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IN THE SUPREME COURT OF THE UNITED STATES

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ANTOINE BRUCE, :

Petitioner : No. 14-844

v. :

CHARLES E. SAMUELS, JR., :

ET AL. :

- - - - - x

Washington, D.C.

Wednesday, November 4, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:51 a.m.

APPEARANCES:

ANTHONY F. SHELLEY, ESQ., Washington, D.C.; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:51 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-844, Bruce v. Samuels.

Mr. Shelley.

ORAL ARGUMENT OF ANTHONY F. SHELLEY

ON BEHALF OF THE PETITIONER

MR. SHELLEY: Mr. Chief Justice, and may it please the Court:

There are at least three reasons why the Court should adopt what the courts of appeals have called the per-prisoner approach under PLRA Section 1915(b) (2).

One, the per-prisoner approach best comports with the statutory text.

Two, the per-prisoner approach is the only one consistent with the careful balance Congress struck between deterring frivolous prisoner lawsuits and preserving their right to bring meritorious ones.

And three, the per-prisoner approach avoids anomalies and disincentives that Congress could never have intended, disincentives such as discouraging prisoner work by taking one hundred percent of their income month after month.

I would like to, of course, start with the

1 text. The key sentence is in -- the key sentence is the  
2 second sentence of Subsection (b) (2). It says the  
3 following: "The agency having custody of the prisoner  
4 shall forward payments from the prisoner's account to  
5 the clerk of the court" -- singular -- "each time the  
6 amount in the account exceeds \$10 until the filing  
7 fees" -- plural -- "are paid."

8 The combination of that singular, clerk of  
9 the court, and filing fees, plural, indicates the  
10 per-prisoner approach because it means one clerk is to  
11 receive payments, even when there are numerous filing  
12 fees.

13 Filing fees, the plural, appears in the --

14 JUSTICE SCALIA: There -- there --

15 MR. SHELLEY: -- in the statute exactly  
16 twice.

17 JUSTICE SCALIA: Can't there be more than  
18 one filing fee for a single court?

19 MR. SHELLEY: No, there cannot, not in the  
20 way Congress understood the term in the PLRA. If you  
21 look to (b) (1) and (b) (3), Congress creates it almost as  
22 a term of art. A filing fee includes -- a filing fee,  
23 with the word "filing" in front of "fee," a filing fee  
24 includes all of the subsidiary costs to start up a case.

25 So a court of appeals, for instance, has a

1 \$500 docketing fee and a \$5 statutory fee, and that's  
2 referred to as a --

3 JUSTICE GINSBURG: So what happens if you  
4 have -- the district court makes an order, there has to  
5 be a filing fee?

6 MR. SHELLEY: In the district court?

7 JUSTICE GINSBURG: Yes, and then that fee is  
8 not totally paid. In fact, the prisoner loses, so  
9 there's a cost award in addition. And then it goes up  
10 to the court of appeals, where there's another filing  
11 fee.

12 MR. SHELLEY: Right.

13 JUSTICE GINSBURG: Does -- does -- on your  
14 reading, does the court of appeals filing fee also have  
15 to wait until the district court filing fee is fully  
16 paid?

17 MR. SHELLEY: Yes. There would be an  
18 initial partial filing fee that's paid upon the -- the  
19 filing of the appeal. Under Subsection (b)(1) there's a  
20 20 percent initial partial filing fee that would be  
21 assessed against the prisoner.

22 JUSTICE GINSBURG: And that would be across  
23 the board that you always have to pay.

24 MR. SHELLEY: Always have to pay that.

25 But the second filing fee, the one from the

1 court of appeals, would line up. So the first filing  
2 fee from the district court would be paid off first, and  
3 then sequentially the court of appeals would be paid  
4 off, but only 20 percent would be taken every month from  
5 the prisoner. You wouldn't take 40 percent.

6 JUSTICE SCALIA: If he files enough cases,  
7 he's never going to have to pay for it, right? I mean,  
8 you know, he files 20 cases, that 20 percent will  
9 never -- will never come home to roost.

10 What -- what's the disincentive for him --  
11 for his continuing to file cases?

12 MR. SHELLEY: Well, first of all, it would  
13 come to roost back in 1995 when Congress enacted the  
14 statute because the filing fee for a district court case  
15 was only \$120, and a court of appeals was 105. And so a  
16 prisoner who earned, say, 55 or 100 -- 50 or \$100 a  
17 month, which is not outlandish given the small wages,  
18 could pay off a filing fee in a -- in a matter of months  
19 under that. It's much higher now.

20 But to get to the rest of your question,  
21 Justice Scalia, there are a number of other things in  
22 the statute that work in tandem with (b) (2) to stop that  
23 kind of behavior. So there's the initial partial filing  
24 fee. He or she is always going to have to pay that.  
25 There's the three-strikes rule, which comes into being.

1 There's the ability of the district court or court of  
2 appeals to sui sponte dismiss under the PLRA those cases  
3 that are frivolous.

4 JUSTICE SCALIA: All right. So -- so you  
5 say there are disincentives, but this was intended to be  
6 a disincentive. Was this not intended to be a  
7 disincentive?

8 MR. SHELLEY: It was and it is.

9 JUSTICE SCALIA: I'm pointing out that it's  
10 a very ineffective disincentive if the person keeps  
11 filing a lot of cases.

