme Court explained that the Due Process Clause of the Fourteenth Amendment ordinarily requires States to provide notice and a hearing before seizing real property. *United States v. James Daniel Good Real Property*, 510 U. S. 43, 62 (1993). However, States may immediately seize personal property subject to civil forfeiture when the property (for example, a car) otherwise could be removed, destroyed, or concealed before a forfeiture hearing. When a State seizes personal property, due process requires a *timely* post-seizure forfeiture hearing. See *United States v. Von Neumann*, 474 U. S. 242, 247-250 (1986); *United States* v. *$8,850*, 461 U. S. 555, 562-565 (1983). Culley and Sutton argued that the Due Process Clause requires States to also hold a separate preliminary hearing before the forfeiture hearing.

The Supreme Court concluded that its decisions in *$8,850* and *Von Neumann* made clear that due process does not require a separate preliminary hearing to determine whether seized personal property may be retained pending the ultimate forfeiture hearing. In *$8,850*, the Court addressed

the process due when the Customs Service seized currency from an individual entering the United States but did not immediately file for civil forfeiture of the currency. The Court concluded that a post-seizure delay "may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time," 461 U. S., at 562-563, and prescribed factors for courts to consider in assessing whether a forfeiture hearing is timely. *Id.*, at 564-565.

In *Von Neumann*, a property owner failed to declare the purchase of his new car upon driving it into the United States, and a customs official seized the car after determining that it was subject to civil forfeiture. The plaintiff filed a petition for remission of the forfeiture—in essence, a request under federal law that the Government exercise its discretion to forgive the forfeiture—which the Government did not answer for 36 days. The plaintiff sued, arguing that the Government's delay in answering the remission petition violated due process. The Court rejected that claim, broadly holding that due process did not require a pre-forfeiture-hearing remission procedure in the first place. See 474 U. S., at 249-250. Instead, *Von Neumann* held that a timely forfeiture hearing satisfies due process in civil forfeiture cases, and that *$8,850* specifies the standard for when a forfeiture hearing is timely. The Supreme Court added that historical practice reinforced the Court's conclusions in *$8,850* and *Von Neumann* that due process does not require preliminary hearings in civil forfeiture cases. The Court stated that both Congress and the States have long authorized law enforcement to seize personal property and hold it until a forfeiture hearing. The absence of separate preliminary hearings in civil forfeiture proceedings—from the Founding until the late 20th century—was strong evidence that due process does not require such hearings. The United States Supreme Court accordingly affirmed.

E. Good faith exception to the exclusionary rule applied where detective took objectively reasonable steps to determine whether the defendant was on searchable probation before warrantless search of hotel room.

People v. Pritchett, 2024 Cal. App. LEXIS 348 (1st Dist. May 8, 2024)

Facts: In August 2018, Tara Shawnee Pritchett was placed on two years' probation for a misdemeanor offense, which was later extended another year. In May 2019, Pritchett was placed on three years' probation for another misdemeanor offense. However, effective January 1, 2021, Penal Code section 1203a, was amended by Assem. Bill No. 1950[1] to limit the maximum term of probation a trial court is allowed to impose for most misdemeanor offenses to one year. In September 2021, Nick Vlahandreas, a narcotics detective for Santa Rosa, conducted a search of Pritchett's hotel room. Prior to the search, Vlahandreas checked Crimnet, which is a database of information directly from Sonoma County courts rather than from a police agency. Among other things, Crimnet lists a person's probation status and notes if someone's probation had been terminated. Crimnet showed that Pritchett was on active probation with a condition that she "submit to warrantless search and seizure of person, property, residence, vehicles." A search of the room located U.S. currency and what Vlahandreas believed was fentanyl.

The People charged Pritchett with a felony count of possession for sale of a controlled substance. The trial court granted Pritchett's motion to suppress the evidence obtained from the search,

[1] 2019–2020 Reg. Sess.

concluding her probation grants automatically terminated when Assem. Bill No. 1950 became effective on January 1, 2021, and that the good faith exception to the exclusionary rule did not apply. The trial court thereafter dismissed the charge against Pritchett. The People appealed.

