CPOA CASE SUMMARIES – JANUARY 2025

CONSTITUTIONAL LAW

Amendment of statute restricting possession of butterfly knives mooted Second Amendment challenge because new law did not burden the plaintiff's rights in the same fundamental way as the original version.

Teter v. Lopez, 2025 U.S. App. LEXIS 1352 (9th Cir. Jan. 22, 2025)

Facts: In 1999, the Hawaii Legislature prohibited the possession of butterfly knives.[1] Specifically, Hawaii Revised Statutes section 134-53(a) (1999) provided: "Whoever knowingly manufactures, sells, transfers, possesses, or transports in the State any butterfly knife . . . shall be guilty of a misdemeanor." In 2018, Hawaii residents Andrew Teter and James Grell brought an action under 42 U.S.C. section 1983 against the Hawaii Attorney General and the Hawaii Sheriff Division Administrator (together, "the Attorney General"), alleging that the ban on butterfly knives in Section 134-53(a) violated the Second Amendment. In the complaint, Teter asserted "an as-applied and facial challenge to the applicable Hawaii laws which prevent [Teter] from owning butterfly knives." He sought an injunction against Hawaii's "policies generally banning the acquisition, possession, carrying and use of butterfly knives." At a hearing on the parties' respective motions for summary judgment, Teter agreed that his challenge focused on "the right to possess a butterfly knife in [the] home, as well as the right to carry it openly in public."

The District Court granted summary judgment to the Attorney General, and Teter appealed. While the appeal was pending, the United States Supreme Court decided *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), which held "that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and a regulation may be justified only if it "is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17. In light of *Bruen*, a three-judge panel of Ninth Circuit Court of Appeals reversed the District Court's decision.

The Attorney General petitioned for rehearing en banc. While the petition was pending, the Hawaii Legislature amended Section 134-53(a). Although the new statute continues to impose some restrictions on butterfly knives, it no longer prohibits them. The new statute provides: "Whoever knowingly carries concealed on the person, or in a bag or other container carried by the person, any butterfly knife shall be guilty of a misdemeanor."

Held: The Ninth Circuit Court of Appeals en banc noted that Article III of the Constitution limits the jurisdiction of federal courts to actual "Cases" and "Controversies."[2] "[I]f the dispute '[wa]s no longer embedded in any actual controversy about the plaintiffs' particular legal rights,'"[3] the case would be moot and the en banc court would lack Article III jurisdiction. The en banc court

[1] A butterfly knife is a knife with a folding handle that covers the sharp edge of the blade when the knife is closed. Its design allows a user to expose the blade of the knife by flipping it open with one hand.
[2] U.S. Const. Art. III, section 2.
[3] *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

stated, "we 'presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot, unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it.'" *Board of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc). The presumption can be overcome by showing, for example, that the legislative body has announced its intention to reenact the law at issue. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n. 11 (1982).

The en banc court concluded that Section 134-53(a) "ha[d] been 'sufficiently altered so as to present a substantially different controversy from the one the District Court originally decided.'"[4] The statutory amendment gave Teter "everything [he] hoped to achieve" in this litigation.[5] Because no further relief could be granted, the case was moot, and the court lacked Article III jurisdiction. The Court explained that the amended Section 134-53(a) does not restrict the acquisition, possession, and use of butterfly knives, except insofar as a different subsection now prohibits their possession or use by someone engaged in the commission of a separate felony or misdemeanor. Nor does the statute prohibit carrying butterfly knives. Although it does prohibit carrying concealed butterfly knives, Teter made clear in the District Court that he sought the right to carry a butterfly knife openly, which, under the amended statute, he had. This case was therefore moot, and the en banc court vacated the District Court's judgment, and remanded for further proceedings.

A dissenting opinion maintained that there were strong reasons to suspect that the very lawsuit at hand was the impetus for the legislative amendment; that the case had not been shown to be moot; and proceeding to the merits, that bladed weapons facially constitute arms within the meaning of the Second Amendment.

MARIJUANA

A. Property owners alleged plausible Eighth Amendment claim under Excessive Fines Clause where County's administrative penalties and fees pertaining to cannabis abatement were apparently punitive rather than remedial.