12 MR. SHELLEY: Well, it's not an ineffective  
13 disincentive because it creates months and months more  
14 of additional income being garnished. So it lines up  
15 with the others. None of them were anticipated to be  
16 wholly barriers to filing a lawsuit. And this one, as  
17 with the others, creates a whole scheme where there are  
18 added disincentives.

19 But Congress also wanted to make sure the  
20 meritorious cases would be brought. And so it didn't  
21 want to be overwhelming and put -- and put the thumb too  
22 much on the scale to kill all of those cases.

23 JUSTICE KAGAN: Mr. Shelley, can we go back  
24 to the sentence that you're relying on, because I have  
25 to admit I don't understand your reading. The -- the

1 sentence says -- and I'm taking out some unnecessary  
2 words. It says, the agency shall forward payments to  
3 the clerk, singular, until the filing fees are paid.

4 Now, that makes perfect sense if the filing  
5 fees are all in one case, going to a single clerk. But  
6 if you're right and what they mean is the filing fees  
7 are in multiple cases, then it doesn't make sense to say  
8 that the agency shall forward payments to the clerk.  
9 The only way to make that sentence makes sense, if the  
10 filing fees are in multiple cases, is for Congress -- is  
11 for the statute to have read, the agency shall forward  
12 payments to many clerks or to several clerks seriatim.  
13 And that suggests not the per-prisoner approach, but the  
14 per-case approach.

15 MR. SHELLEY: I think that's incorrect  
16 because I think what -- what you should insert, if -- if  
17 necessary, in front of the clerk of the court is the  
18 relevant clerk of the court. So the prison officials  
19 are going to distribute to the relevant clerk of the  
20 court.

21 JUSTICE KAGAN: But then -- so that -- that  
22 seems right, to make the sentence work the way you want  
23 it to work -- and this is the sentence you are relying  
24 on. To make it work the way you want it to work, you  
25 have to add language to it.



1           MR. SHELLEY: You -- you do not, because  
2 there's still -- there's one clerk of the court, and  
3 there's always going to be a clerk, because every case  
4 the filing fee is paid to a clerk; so there's always  
5 going to be the clerk of the court. And -- and in most  
6 cases -- in -- in all cases, there's only one filing.

7           JUSTICE KAGAN: Yes, I'm going to say, you  
8 know what, even as I look at that, even if you add that  
9 language, it still doesn't make sense. "The agency  
10 shall forward payment to the relevant clerk until  
11 multiple filing fees are paid." It's just -- it  
12 doesn't -- the two halves of the sentence don't connect  
13 there.

14           MR. SHELLEY: Well, the filing fee's plural.  
15 It -- it can't allow for the -- for the per-case  
16 approach, the opposite approach, because filing fees we  
17 know means more than one. And so it has to mean more  
18 than one, because in (b)(1) and (b)(3) Congress used  
19 this term of art to mean filing fee encompasses. It's  
20 the thing that comprises all of the other fees.

21           And so I would say that the opposite side is  
22 the one that cannot make any textual sense out of that  
23 sentence, because there's never more than one filing fee  
24 from a -- to a single clerk.

25           JUSTICE KAGAN: Well, but Congress doesn't

1 know that. Congress just thinks fees in a case, fees in  
2 a case. So then it makes perfect sense. Give the fees  
3 in a case to the clerk. But you're saying give fees in  
4 multiple cases to the clerk, when it's not. It's give  
5 fees to -- in multiple cases to multiple clerks.

6 MR. SHELLEY: It's give the fee to that  
7 clerk that that clerk is owed until all the fees are  
8 paid. You keep going back to a clerk until all the fees  
9 are paid. So --

10 JUSTICE GINSBURG: Isn't -- isn't the  
11 statute drafted, though, that with a single-case focus,  
12 that is, 1915 throughout, talks about an action?

13 MR. SHELLEY: Not -- not true. First of  
14 all, the whole purpose of the statute was to deal  
15 with -- with multiple filers. So the whole -- Congress  
16 comes into it with a purpose of dealing with individuals  
17 who file many cases.

18 But second of all, the three-strikes rule  
19 assumes numerous cases. And I'd also point to  
20 Section 1915(d), which has the statutory language, "The  
21 officers of the court shall issue and serve all process  
22 and perform all duties in such cases."

23 So there are references to more than one  
24 case in various places. But even if it was written in a  
25 singular way, in a way to deal only with one case, that

1 really doesn't prove anything against us. It just means  
2 you got to look to other statutory construction tools,  
3 because it would just say that there's going to be an  
4 initial partial filing fee in every case. And there  
5 needs to be installment payments in every case.

6 And we don't disagree with that. We agree  
7 that there are installment payments in every case, and  
8 it's just a matter of when. And the statute doesn't  
9 answer when, necessarily, right off the bat.

10 JUSTICE GINSBURG: But why is the initial  
11 fee -- the initial partial fee, you say each time you  
12 file it, you've got to pay that? Why shouldn't that go  
13 the same way?

14 MR. SHELLEY: Well, the -- the two sections  
15 are written differently. (b) (1) is very different from  
16 (b) (2). It's a different collector. One is the prison  
17 official. The other is the clerk of the court. One  
18 mentions filing fees, plural. The other only mentions  
19 filing fee, singular. There's a \$10 rule in the  
20 second -- in the second -- in (b) (2) but not in (b) (1).  
21 So they -- they are a little bit different.