Held: The First District Court of Appeal assumed, without deciding, that Assembly Bill 1950 automatically terminated Pritchett's probation on its effective date because she had been on probation for more than one year at that time, and stated that the subsequent probation search of her hotel room was presumptively invalid. The Court explained that "the question … becomes whether such constitutional violation is appropriately remedied by the application of the judicially created exclusionary rule which prohibits the admission at trial of the evidence obtained during the unlawful search." (*People v. Downing* (4th Dist. 1995) 33 Cal.App.4th 1641, 1651, citing *United States v. Leon* (1984) 468 U.S. 897, 906.) Exclusion of the evidence is compelled "only where it '"result[s] in appreciable deterrence."'" (*Herring v. United States* (2009) 555 U.S. 135, 141.) "[W]hen police mistakes are the result of negligence … rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' [Citation.] In such a case, the criminal should not 'go free because the constable has blundered.'" (*Id.* at pp. 147–148.) The "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" (*Id.* at p. 145.)

The People argued that the trial court erred in concluding the good faith exception to the exclusionary rule was inapplicable, as Vlahandreas acted reasonably in relying on court records to verify Pritchett's probation status prior to conducting the search. The Court noted that Crimnet contains information directly from the judicial system, including whether a person's probation had terminated. Vlahandreas found Crimnet accurate and could not recall an instance where he had incorrectly noted someone in the system was on searchable probation. He had been a detective for three years and used Crimnet extensively in his investigations. He used it to check Pritchett's probation status the morning of the search, and it showed that her probation was still active and included a condition that she submit to warrantless searches of her residence.

The Court could not conclude that the detective would or should have known that the information on Crimnet regarding Pritchett's probation status was incorrect. Even presuming the detective should have been aware that Assem. Bill No. 1950 made changes to the length of some probation terms, this did not change the Court's conclusion. Given the complexity of the issue, the detective's failure to recognize Pritchett's probation terms may have terminated without a court order or to conduct his own legal analysis of her probation status prior to the search did not undermine the conclusion that he acted reasonably based on the information he had. The Court of Appeal concluded that the trial court erred in concluding the good faith exception did not apply, as Vlahandreas acted reasonably in relying on court records to verify Pritchett's probation status prior to conducting the search. The First District Court of Appeal accordingly reversed.

FIREARMS

A. California legislation enabling firearm violence research using California Department of Justice databases did not violate registered gun owners' property rights.

Doe v. Bonta, 101 F.4th 633 (9th Cir. 2024)

Facts: Assembly Bill 173 ("AB 173"), intended to encourage research on firearm violence, became effective September 2021. AB 173 enables research using databases maintained by California's Department of Justice ("DOJ").[2] AB 173 requires the DOJ to provide from these databases information about purchasers of firearms and ammunition, as well as persons who hold permits to carry concealed weapons to a research center at the University of California-Davis and gives the DOJ discretion to disseminate this information to other accredited research institutions.

Within a few months of AB 173's effective date, five registered California gun owners ("Plaintiffs") filed an action challenging the legislation in District Court pursuant to 42 U.S.C. section 1983. They alleged, among other things, that AB 173 unconstitutionally infringed their Fourteenth Amendment right to informational privacy. Plaintiffs moved for a preliminary injunction against enforcement of AB 173. The District Court granted the State's motion to dismiss, holding that plaintiffs failed to allege a plausible informational privacy claim. Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeals observed that the Circuit had recognized a right to informational privacy under the Fourteenth Amendment stemming from an individual's interest in avoiding disclosure of personal matters. See *Endy v. County of Los Angeles*, 975 F.3d 757, 768 (9th Cir. 2020). In *Doe v. Garland*, the Court had described such matters as "highly sensitive" personal information, like medical records relating to abortion. 17 F. 4th 941, 947 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2815 (2022). The Court also held that the information at issue there—plaintiff's name, age, and employment history, and the charges against him—was *not* similarly sensitive and thus did not implicate the right to informational privacy. *Id.* at 944, 947.