Thomas v. Cnty. of Humboldt, 2024 U.S. App. LEXIS 32834 (9th Cir. Dec. 30, 2024)

Facts: Pursuant to Humboldt County's County Code, illegal cultivation of cannabis can carry a daily fine between $6,000 and $10,000. If the County's Code Enforcement Unit serves a responsible party with a notice of violation ("NOV"), the party then has ten days to abate all violations or face penalties, subject to an appeals process, during which the penalties continue to accrue.

In October 2022, Plaintiffs, residents of Humboldt County, filed a putative class action pursuant to 42 U.S.C. section 1983, alleging, in part, that the County's system of administrative penalties and fees pertaining to cannabis abatement violates the Eighth Amendment's Excessive Fines Clause. They contended that the County charges landowners with violations based on imprecise

[4] *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (quoting *id.* at 671 (O'Connor, J., dissenting)).
[5] *Chemical Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 876 (9th Cir. 2006).

images from satellites or drones, or on the conduct of previous property owners. The District Court dismissed all claims in their entirety. The District Court concluded that the Excess Fines Clause claim was not justiciable and that it was untimely. Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeals determined that at least one plaintiff had standing and their claim was ripe. The Court also concluded that Plaintiffs' claims were timely. Turning to the merits of Plaintiffs' claims, the Court considered whether Plaintiffs alleged a plausible claim for relief under the Excessive Fines Clause. The Court observed that "[t]o determine whether a fine is grossly disproportional to the underlying offense, four factors are considered: (1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense." *Pimentel v. City of Los Angeles* (974 F.3d 917, 921 (9th Cir. 2020). The Court explained that "if [the alleged violator's] culpability is low, the nature and extent of [their] violation is minimal." *Id.* at 922. Here, the underlying offense was a property offense related to cannabis cultivation.

The Ninth Circuit held that Plaintiffs alleged a plausible claim for relief under the Excessive Fines Clause. Plaintiffs alleged that the administrative penalties, which could reach millions of dollars, and the County's demolition orders were punitive, not remedial. The Court found that Plaintiffs plausibly alleged that the fines were excessive given that (1) at least some of the plaintiffs had been charged with violations that pre-dated their occupation of their respective properties; (2) the violations were inaccurately charged or were the fault of previous property owners; (3) lesser penalties could accomplish the same health and safety goals; and (4) the alleged offenses caused no harm beyond a technical lack of compliance with the County's cannabis permitting regulations.

The Ninth Circuit Court of Appeals accordingly reversed the lower court's dismissal of Plaintiffs' Eighth Amendment claim and remanded for further proceedings.

B. Conditional use permit to cultivate cannabis was defeated by servient tenant's objection to easement on the grounds that cannabis is illegal under federal law.

JCCrandall, LLC v. Cnty. of Santa Barbara, 107 Cal. App. 5th 1135 (2nd Dist. 2025)

Facts: Santa Rita Holdings, Inc., applied to the County of Santa Barbara ("County") for a conditional use permit ("CUP") to cultivate cannabis. The cultivation would occur on 2.54 acres owned by Kim Hughes, as trustee of the Hughes Land Holding Trust ("Hughes"). Hughes consented to the cannabis cultivation.

Under the County's Land Use and Development Code ("LUDC"), a CUP is necessary for cannabis cultivation. The issuance of a CUP requires that the County find streets and highways are adequate for the proposed use. An easement for ingress and egress across land owned by JCCrandall, LLC ("JCCrandall"), serves the Hughes parcel. The easement, created by deed in 1998, is the only access to the Hughes parcel.

JCCrandall, the owner of the servient tenement objected to the use of this land to transport cannabis. Over JCCrandall's objection, the County granted the CUP. The County's board of

supervisors denied JCCrandall's appeal, finding the road that runs over the easement was adequate to serve the cannabis cultivation project.

JCCrandall petitioned for a writ of administrative mandate, challenging the County's grant of the CUP. The trial court denied the petition, determining that the County's decision did not involve a fundamental vested right and that the County's decision was supported by substantial evidence. JCCrandall appealed.