22 But even if --

23 JUSTICE BREYER: If you don't know -- I  
24 mean, I can't get anything out of the second sentence,  
25 to tell you the truth, because I think that a prison is

1 usually within a single district. And so when you're  
2 worried about a multiple filer, what he does is he files  
3 about 15 cases in the same court.

4 And -- and therefore, it's perfectly  
5 understandable why Congress would refer to multiple  
6 fees, because they are going to be like ten of them.  
7 It's the people they are really worried about are -- are  
8 what's at issue. So I can't get anything out of the  
9 second sentence.

10 It's the first sentence that -- that is, it  
11 seems to me, both your strength and your weakness.  
12 There it talks about after payments of the -- the  
13 initial partial filing fee. Okay. It sounds as if it's  
14 talking about a case. And so what do we do about that?  
15 I mean, there it is. "After the initial partial filing  
16 fee, the prisoner shall be required to make monthly  
17 payments of 20 percent," et cetera. That's where you  
18 have the word "fee."

19 MR. SHELLEY: Well, first of all, I don't  
20 think Congress necessarily had in mind a prisoner who is  
21 filing numerous cases in the same court, because if you  
22 look up to (a)(2), for instance, it talks about the  
23 prisoner having to file a statement of his indigency.  
24 And Congress talked about it needed to be obtained from  
25 the appropriate official of each prison at which the

1 prisoner is or was confined.

2           And the government concedes that prisoners  
3 are moved around all the time, and therefore, there are  
4 numerous districts --

5           JUSTICE BREYER: I don't mean it's  
6 exclusive.

7           MR. SHELLEY: Sure.

8           JUSTICE BREYER: I'm just giving you an  
9 explanation as to why they might have used the words  
10 "fees," even though they previously defined a filing fee  
11 of \$350.

12           MR. SHELLEY: So then let's go to that first  
13 sentence in -- in the statutory text in  
14 Subsection (b)(2). We don't disagree that after a  
15 partial filing fee is assessed, the installment payments  
16 will also start to kick in. It's just a matter of do  
17 they line up or do they -- or do they come first.

18           So I don't think under that -- I don't think  
19 (b) -- (b)(2) in that first sentence then would answer  
20 the question. It -- under our theory, you also get a --  
21 you also get an installment payment after the payment of  
22 the initial partial filing fee.

23           But --

24           JUSTICE SOTOMAYOR: In terms of one of your  
25 purposes, why isn't the government's concession that in

1 no circumstance can a fee 20 percent be taken until --  
2 unless it's above \$10? Why doesn't that take care of  
3 your problem?

4 MR. SHELLEY: Because I don't think the  
5 government's position is -- is statutory allowed. So if  
6 you take a situation where, let's say \$11 was earned by  
7 the prisoner the -- the previous month, and that's all  
8 that was in the account. In that case you'd have to  
9 take -- under the statute, you meet the statutory terms.  
10 There's \$10 in -- in the account, and you have to take  
11 20 percent. "Shall" is the word. Shall take 20 percent  
12 if there's over \$10. Well, there's \$11 in there. The  
13 government would say, we're not going to take the 20  
14 percent because it's going to send it under \$10. So  
15 that -- that can't work out.

16 JUSTICE SOTOMAYOR: No, what the  
17 government -- I understand -- and they'll correct me --  
18 is I think they are saying that if you pay a -- the  
19 initial filing fee, and you're down to \$8, they can't  
20 take another 10 -- another 20 percent.

21 MR. SHELLEY: Sure. Well, that's --

22 JUSTICE SOTOMAYOR: That's how I understood  
23 their concession.

24 MR. SHELLEY: So that was their alternative  
25 position. But even that one won't hurt our purposes

1 argument, because if you take a prisoner who now, let's  
2 say, he has \$55 in income. And that's not outlandish  
3 because if you earn 35 cents an hour and you work a  
4 40-hour week, you have \$55. In that situation, the  
5 first four encumbrances will take \$11 each, \$44, leaving  
6 you at \$11. The last one is going to take the whole  
7 amount, cause you have got a fifth encumbrance and  
8 you're over \$10.

9 So under even this alternative approach, you  
10 take 100 percent of the income every time the income is  
11 more than \$55. Maybe I should go through that again.

12 Okay. So --

13 JUSTICE BREYER: If you're clarifying it,  
14 \$11, I guess you'd take a dollar. All right. I mean,  
15 what's unclear?

16 JUSTICE SOTOMAYOR: If you're at 55, you  
17 take 10.

18 MR. SHELLEY: The statute says 20 percent if  
19 it exceeds \$10. So if you have \$11 in there after  
20 the -- after the fourth one, you have to take the fifth  
21 20 percent increment --

22 JUSTICE BREYER: They can't administer it  
23 that way. I mean, is there somebody who is  
24 administering this that way?

25 MR. SHELLEY: Every circuit who has looked

1 at it has described the per-prisoner approach as one  
2 that as long as there's \$10 in the account, it's the  
3 trigger. You can take the whole income.