Here, the Court found the personal information contained in DOJ's databases was similarly not highly sensitive as it consisted largely of biographical data, which the Court had recently observed does not implicate the right to informational privacy. *See A.C. by & through Park v. Cortez*, 34 F.4th 783, 787-88 (9th Cir. 2022). Such information was similar to that found in other public registries. The Court found that Plaintiffs had no reasonable expectation that such information would never be disclosed. The Ninth Circuit Court of Appeals held that plaintiffs did not state a claim for violation of the right to informational privacy under the Fourteenth Amendment, and affirmed the lower court's dismissal.

B. Federal statute banning non-violent convicts from possessing firearms violates the Second Amendment, as applied to a non-violent offender who had served his time in prison and re-entered society.

United States v. Duarte, 2024 U.S. App. LEXIS 11323 (9th Cir. May 9, 2024)

[2] See 2021 Cal. Stat., ch. 253.

Facts: In March 2020, two Inglewood police officers saw a vehicle run a stop sign. When they activated their patrol lights, one officer saw the rear passenger (later identified as Steven Duarte) roll the window down and toss out a handgun. The handgun was later recovered with its magazine missing. The vehicle drove about a block farther before stopping. A search of the car's interior recovered a loaded magazine that fit the discarded handgun "perfectly."

18 U.S.C. section 922(g)(1) makes it a crime for any person to possess a firearm if he has been convicted of an offense "punishable by imprisonment for a term exceeding one year." Duarte had five prior non-violent state criminal convictions all punishable for more than a year. A federal grand jury indicted Duarte for violating Section 922(g)(1). Duarte pleaded not guilty, but he was convicted under Section 922(g)(1).

Duarte appealed, arguing that, under the United States Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), Section 922(g)(1) violated the Second Amendment as applied to him, a non-violent offender who had served his time in prison and reentered society.

Held: The Ninth Circuit Court of Appeals noted that the Circuit had held in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010) "that [Section] 922(g)(1) does not violate the Second Amendment as it applies to . . . convicted felon[s]." *Id.* at 1118. The Government argued the pre-*Bruen* decision in *Vongxay* foreclosed Duarte's Second Amendment challenge, but the Ninth Circuit concluded here that *Vongxay* was "clearly irreconcilable"[3] with *Bruen* and therefore no longer controlled. The Court explained that *Vongxay* held that Section 922(g)(1) comported with the Second Amendment without applying the textually and historically focused mode of analysis that *Bruen* later established and required courts now to apply to all Second Amendment challenges.

The Ninth Circuit stated that *Bruen* instructs courts to assess all Second Amendment challenges through a framework grounded exclusively in text and history. If the Second Amendment's plain text protects the person, his arm, and his proposed course of conduct, it then becomes the Government's burden to prove that the challenged law "is consistent with this Nation's historical tradition of firearm regulation." *Bruen* at 18, 44 n.11. *Vongxay* did not apply these two analytical steps because *Bruen* had not yet established them. The Ninth Circuit therefore reconsidered Section 922(g)(1)'s constitutionality, this time applying *Bruen*'s two-step, text-and-history framework.

At step one of *Bruen*, the Ninth Circuit concluded that Duarte's weapon, a handgun, was an "arm" within the meaning of the Second Amendment's text and that Duarte's "proposed course of conduct—carrying [a] handgun[] publicly for self-defense"—fell within the Second Amendment's plain language, two points the Government never disputed. *Bruen*, 597 U.S. at 32. The Government argued only that "the people" in the Second Amendment excludes felons like Duarte because they are not members of the "virtuous" citizenry. The Court disagreed with that view, explaining that *Bruen* and *Heller* foreclosed that argument because both recognized the "strong