Held: The California Second District Court of Appeal initially explained that JCCrandall was claiming the right to exclude an unauthorized person from its property, which was indeed a fundamental vested right. Here, the CUP was premised on Santa Rita Holdings, Inc.'s right to physically use JCCrandall's property.

The Court stated that under federal law, cannabis is illegal in every state and territory of the United States.[6] Article VI, paragraph 2 of the United States Constitution, known as the supremacy clause, provides in part, "The Constitution, and the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, cannabis cultivation and transportation are illegal in California as long it remains illegal under federal law. The Second District stated that although California Civil Code section 1550.5 states that cannabis is legal in California, the state law defied the Supreme Clause because cannabis cultivation and transportation remain illegal under federal law.

The Second District noted that the CUP was premised on JCCrandall being forced to allow its property to be used in cannabis transportation, but the Court stated that transportation of cannabis is a crime under federal law. Moreover, Bus. & Prof. Code section 26051.5(a)(2), requires permission for commercial cannabis activities from all landowners where land is so used, including the owners of servient tenants over which cannabis is transported. JCCrandall did not give consent to use its land for commercial cannabis activity. Furthermore, JCCrandall could not be forced to allow its property to be used to transport cannabis because such use exceeded the scope of the easement. Because the easement was not available for the proposed use, then the streets and highway could not be deemed adequate (per the LUDC).

The Second District concluded that JCCrandall's objection on the ground that cannabis is illegal under federal law, even in California, was sufficient to defeat the CUP. Accordingly, the Court reversed.

MISCELLANEOUS

A. A warning slip placed on an illegally parked car's windshield two days before a car was to be towed provided notice reasonably calculated to inform car's owner.

Grimm v. City of Portland, 125 F.4th 920 (9th Cir. 2025)

[6] See Controlled Substances Act, 21 U.S.C. section 801 et seq.; 21 U.S.C. section 812 (c)(10).

Facts: In December 2017, Andrew Grimm parked a car on the side of a downtown street in the City of Portland, Oregon, paid for an hour and 19 minutes of parking through a mobile app created and operated by a private entity, and then left the car on the street for seven days. During that time, City parking enforcement officers issued multiple parking citations, which they placed on the car's windshield. After the car had sat on the street for five days, a parking enforcement officer added to this growing pile a red slip warning that the car would be towed. Grimm did not move the car, and, two days after the warning slip was placed on the windshield, the car was towed. The City then mailed a tow notice and information about how to retrieve the car to the addresses listed on the car's registration. The City did not otherwise attempt to contact Grimm. The City could not send notifications regarding citations or towing through the private entity's mobile app. Nor did the app company regularly share users' contact information with the City. Grimm did not return to the car before it was towed and did not see the citations or the warning slip. He picked up the car from the towing company over two weeks after he initially parked the car on the street, paying $514.

Grimm sued the City, alleging that its procedures for notifying him that his car would be towed were deficient under the Fourteenth Amendment's Due Process Clause. Ultimately, the District Court granted summary judgment to the City. The District Court explained that, although Grimm's failure to remove the citations from the windshield might have alerted the City that its attempt to provide notice had failed, no other form of notice was practicable under the circumstances. Grimm appealed.

Held: The Ninth Circuit Court of Appeals first considered whether the City provided notice reasonably calculated to alert Grimm of the impending tow. The Court observed that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated…to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In determining what notice is appropriate under the *Mullane* standard, courts must "balanc[e] the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.'" *Tulsa Pro. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988) (quoting *Mullane*, 339 U.S. at 314).

In its earlier decision in *Clement v. City of Glendale*, the Ninth Circuit held that governments must provide notice in most circumstances before towing an illegally parked car. 518 F.3d 1090, 1095-96 (9th Cir. 2008). There, the Court explained that "[t]he punishment for illegal parking is a fine, which is normally imposed by affixing a ticket to the windshield." *Id.* at 1094. *Clement* emphasized that the "ticket can also serve as notice of the illegality and a warning that the car will be towed if not moved or properly registered." *Id.* Here, the Ninth Circuit concluded that the City provided Grimm with all the notice that the Fourteenth Amendment requires, explaining that the red warning slip placed on the car's windshield five days after Grimm had parked the car was reasonably calculated to inform him that the car would be towed. The warning slip provided two days' advance notice that the car would be removed from the city street. Moreover, the red warning slip explicitly stated that the car would be towed if it were not moved. The Court added that a standard requiring the City to mail out a notice, send an email, or make a phone call in addition to leaving a warning slip would strike the wrong balance between the "'interest of the State' and 'the individual interest

sought to be protected by the Fourteenth Amendment.'" *Tulsa Pro. Collection Servs., Inc.*, 485 U.S. at 484 (quoting *Mullane*, 339 U.S. at 314).