4 JUSTICE BREYER: And they are really doing  
5 that?

6 MR. SHELLEY: As far as I know, yes. Well,  
7 the BOP says it is not. I understand the States, where  
8 many of the prisoner are, are doing exactly that. And  
9 we showed two -- we cited two district court cases where  
10 they went over what the States were doing, and they  
11 drain it down to zero.

12 I mean, the Newlin case says you can drain  
13 it down to zero. Torres, Siluk. In fact, that's why  
14 they -- they -- the -- the Second, Third, and Fourth  
15 Circuits all got into this issue of -- of the  
16 constitutionality or the purposes because they said,  
17 look, prisoners are going to be left with zero.

18 JUSTICE SCALIA: That's inconceivable to me.  
19 I mean, what? Is -- is there a constitutional  
20 requirement that prisoners be given income while they  
21 are in prison?

22 MR. SHELLEY: There isn't, I -- I don't  
23 think. They are given the essentials, but the point of  
24 it is, is that --

25 JUSTICE SCALIA: Especially if the fact that



1 they don't have any is their own fault, if they keep  
2 filing baseless suits.

3 MR. SHELLEY: Well, but the -- you'd be out  
4 of -- you wouldn't be filing baseless suits because you  
5 got the three strikes, eventually. But Mr. Bruce, for  
6 instance, had -- had six cases before he incurred his  
7 first strike, even. And so the -- the constitutional  
8 dimension that the Second, Third, and Fourth Circuits  
9 have all adopted goes to the point of you can't put  
10 the -- the prisoner in the position of losing  
11 100 percent of the income that he works to earn as -- as  
12 the Hobson's choice to filing what may be a meritorious  
13 case. They haven't said it's unconstitutional. They've  
14 just said the statute leaves you scratching your head.

15 JUSTICE SCALIA: Well, it -- it's not a  
16 Hobson's choice if he forfeits all except \$10. That's  
17 going to be the difference, whether he has \$10 in his  
18 account or nothing.

19 MR. SHELLEY: Yes. Yes. And as this Court  
20 has said, and as Congress said in 1892 when it enacted  
21 the in forma pauperis statute, a man who has very little  
22 cares about each penny. And in prison if you have \$6,  
23 it makes a difference. It makes a difference that month  
24 than if you had zero. It's a difference between --

25 JUSTICE BREYER: Is there a way of

1 interpreting the statute, which I think would make --  
2 I -- I would guess, not in every case, where this  
3 multiple thing is likely to arise is where: Files a  
4 frivolous case, it's dismissed by the district court,  
5 and then he takes an appeal. Okay? There we have two.

6 And so the question is -- he has to get the  
7 filing fee. Then the next slot is going to be, like,  
8 20 percent or 40 percent, right? But you should leave  
9 him with \$10.

10 Given the purpose of the statute, which is  
11 to stop these frivolous suits, or at least make it a  
12 little tougher, doesn't it make sense, say, what I just  
13 said: Leave him with the \$10, but you can take the  
14 40 percent: 20 percent for one court, 20 percent for  
15 the other?

16 Now, maybe what I've just said doesn't make  
17 sense. To me, it makes sense at the moment. But it  
18 would -- it would both leave him with the \$10, but allow  
19 the clerks to collect the 20 percent for the district  
20 court, 20 percent for the Court of Appeals.

21 Is -- is that impossible to bring about?

22 MR. SHELLEY: I think it is, given the  
23 statutory language. I think, given the fact that the  
24 prison officials shall forward payments each time the  
25 amount in the account is greater than \$10 doesn't allow

1 the prison official to say I'm going to use it as a  
2 floor, as opposed to a trigger.

3 And while that might have been the way  
4 Congress could have written it, it did not. And given  
5 the way Congress did write it, the best approach is that  
6 per-prisoner approach that leaves some money to the  
7 prisoner for things like phone calls.

8 JUSTICE SOTOMAYOR: Actually, I -- I didn't  
9 realize the back end of this. Forget about the  
10 prisoner. I'm thinking about the courts.

11 Basically, you're saying the last court that  
12 brings him over 10 -- the moment he has over \$10, the  
13 court who gives -- no. That doesn't happen. The  
14 court -- he pays a filing fee. He now has more than \$10  
15 in the account. That court gets more money than the  
16 other courts?

17 MR. SHELLEY: No. They all get -- they all  
18 get 20 percent. The -- the way it should work is, is  
19 there \$10 in the account? If there's \$10.01, you then  
20 can take 20 percent, a 20 percent installment. Perhaps  
21 another 20 percent for cost; that's a different issue.  
22 But you -- for the filing fees you take a 20 percent  
23 installment, and it goes down to, say, \$8 at that point.  
24 That's the end of it under the -- under the per-prisoner  
25 approach that we espouse.

1 Under the per-case approach, the way the  
2 courts of appeals at least have understood it, if there  
3 is \$10.01 in the account and there are five filing fees,  
4 that's 100 percent of the \$10.01 that goes. 20 percent  
5 for each.

6 JUSTICE GINSBURG: That wouldn't be true for  
7 a Federal prisoner, because the Bureau of Prisons says  
8 no matter what, the prisoner has to be left with \$10.