[3] *Miller v. Gammie*, 335 F.3d 889,893 (9th Cir. 2003). See also *In re Nichols*, 10 F.4th 956, 962 (9th Cir. 2021) ["Ever since . . . *Miller v. Gammie*[,] . . . we have not hesitated to overrule our own precedents when their underlying reasoning could not be squared with the Supreme Court's more recent pronouncements."].

presumption" that the text of the Second Amendment confers an individual right to keep and bear arms that belongs to "all Americans," not an "unspecified subset." *Bruen*, 597 U.S. at 70 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)). Moreover, the Court's own analysis of the Second Amendment's publicly understood meaning confirmed that the right to keep and bear arms was every citizen's fundamental right. Because Duarte was an American citizen, he was "part of 'the people' whom the Second Amendment protects." *Bruen*, 597 U.S. at 32.

At *Bruen*'s second step, the Court of Appeals concluded that the Government had failed to prove that Section 922(g)(1)'s categorical prohibition, as applied to Duarte, "is part of the historical tradition that delimits the outer bounds of the" Second Amendment right. *Bruen*, 597 U.S. at 19. The Government put forward no "well-established and representative historical analogue" that "impose[d] a comparable burden on the right of armed self-defense" that was "comparably justified" as compared to Section 922(g)(1)'s sweeping, no-exception, lifelong ban. *Id.* at 29, 30. The Ninth Circuit Court of Appeals therefore vacated Duarte's conviction and reversed the District Court's judgment entering the same.[4]

C. National Rifle Association plausibly alleged First Amendment violation by government official who used her status to induce NRA affiliates to terminate gun-promoting relationships.

NRA of Am. v. Vullo, 218 L.Ed.2d 642 (U.S. 2024)

Facts:[5] The New York Department of Financial Services ("DFS") regulates insurance companies and financial services institutions doing business in New York, and has the power to initiate investigations and civil enforcement actions, as well as to refer matters for criminal prosecution. The National Rifle Association ("NRA") contracted with DFS-regulated entities—affiliates of Lockton Companies, LLC—to administer insurance policies the NRA offered as a benefit to its members, which Chubb Limited and Lloyd's of London ("Lloyd's") would then underwrite. In October 2017, former superintendent of DFS Maria Vullo began investigating one of these affinity insurance policies—Carry Guard—on a tip passed along a month earlier from a gun-control advocacy group. The investigation revealed that Carry Guard insured gun owners from intentional criminal acts in violation of New York law, and that the NRA promoted Carry Guard without the required insurance producer license. Lockton and Chubb subsequently suspended Carry Guard. Vullo then expanded her investigation into the NRA's other affinity insurance programs.

In February 2018, Vullo met with senior executives at Lloyd's, expressed her views in favor of gun control, and told the Lloyd's executives that DFS was less interested in pursuing infractions unrelated to any NRA business so long as Lloyd's ceased providing insurance to gun groups, especially the NRA. Vullo and Lloyd's struck a deal: Lloyd's would instruct its syndicates to cease

[4] Judge M. Smith dissented. He wrote that until an intervening higher authority that is clearly irreconcilable with *Vongxay* is handed down, a three-judge panel is bound by that decision. He wrote that *Bruen*, which did not overrule *Vongxay*, reiterates that the Second Amendment right belongs only to law-abiding citizens; and that Duarte's Second Amendment challenge to Section 922(g)(1), as applied to nonviolent offenders, was therefore foreclosed.

[5] In this United States Supreme Court opinion, the Court wrote that the NRA's "well-pleaded factual allegations," *Ashcroft* v. *Iqbal*, 556 U. S. 662, 678-679 (2009), were taken as true at the motion-to-dismiss stage that the case came before the Court.

underwriting firearm-related policies and would scale back its NRA-related business, and in exchange, DFS would focus its forthcoming affinity-insurance enforcement action solely on those syndicates which served the NRA.