The Court also held that Grimm's failure to remove the citations and warning slip from the windshield did not provide the City with actual knowledge that its attempt to provide notice had failed. Moreover, the Ninth Circuit had already held in *Clement* that notice provided by a ticket is generally sufficient. 518 F.3d at 1094. Accordingly, the Ninth Circuit Court of Appeals affirmed.

B. Oregon's conversational privacy statute requiring that notice be given before oral conversations may be recorded does not violate the First Amendment.

Project Veritas v. Schmidt, 125 F.4th 929 (9th Cir. 2025)

Facts: Section 165.540(1)(c) of the Oregon Revised Statutes requires that notice be given before oral conversations may be recorded. Specifically, the statute provides that "a person may not . . . [o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine, or apparatus, . . . if not all participants in the conversation are specifically informed that their conversation is being obtained." *Id.* The statute has several exceptions, including (1) the felony exception, which allows a recording of a conversation during a felony that endangers human life;[7] and (2) the law enforcement exception, which allows a recording of a conversation in which a law enforcement officer is a participant if certain conditions are met.[8]

Project Veritas is a nonprofit media organization engaged almost exclusively in undercover journalism. Whether recording openly or surreptitiously, Project Veritas does not expressly inform individuals that their conversations are being recorded. Project Veritas sought to conduct undercover investigations in Oregon. In 2020, Project Veritas and Project Veritas Action Fund (collectively, "Project Veritas") filed suit against the Multnomah County District Attorney, Michael Schmidt, and the Oregon Attorney General, Ellen Rosenblum (collectively, "Oregon"), alleging that Oregon's conversational privacy statute violates the First Amendment. The District Court dismissed the complaint, and Project Veritas appealed.

Held: The Ninth Circuit Court of Appeals reviewed the matter en banc. The en banc court construed the complaint as raising both facial and as-applied challenges to the statute.

The Court held that the as-applied challenge was constitutionally and prudentially ripe, noting that Project Veritas articulated a concrete intention to violate the statute and self-censored to comply with the statute. The en banc court held that Project Veritas's recording of conversations in connection with its newsgathering activities was protected speech, and that because Section 165.540(1)(c) would directly regulate Project Veritas's act of creating speech that fell within the core of the First Amendment, it triggered First Amendment scrutiny.

The en banc court next considered whether Oregon's conversational privacy statute was content based or content neutral. See *United States v. Swisher*, 811 F.3d 299, 311 (9th Cir. 2016) (en banc).

[7] See Or. Rev. Stat. section 165.540(5)(a).
[8] See Or. Rev. Stat. section 165.540(5)(b).

The Court explained that the First Amendment "does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Thus, laws "that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to strict scrutiny. *Id.* at 642. A regulation that is content neutral, on the other hand, must only satisfy intermediate scrutiny. *Id.*

Project Veritas argued that Section 165.540(1)(c) was a content-based restriction on expression that was subject to strict scrutiny. However, the en banc court disagreed, noting that regulations that "confer benefits or impose burdens on speech *without reference to the ideas or views expressed* are in most instances content neutral." *Turner*, 512 U.S. at 643 (emphasis added). The en banc court held that Section 165.540(1)(c) was content-neutral because it did not discriminate on the basis of viewpoint or restrict discussion of an entire topic. See *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 73-74 (2022). Rather it placed neutral, content-agnostic limits on the circumstances under which an unannounced recording of a conversation may be made. The en banc court concluded that neither the felony exception nor the law enforcement was content-based within the meaning of controlling First Amendment precedent as neither exception addressed the content of the recording. Thus, intermediate scrutiny applied.