9 MR. SHELLEY: It's a matter of grace. It's  
10 not set out in regulation. It's not set out in  
11 guidance. It's --

12 JUSTICE GINSBURG: Do they know to the  
13 extent to which the States are following that?

14 MR. SHELLEY: Yes. To the extent we've been  
15 able to investigate that, we've cited two -- two  
16 district courts in our reply brief. I think one from  
17 Iowa and maybe one from another Midwest state --  
18 Maryland and Iowa. Those two cases, the -- the way the  
19 Court's decision reads, it indicates that they are  
20 looking to see if there's \$10.01, and then they're  
21 taking -- they're going down 20, 20, 20, and 20.

22 And I would also note, if you look at Siluk,  
23 the Third Circuit; Torres, the Fourth Circuit; and  
24 Judge Easterbrook's decision in Newlin, they all talk  
25 about if there's more than the \$10, you take 100 percent

1 if there's five filing fees.

2 JUSTICE GINSBURG: If -- if --

3 CHIEF JUSTICE ROBERTS: Now, I don't see how  
4 the Bureau of Prisons can do this as a matter of grace.  
5 I mean, the statute says what it says, "shall." I  
6 don't -- I don't know why think they can do -- they may  
7 have their own views on what's good policy, but  
8 Congress, it seems to me, has written the statute  
9 exactly the way you say.

10 MR. SHELLEY: I agree. I agree with that.  
11 The only possibility is that alternative approach they  
12 say, where they stop after the first one goes below \$10.  
13 But that one takes 100 percent of the income and helps  
14 us in proving the per-prisoner approach, because in most  
15 cases, where there's any -- any -- any job or wage  
16 income being earned by the prisoner, you're going to  
17 take 100 percent because the last 20 percent increment  
18 will be above the \$10 threshold.

19 JUSTICE BREYER: You can interpret it the  
20 other way, linguistically. You say, you forward the  
21 20 percent each time the amount in the account exceeds  
22 \$10. Well, the instant you write that check, you say,  
23 it -- it does not exceed \$10, and therefore you can't  
24 forward it. So you can't write that kind of a check.

25 I mean, isn't that literally --

1 CHIEF JUSTICE ROBERTS: Well, it exceeds \$10  
2 until they cash the check.

3 MR. SHELLEY: I would agree with that.

4 JUSTICE BREYER: Well, now we're getting  
5 into the technicalities of banking --

6 (Laughter.)

7 JUSTICE BREYER: -- which -- so -- so I --  
8 I -- I think you can read it the way I suggested, if  
9 you're not too technical about it. It seems consistent  
10 with the language.

11 JUSTICE SCALIA: Does the Fed have a  
12 position on this that -- that -- that Chevron requires  
13 us to defer to?

14 MR. SHELLEY: No. No Chevron deference  
15 here. There's no regulation. There's no guidance.  
16 It's a statement in an adversary brief.

17 But, Justice Breyer, I think that there  
18 are -- there are a number of machinations that can be  
19 go -- that can be gone through in order to defend  
20 this -- this idea or that idea, and the government comes  
21 up with alternative ones that they're not even using to  
22 try to deal with the plural filing fees, for instance.

23 But our approach is much simpler. Our  
24 approach is you read the statute the way it -- the way  
25 it states a "shall." You know, "shall the prisoner."

1 You don't look to see if it's -- the payment's going to  
2 be under \$10 afterwards, but look to see if it's over as  
3 a trigger and then pay.

4 In addition, you don't have a lot of other  
5 problems with our approach. You just figure out which  
6 one was first, which one was second, which one was  
7 third.

8 JUSTICE GINSBURG: What happens -- I think  
9 this -- this -- Mr. Bruce had multiple filings, right?

10 MR. SHELLEY: At this point, yes.

11 JUSTICE GINSBURG: Yes. It's something  
12 like -- how many? 17?

13 MR. KIMBERLY: 19. But -- but the first --

14 JUSTICE GINSBURG: 19. So it is --  
15 realistically, those later fees are never going to be  
16 paid, because he's going to be released from prison  
17 somewhere along that chain.

18 MR. SHELLEY: First of all, Mr. Bruce didn't  
19 incur -- the last seven or so have not been filed,  
20 essentially because he had had three strikes by the  
21 12th. So there's really only 12 lawsuits we're -- we're  
22 talking about that could have filing fees.

23 But the answer to the question, Justice  
24 Ginsburg, of whether he's never going to pay those,  
25 again I would go back to 1995 and say Congress thought,

1 well, they could be paid relatively quickly if the  
2 filing fees were lower.

3           But you -- you touch on a question that is  
4 unsettled in the lower courts, which is does the amount  
5 come due at the end of when the prisoner -- when the  
6 prisoner sentence ends? And the courts of appeals are  
7 divided about that, with the Fifth Circuit saying, yes,  
8 it does come due, and you have to come up with some kind  
9 of a plan with each of the clerks to which you owe  
10 money, and you shall pay it off. Other circuits say it  
11 is. It does come due, but it only comes due and you  
12 have to pay it if you're not in forma pauperis at the  
13 time the government seeks to collect it after you're  
14 out -- out of release.

15           So I don't think it's correct to say, at  
16 least as a matter of law, it's settled as to whether  
17 these filing fees forever go away once the prisoner --  
18 prisoner leaves prison.