In April 2018, Vullo issued letters entitled, "Guidance on Risk Management Relating to the NRA and Similar Gun Promotion Organizations." ("Guidance Letters"). In the Guidance Letters, Vullo "encourage[d]" DFS-regulated entities to: (1) "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations"; (2) "review any relationships they have with the NRA or similar gun promotion organizations"; and (3) "take prompt actions to manag[e] these risks and promote public health and safety." Vullo and Governor Cuomo also issued a joint press release echoing many of the letters' statements, and urging all insurance companies and banks doing business in New York to join those that have already discontinued their arrangements with the NRA. DFS subsequently entered into separate consent decrees with Lockton, Chubb, and Lloyd's, in which the insurers admitted violations of New York's insurance law, agreed not to provide any NRA-endorsed insurance programs (even if lawful), and agreed to pay multimillion dollar fines.

The NRA sued Vullo, alleging that she violated the First Amendment by coercing DFS-regulated parties to punish or suppress the NRA's gun-promotion advocacy. The Second Circuit held that Vullo's alleged actions constituted permissible government speech and legitimate law enforcement. The Supreme Court of the United States granted certiorari to address whether the NRA's complaint stated a First Amendment claim.

Held: The Supreme Court explained at the outset that "[a]t the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society." The Clause prohibits government entities and actors from "abridging the freedom of speech."[6] When government officials are "engaging in their own expressive conduct," though, "the Free Speech Clause has no application." *Pleasant Grove City* v. *Summum*, 555 U. S. 460, 467 (2009). While a government official can share her views freely and criticize particular beliefs in the hopes of persuading others, she may not use the power of her office to punish or suppress disfavored expression. See *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 830 (1995) (explaining that governmental actions seeking to suppress a speaker's particular views are presumptively unconstitutional).

The Supreme Court explained that in *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963), the Court explored the distinction between permissible attempts to persuade and impermissible attempts to coerce. There, the Court explained that the First Amendment prohibits government officials from relying on the "threat of invoking legal sanctions and other means of coercion . . . to achieve the suppression" of disfavored speech. *Id.*, at 67. Here, the Court explained that ultimately, *Bantam Books* stands for the principle that a government official cannot directly or indirectly coerce a private party to punish or suppress disfavored speech on her behalf.

The Court noted that to state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or

[6] US Const. amend. 1.

suppress the plaintiff 's speech. See *Id.*, at 67-68. Accepting the well-pleaded factual allegations in the complaint as true, the Supreme Court concluded that "the NRA plausibly alleged that Vullo violated the First Amendment by coercing DFS-regulated entities into disassociating with the NRA in order to punish or suppress the NRA's gun-promotion advocacy." The Court explained that as DFS superintendent, Vullo had direct regulatory and enforcement authority over all insurance companies and financial service institutions doing business in New York. Vullo made clear she wanted Lloyd's, a DFS-regulated entity, to disassociate from all gun groups, although there was no indication that such groups had unlawful insurance policies similar to the NRA's. Vullo also told the Lloyd's executives she would "focus" her enforcement actions "solely" on the syndicates with ties to the NRA, "and ignore other syndicates writing similar policies." Vullo thus conveyed clearly that Lloyd's could avoid liability for unrelated infractions if it aided DFS's campaign against gun groups by terminating its business relationships with them. The Court found that Vullo's alleged communications were reasonably understood as coercive. Moreover, other allegations concerning the Guidance Letters and accompanying press release, viewed in context of their issuance, reinforced the NRA's First Amendment claim. The Supreme Court accordingly vacated the Second Circuit's judgment and remanded.

MISCELLANEOUS

Conviction as adult for crime committed at 14 years old was nonfinal after conditional reversal, entitling defendant to benefit from laws barring transfer of such cases to adult criminal court.