The en banc court then concluded that Section 165.540(1)(c) survived intermediate scrutiny as applied to Project Veritas. The en banc court concluded that Oregon had a significant government interest in ensuring that its residents know when their conversations are recorded, the statute was narrowly tailored to that interest, and the statute left open ample alternative channels of communication for Project Veritas to engage in investigative journalism and to communicate its message.[9]

Project Veritas also contended that Section 165.540(1)(c) was facially invalid as overbroad. The en banc court rejected this last challenge because the Project Veritas failed to show that any unconstitutional applications of the conversation privacy statute substantially outweighed its constitutional applications. The en banc court affirmed the District Court's dismissal.

Dissenting, Judge Lee, joined by Judge Collins, wrote that even assuming intermediate scrutiny applied, Oregon's law was grossly overbroad and not narrowly tailored to advance the state's interest in conversational privacy. Moreover, strict scrutiny should be applied (because, the dissent maintained, the law was not content-neutral) and the law could not survive strict scrutiny because it was not necessary to serve a compelling interest.

C. In cases confined to drug importation charges, district courts do not abuse their discretion when admitting relevant, probative, not unfairly prejudicial evidence of the retail value of narcotics.

United States v. Velazquez, 2025 U.S. App. LEXIS 1248 (9th Cir. Jan. 21, 2025)

[9] To survive intermediate scrutiny, a content-neutral regulation of speech must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Facts: Alfred Velazquez—a 34-year-old United States citizen residing in Tijuana—was arrested at the U.S.-Mexico border by a U.S. Customs and Border Protection officer after 4.53 pounds of fentanyl were found hidden in the engine compartment of his vehicle. A lab analysis confirmed that the packages contained fentanyl and heroin.

The Government filed a complaint against Velazquez, charging him with, inter alia, violating 21 U.S.C. section 952 by importing approximately 2.58 kilograms of a mixture containing fentanyl. At Velazquez's first trial, a jury convicted him of violating Section 952. However, this conviction was reversed by the Ninth Circuit Court of Appeals due to the prosecutor's misstatement of the reasonable doubt standard. At Velazquez's second trial, jurors were split 7-5 in favor of conviction, and the District Court declared a mistrial.

At his third trial, the District Court denied Velazquez's supplemental motion to exclude the retail value of the fentanyl found in the Firebird. The District Court reasoned that, under Federal Rule of Evidence 403, "the probative value" of the information "outweighed the prejudice of introduction." The Government subsequently presented evidence of the wholesale and retail value of the fentanyl through the testimony of Homeland Security Investigations Special Agent Peter Keisel, who stated that the retail value ranged from $405,888 to $608,832. After the jury returned a guilty verdict, the District Court entered judgment and imposed a sentence of 139 months in custody and 5 years of supervised release. Velazquez appealed.

Held: On appeal, Velazquez argued that the District Court abused its discretion in admitting Keisel's expert testimony about the retail value of the fentanyl because the testimony was irrelevant; the prejudicial effect of the testimony substantially outweighed its probative value; and the Ninth Circuit Court of Appeals had never definitively held that testimony about the retail value of drugs is permissible when the defendant is charged only with importation-related crimes.

Velasquez argued that although previous Ninth Circuit cases had ruled that law enforcement agents may testify about the street value of narcotics, those cases were distinguishable because they involved either distribution-related counts or did not differentiate between wholesale and retail pricing. The Government countered that there were prior cases involving importation charges in which the Ninth Circuit had held that the retail value of drugs is probative of a defendant's knowledge of the presence of narcotics.

Considering Ninth Circuit prior precedent and the persuasive decisions of other courts, the Court declined to adopt Velazquez's position that Government witnesses should not be allowed to testify about the retail value of seized narcotics in cases limited to importation charges. Although Velazquez was not charged with distribution, the Court was persuaded by reasoning in *United States v. Kearney*, 560 F.2d 1358 (9th Cir. 1977) that "[e]vidence of the monetary value of illicit narcotics is relevant to show a defendant's . . . knowledge of his possession of the [drugs]." *Id.* at 1369; see also *Gaylor v. United States*, 426 F.2d 233, 235 (9th Cir. 1970) ("[S]uch evidence was properly admitted as refuting the possibility that a stranger could have placed such a valuable cargo in a vehicle in the hope that the vehicle could be followed and the cocaine later recovered in the United States."). The Court of Appeals thus concluded that District Courts do not abuse their discretion when admitting evidence of the retail value of narcotics in cases confined to importation

charges when that evidence is relevant, probative, and not unfairly prejudicial under the standards set forth in the Federal Rules of Evidence.