19           I had also started just talking about the  
20 difference -- the different problems of the per-case  
21 approach that ours avoids. And the, as I mentioned,  
22 the -- the per-prisoner approach allows you to line up  
23 the fees one after another. You just have to figure out  
24 which one was incurred first, second, third, fourth.  
25 But under their approach, what happens after the fifth



1 one? You have five. Takes 100 percent of income. And  
2 at that point, well, the sixth one becomes our approach.  
3 If you have six, seven, eight, it then becomes the --  
4 the sequential approach that has all the problems they  
5 say our --

6 JUSTICE GINSBURG: I thought the  
7 government's position was you can't get blood out of a  
8 stone, so when it's 100 percent, that's it. Sixth,  
9 seventh, eighth, we'll just have to --

10 MR. SHELLEY: They stood in line. What --  
11 the government says that -- page 30 of their brief is  
12 that that gets deferred. Deferred until one of them  
13 gets paid off. So then you have to figure out, well,  
14 one of them got paid off, so which one do you switch in,  
15 and how much do you switch in? And it just -- the  
16 problems start to multiply.

17 JUSTICE SCALIA: Why do you pick the  
18 earliest? I mean, all of them -- all of them are owed.  
19 Why don't you pick the nearest court?

20 MR. SHELLEY: Well, you could. You could  
21 pick the nearest court; you could pick the last one, the  
22 most -- the most --

23 JUSTICE SCALIA: Right.

24 MR. SHELLEY: -- the most current.

25 But the way the courts of appeals have

1 looked at it, they've looked at, in time, the first.

2 And I don't think the government disagrees  
3 because, at least when you get to the sixth one, it's --  
4 they -- they treat that one as being deferred under  
5 their approach, with the first five being paid.

6 CHIEF JUSTICE ROBERTS: Is he on the hook  
7 for the filing fees here?

8 MR. SHELLEY: He is not. He is not.

9 CHIEF JUSTICE ROBERTS: Why not?

10 MR. SHELLEY: I don't understand the Court  
11 to apply the PLRA for its cert petitions, for instance.  
12 And in any event, I believe his filing fee was paid  
13 on -- oh, he is -- he is subject to a filing fee in this  
14 case, and he did pay it. But I don't understand the  
15 Court to apply the PLRA to cert petitions.

16 One last point I wanted to make is that I  
17 think it is often thought that a prisoner who has 12  
18 filing fees or 10 filing fees is a recidivist prisoner,  
19 but that's not the case.

20 As the -- the Second Circuit noted in the  
21 Whitfield case, that single case produced five  
22 encumbrances. It was a district court appeal, it was a  
23 district court case, a Second Circuit appeal. There  
24 were two cost awards from the district court and the  
25 court of appeals, and there was a second appeal. There

1 were five encumbrances in one single piece of  
2 litigation. So these encumbrances can add up quite  
3 quickly, and you can get up to five, seven, eight.

4 And that case, it was a meritorious case,  
5 the Second Circuit said. It wasn't a frivolous case.  
6 The prisoner didn't win, but it was -- it was a case  
7 that wasn't, as -- as Justice Kagan used in the last  
8 argument, it wasn't a laughing-stock case. These  
9 were -- it was a meritorious case in the sense that it  
10 was one that could be brought by any other American that  
11 the prisoner -- that the prisoner brought.

12 So I'd like to reserve the remainder of my  
13 time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Ms. Saharsky.

16 ORAL ARGUMENT OF NICOLE A. SAHARSKY  
17 ON BEHALF OF THE RESPONDENTS

18 MS. SAHARSKY: Mr. Chief Justice, and may it  
19 please the Court:

20 This statute is written from the perspective  
21 of a single case. And what I mean by that is that for  
22 each action or appeal, it provides a list of things for  
23 the Court to do: To check for the affidavit of  
24 indigency, to check for three strikes, and as relevant  
25 here, to require full payment of filing fees on an

1 installment schedule.

2 So what we're talking about here is  
3 Subsection (b), which is the filing fee provision, and  
4 it says, first, that an IFP prisoner has to pay the full  
5 amount of each action or appeal, talking about a single  
6 action or appeal, and then it sets out an installment  
7 plan, which is an initial payment and a monthly payment.

8 So we're at the point where Petitioner  
9 agrees that the initial payment is for each case, but  
10 the -- he says that the statute somehow shifts  
11 perspective to all of an inmate's cases when it starts  
12 talking about the monthly payments.

13 And we just don't think there's any kind of  
14 clear explanation in the statute that does that. We  
15 think the burden should be really on him to show a shift  
16 from a single case to all of the cases, and it wouldn't  
17 make sense to do that.

18 I think Justice Scalia made the point in  
19 this discussion that there just wouldn't be any marginal  
20 deterrence if an inmate could file as many lawsuits as  
21 he wanted and not make any additional --

22 JUSTICE BREYER: You say the word "fees."  
23 What about the word "fees"? Does that show?

24 MS. SAHARSKY: Right. What petitioner says  
25 is that the word "fees," plural, always means more than

1 one case. And we know from the text of this statute  
2 that that's not true, because there are several places  
3 where Congress says "fees" and it's referring to a  
4 single case.