In re A.M., 2024 Cal. App. LEXIS 354 (2nd Dist. May 31, 2024)

Facts: In April 2009, gang member A.M. (age 14), got into a fight with a member of a rival gang. The fight escalated. A.M. stabbed his rival multiple times, and the rival member died from his wounds. In 2013, A.M. was tried as an adult and a jury convicted him of first degree murder. He was sentenced him to 26 years to life in state prison. The Second District Court of Appeal affirmed the judgment on appeal and the California Supreme Court denied review in October 2016.

On November 9, 2016, Prop. 57 took effect. As adopted, Prop. 57 prohibited trying a minor as an adult without "'a judicial determination … that [they were] unfit to be dealt with under juvenile court law.'" (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 305.) The Legislature later enacted several statutes to amend and implement Prop. 57's provisions. Senate Bill 1391,[7] effective January 1, 2019, bars a juvenile court from transferring a 14-or 15-year-old to adult criminal court, regardless of the crime they allegedly committed.[8]

In 2021, A.M. moved the Second District to recall the remittitur in his underlying case, contending he was entitled to relief under Prop. 57 and its amendments, including Senate Bill 1391. The

[7] 2017-2018 Reg. Sess.

[8] Stats. 2018, ch. 1012, section 1; see Welf. & Inst. Code section 707(a)(1); Senate Bill 1391 includes an exception for a 14-or 15-year-old not apprehended before the termination of the juvenile court's jurisdiction. (See Welf. & Inst. Code section 707(a)(2).) That exception was not relevant here because A.M. had been in custody since he was 14 years old.

Attorney General conceded that Prop. 57 applied to A.M.'s case. The Second District instead issued an order to show cause, returnable in the superior court, as to whether A.M. was entitled to a transfer hearing. After a hearing on the order to show cause, the superior court conditionally reversed A.M.'s conviction and sentence and ordered the juvenile court to conduct a transfer hearing pursuant to Prop. 57. The juvenile court conducted the hearing, granted the District Attorney's motion to transfer A.M.'s case to criminal court, and reinstated the judgment. A.M. appealed, arguing that SB 1391 applied and his case should not have been transferred because he was 14 years old when he committed his crime.

Held: The Second District Court of Appeal explained that when a court vacates a sentence, the judgment in that case becomes nonfinal for purposes of retroactively applying ameliorative laws. (*People v. Padilla* (2022) 13 Cal.5th 152, 161–162; see *In re Estrada* (1965) 63 Cal.2d 740.) Under *Estrada*, "new laws that mitigate punishment … are presumed to apply to cases charged before the law's enactment but not yet final." (*Padilla, supra*, 13 Cal.5th at p. 160.) As the Attorney General conceded, the provisions of Senate Bill 1391 apply even if the case was not yet final on appeal when Senate Bill 1391 took effect (see, e.g., *People v. Superior Court (I.R.)* (5th Dist. 2019) 38 Cal.App.5th 383, 392–393).

In *Padilla*, the juvenile defendant was sentenced to life imprisonment without the possibility of parole before the United States Supreme Court held that his sentence was unconstitutional. His sentence was later vacated, rendering his case nonfinal. As the *Padilla* court stated, "When Padilla's sentence was vacated, the trial court *regained the jurisdiction and duty to consider what punishment was appropriate for him*, and Padilla regained the right to appeal whatever new sentence was imposed." (*Id.* at pp. 161–162, italics added.) That appeal must be deemed "part of direct review of a nonfinal judgment, not collateral review of a final judgment." (*Id.* at p. 163.)

Applying those principles here, the Second District concluded that A.M. was entitled to the ameliorative benefit of Senate Bill 1391's provisions. The Court of Appeal explained that because A.M.'s judgment was not final on November 9, 2016, Prop. 57 retroactively applied to his case. The superior court was therefore required to conditionally reverse his conviction and sentence on habeas corpus. It did so and referred his case to the juvenile court for a transfer hearing. Once that occurred, A.M.'s case became nonfinal. Accordingly, the Second District Court of Appeal reversed the order granting the District Attorney's motion to transfer A.M.'s case to criminal court, and remanded to the juvenile court with directions to enter a new order denying the motion.