The Ninth Circuit also held that in this case, the District Court did not abuse its discretion when it ruled that the Special Agent's testimony was relevant and in concluding that the evidence of the retail value was not substantially outweighed by any prejudicial effect. Under "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The Ninth Circuit explained that the retail value of the fentanyl satisfied Rule 401 because it tended to make Velazquez's *knowledge* of the drugs in his vehicle more probable. The large quantity of fentanyl, 4.53 pounds, was clearly intended for further distribution in the United States. The retail value of the fentanyl was relevant to Velazquez's knowledge because it made it more likely, given the profits at stake, that he knew the packages were in his vehicle. Keisel's testimony focused almost exclusively on his background and experience in investigating narcotics-smuggling operations, on how law enforcement determines the value of street drugs, and on why that value was important to their work. He did not offer any prejudicial information about Velazquez, such as his role in or knowledge of drug cartel operations, which would have substantially outweighed the probative value of his testimony. Accordingly, the Ninth Circuit Court of Appeals affirmed.

D. The Prison Litigation Reform Act does not prohibit prisoners from proceeding together in lawsuits, but it does require that each prisoner in the lawsuit pay the full amount of the filing fee.

Johnson v. High Desert State Prison, 2025 U.S. App. LEXIS 1683 (9th Cir. Jan. 27, 2025)

Facts: Responding to the sharp rise in prisoner litigation in the federal courts,[10] Congress enacted the Prison Litigation Reform Act of 1995 ("PLRA").[11] Among other reforms, the PLRA amended the statute governing in forma pauperis ("IFP") proceedings, 28 U.S.C. section 1915. Under Section 1915(b)(1), "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee."[12]

In July 2022, Topaz Johnson, Ian Henderson, and Kevin Jones Jr. were all incarcerated in High Desert State Prison in California when they jointly filed suit under 42 U.S.C. section 1983 and applied to proceed IFP.[13] The District Court denied their request for joinder and severed their claims, holding that "the interplay of the filing fee provisions" in the PLRA requires prisoners to file lawsuits separately.

The District Court concluded that Section 1915(b)(1) expressly requires prisoners proceeding in IFP to each pay the full filing fee for commencing an action. The District Court then pointed to one of (b)(1)'s neighboring provisions, 28 U.S.C. section 1915(b)(3), which provides that "[i]n no event shall the filing fee collected exceed the amount of fees permitted by statute for the

[10] See *Woodford v. Ngo*, 548 U.S. 81, 84 (2006).
[11] Pub. L. No. 104-134, 110 Stat. 1321-71.
[12] 28 U.S.C. section 1915(b)(1).
[13] The prisoners alleged, among other things, that that their conditions of confinement violated the Eighth Amendment.

commencement of a civil action." The District Court believed that reading these two provisions together meant that prisoners cannot bring a lawsuit together because if multiple prisoners were permitted to proceed with a joint action and each paid the full filing fee in accordance with Section 1915(b)(1), the amount of fees collected would exceed the amount permitted by statute for commencement of the action in violation of Section 1915(b)(3) and the apparent intent of Congress. The District Court ultimately dismissed the entire action. Johnson and Henderson appealed.

Held: The Ninth Circuit Court of Appeals initially explained that Section 1915(b) provides in relevant part:

> (b)(1) [I]f a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect . . . an initial partial filing fee . . .
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> (2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.
>
> (3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.
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> (4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

28 U.S.C. section 1915(b).

The Ninth Circuit explained that Section 1915(b)'s subsections "stubbornly require" courts to assess and collect filing fees based on an individual prisoner's financial circumstances. *See Niz-Chavez v. Garland*, 593 U.S. 155, 161 (2021). The Court explained that Section 1915(b) contemplates a "per-litigant approach,"[14] and subsection (b)(3) governs collecting fees from an individual prisoner no matter how many join in a lawsuit. The Court held that while Section 1915(b) requires prisoners to each pay the full filing fee to commence an action, the statute poses no obstacle to prisoners joining in a lawsuit. Prisoners may join in a lawsuit and proceed together under Section 1915 so long as they each pay the full amount of a filing fee.