5 So for example, in Subsection (b) (3),  
6 Congress talks about the amount of fees permitted by  
7 statute for a civil action or an appeal. In (b) (1) it  
8 talks about any court fees required by law for an action  
9 or appeal. Similarly, in (a) (1) and (a) (2) it talks  
10 about fees, plural, for a -- a single action or a single  
11 appeal.

12 And to be clear, we think that in this  
13 statute Congress used "fee" and "fees" somewhat  
14 interchangeably in the way that people do out in the  
15 world; that people would say "attorney's fees," "an  
16 attorney fee award," "fee shifting," "we're shifting all  
17 the fees," that sort of thing, that that's just common  
18 usage, and that the single/plural fees in  
19 Subsection (b) (2) just does not provide the kind of  
20 strong indication that would be necessary to overcome  
21 the real thrust of the rest of the statute, which is  
22 that it's something that a court does for each of these  
23 cases. It sets out this payment plan; it does each of  
24 the other things that are set out in the statute.

25 CHIEF JUSTICE ROBERTS: Ms. Saharsky, I

1 don't -- I can't -- I'm not terribly persuaded by your  
2 deterrence argument. I mean, no statute pursues its  
3 purposes at every cost. And maybe Congress decided they  
4 could -- they didn't need to take the last 23 cents an  
5 hour the prisoner earned to promote the deterrence when  
6 they have all these other anti-filing provisions in the  
7 law.

8 MS. SAHARSKY: Well, this is the only  
9 provision that provides a financial deterrent. There  
10 are other provisions, like the three-strikes provisions,  
11 et cetera. But this is the one, and this is in the  
12 record, where members of Congress said it makes an  
13 inmate stop and think: Is this lawsuit worth the cost?

14 And in the amount that --

15 CHIEF JUSTICE ROBERTS: Yes, but Congress is  
16 talking about, okay, they have to pay the filing fee.  
17 Certainly Congress didn't focus, I wouldn't think, on  
18 whether it's -- well, I assume they didn't focus on  
19 whether it's per case or per prisoner, because it's  
20 really quite unclear.

21 MS. SAHARSKY: Well, we think that Congress  
22 did make that decision when it wrote the -- the statute  
23 from a perspective of a single case. Congress --

24 CHIEF JUSTICE ROBERTS: I wanted to talk  
25 about that. I -- the first reading, two struck me as

1 different than one, because in -- in one you're talking  
2 about, oh, this is what the Court should do. But on two  
3 you say this is what's required of the prisoner, and it  
4 just says up to 20 percent.

5 Now I know one says required two, but it  
6 immediately shifts its -- he's required to pay the whole  
7 thing, and that's the important point. But -- but two,  
8 it says this is what's required of the prisoner, monthly  
9 payments of 20 percent of the preceding month's income.

10 MS. SAHARSKY: Right. Towards --

11 CHIEF JUSTICE ROBERTS: To me that seems to  
12 be more a prisoner focus than a case-by-case.

13 MS. SAHARSKY: But it's -- it's linked to  
14 Subsection (b)(1). This whole thing is talking about  
15 what happens in a -- in a specific case. It starts by  
16 saying the -- "When a civil action or an appeal is  
17 filed, you shall pay the full amount of the filing fee,  
18 and here's the way to do it." And Subsection (b) then  
19 triggers -- Subsection (b)(1) then triggers  
20 Subsection (b)(2).

21 We think Judge Shreenavossen got this  
22 exactly right in the opinion for the D.C. Circuit where  
23 he said that when you start reading (b)(2), it is  
24 triggered from (b)(1), and it continues the per-case  
25 focus that it's talking about, first we have an initial

1 partial payment for one case, and then we have monthly  
2 payments to pay off the balance of that case.

3 And that's --

4 CHIEF JUSTICE ROBERTS: I'm not sure that's  
5 responsive to my point. I guess what I was saying is I  
6 don't think it carries forward the case-by-case basis  
7 because it speaks solely of what's required of the  
8 prisoner in a way that doesn't address case by case at  
9 all. I mean, that's why this is such a confusing  
10 statute.

11 MS. SAHARSKY: Well, we think -- the reason  
12 that we think it does, just to be clear as possible, is  
13 because of the language that starts Subsection (b) (2),  
14 which is, "After payment of the initial partial filing  
15 fee" -- which is for one case -- "then the prisoner is  
16 required to make monthly payments," which is to pay the  
17 remaining amount because we know he has to pay the full  
18 amount for one case.

19 CHIEF JUSTICE ROBERTS: Of 20 percent of the  
20 preceding month's income. To me, I -- well, I would  
21 think at least as reasonable as you're reading, to say  
22 when you look at what is required of the prisoner, 20  
23 percent of his income, that doesn't have anything to do  
24 case by case, because what you would require, of course,  
25 is that he pay 40 percent if there are two cases, or 60



1 percent if there are three, or all of it, if it's above  
2 \$10. And I think he -- anyone -- someone looking at  
3 that may say, no, he's only supposed to pay 20 percent  
4 of his income.

5 MS. SAHARSKY: But this -- this part of the  
6 statute, and all the parts of this statute, really, are  
7 talking about the perspective of a single case. And we  
8 think the 20 percent makes sense in that regard, because  
9 as one member of Congress said -- and this was quoted in  
10 the D.C. Circuit's opinion -- the filing fee of -- of 20  
11 percent is small enough not to deter a prisoner with a  
12 meritorious claim, but it's large enough to deter  
13 frivolous claims or multiple filings.