The Court of Appeals explained that when read in context, subsection (b)(3) works in tandem with subsection (b)(4) to serve as a "safety-valve" for Congress' new fee-collecting scheme. (*Bruce v. Samuels*, 577 U.S. 82, 89-90 (2016).) Both subsections ensure that "[i]n no event shall" the filing fee collected from a prisoner through their monthly payments "exceed the amount of fees permitted by statute," or that a prisoner be prohibited from bringing a civil action even if "the prisoner has no assets and no means by which to pay the initial partial filing fee." (Section 1915(b)(3),(4).) The District Court erred by failing to internally harmonize Section 1915(b). The Ninth Circuit Court of Appeals accordingly reversed the District Court's denial of the joint IFP application and dismissal of the lawsuit, remanding for further proceedings.

[14] *Boriboune v. Berge*, 391 F.3d 852, 856 (7th Cir. 2004).

Partially dissenting, Judge Graber dissented from the holding that each plaintiff must pay a filing fee. In Judge Graber's view, the PLRA provides for only one filing fee per civil action.

E. Warrantless search of decedent's electronic devices did not violate CalECPA where law enforcement accessed devices with the decedent's parents' permission who had physical possession of the devices and their passcodes.

People v. Clymer, 107 Cal. App. 5th 131 (1st Dist. 2024)

Facts: In January 2019, Officer Anthony Baron responded to a call at the McKay family residence where he found Drew McKay dead in his bedroom. With McKay's parents' permission, Officer Baron and Special Agent Jeffrey Boyce searched McKay's room for narcotics and paraphernalia. McKay's parents repeatedly urged Special Agent Boyce to search McKay's iPhone and iPad, on a bedside table, and they provided the passcode to the devices. Investigators found messages between McKay and a person who was later identified as Gerald Louis Clymer, Jr., regarding the sale of illegal narcotics to McKay. Clymer was later charged with, among other things, possession of diazepam for sale.

Clymer moved to suppress the evidence obtained during the warrantless search of McKay's electronic devices, which the trial court denied. Clymer subsequently pled no contest to the diazepam charge. Clymer appealed, claiming the warrantless searches of McKay's devices violated the California Electronic Communications Privacy Act ("CalECPA") (Penal Code section 1546 et seq.), and therefore the evidence obtained through those searches should have been suppressed .

Held: The First District Court of Appeal explained that CalECPA generally prohibits government entities from accessing electronic information without a warrant except in specified contexts. As relevant here, a government entity may access electronic information without a warrant "[w]ith the specific consent of the authorized possessor of the device" or when the entity "in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information." (Section 1546.1(c)(4),(6).) An "'[a]uthorized possessor'" is defined as the "possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device." (Section 1546(b).) However, CalECPA does not address who becomes an "authorized possessor" of a device when the owner dies.

The First District concluded that under the circumstances that occurred here, McKay's parents became, at the relevant time, "authorized possessors" of McKay's devices, and affirmed. McKay owned an electronic device, lived in the family residence with his parents, and died in his bedroom in the family residence. The only persons who then actually possessed, and could possess, the devices at the relevant time, were his parents. His electronic devices were on a nightstand next to his bed, and upon his death, he was no longer the possessor of the devices, but his parents had actual possession of the devices, and they knew the passcodes to access the devices. Given this, there was no authorized possessor of the devices besides McKay's parents after his death, and they gave consent for law enforcement to access the devices. (See *In re Scott K.* (1979) 24 Cal.3d 395,

404 [under 4th Amend. principles, "[v]alid consent may come from the sole owner of property or from 'a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected,'" quoting *United States v. Matlock* (1974) 415 U.S. 164, 171].) Moreover, the trial court could reasonably conclude, given the totality of the circumstances, McKay, himself, had authorized his parents to access his devices and they could therefore consent to their search. Thus, there was no violation of CalECPA.