14 So the 20 percent essentially leaves room  
15 for multiple filings that you could apply at more than  
16 one time when a prisoner has a second case, a third  
17 case, a --

18 CHIEF JUSTICE ROBERTS: Well, yes, but he  
19 doesn't get off the hook for the other ones. It's  
20 just -- has to pay it further down, you know, it's --  
21 it's like a mortgage. I mean, you get 30 years, you  
22 have to pay it further down. If you're on 15 years, you  
23 have to pay it less.

24 MS. SAHARSKY: Well, I think --

25 CHIEF JUSTICE ROBERTS: I mean, it's not

1 like he's getting off Scott-free.

2 MS. SAHARSKY: Right. I understand your  
3 question, but I think that there are a couple of  
4 problems with that. One is that there's nothing in the  
5 statute that suggests that you would delay the payments.  
6 And it doesn't make sense in terms of the statutory  
7 purpose to delay them.

8 As Judge Easterbrook's opinion for the  
9 Seventh Circuit said, if you want to have a  
10 pay-as-you-go system where there's an immediate cost to  
11 each individual case, the person needs to have an  
12 obligation to start paying right away, not five years in  
13 the future, or perhaps never.

14 CHIEF JUSTICE ROBERTS: Well, he pays the 20  
15 percent in every case right away.

16 MS. SAHARSKY: Right. But that's a one-time  
17 payment, and it could be quite small. And that's very  
18 different from having an ongoing monthly payment that  
19 starts right away and that you have to pay.

20 But I do want to address another -- another  
21 point that I think your question raised, which is are  
22 prisoners ever going to be paying these amounts,  
23 particularly where they have filed numerous cases like  
24 the individual in this case. And I think the answer is  
25 no, for two reasons. The first is a practical one. The

1 second one is a legal one.

2 I guess I'll start with the legal one that  
3 numerous courts that have considered this issue have  
4 said that once a prisoner is out in the world and is no  
5 longer a prisoner but wants to continue his case, he can  
6 try to qualify for regular IFP status and no longer have  
7 to make his payments. So potentially, he's not making  
8 those payments.

9 And regardless of how you would decide  
10 that legal --

11 CHIEF JUSTICE ROBERTS: You agree with that  
12 interpretation?

13 MS. SAHARSKY: It's not something that we've  
14 taken a position on in this case.

15 CHIEF JUSTICE ROBERTS: Then I don't think  
16 it's fair to rely on it.

17 MS. SAHARSKY: Well, then I -- I do think  
18 it's fair to rely on it in light of the fact that no one  
19 is collecting -- no one is -- there's not any  
20 centralized mechanism to collect now.

21 And that's really the second point that I  
22 wanted to make, which is regardless of how you would  
23 resolve that legal question, and actually the reason  
24 that the administrative office has not, so far as we  
25 know, taken a position on that, is because there are

1 serious practical problems to collecting.

2           One of those problems -- when you -- when  
3 you look at the statute, Subsection (b) allows you to  
4 take money from the trust accounts, so it's fairly easy  
5 to collect while the individual is in prison. But once  
6 the person is out in the world, courts -- each  
7 individual court trying to collect filing fees that  
8 are -- that the inmates -- the former inmate's on the  
9 hook for is quite a difficult thing.

10           We have spoken with folks from the  
11 administrative office who tell us that there is not now  
12 any centralized system for trying to refer those  
13 obligations for treasury, and I think you could imagine  
14 how cumbersome that would be. So to think that  
15 potentially paying five years down the road, or never  
16 paying is any kind of marginal deterrent I think would  
17 be wrong.

18           We think that Congress knew that there were  
19 multiple filers out there, and that if they were going  
20 to file more lawsuits, they should pay more. And just  
21 to be clear about what Congress was saying here, no one  
22 is precluded from going to court. All Congress is  
23 saying is something very reasonable, which is if you  
24 have funds available and you continue filing more  
25 lawsuits and appeals, you should have to pay. You

1 should have to contribute. And we think that that makes  
2 complete sense.

3 JUSTICE KAGAN: Ms. Saharsky, can I get back  
4 to the \$10 rule and the BOP policy with respect to this?  
5 I think it was the Chief Justice who said that he didn't  
6 really understand. And I share his lack of  
7 understanding about how the BOP is actually doing this,  
8 given the language of the statute.

9 The statute says, you know, "shall forward  
10 payments each time the amount in the account exceeds  
11 \$10." So that suggests to me that if you're looking at  
12 an account with \$10 and 1 cent, you make the next  
13 payment. And I understand from your brief that that's  
14 not what the BOP is doing. And how can the BOP be not  
15 doing that?

16 MS. SAHARSKY: Well, a -- a couple of  
17 answers. First of all, we think that that language that  
18 you -- you cited can be read multiple ways, as I think  
19 the discussion with Justice Breyer perhaps suggested,  
20 that it could mean a \$10 floor or it could mean that you  
21 start making payments at the \$10 and then go below the  
22 \$10.

23 The BOP has long-standing -- has taken the  
24 position, long-standing position, that you have a \$10  
25 floor that is not in any kind of regulation or published

1 guidance. The way that we do it is we have a database  
2 that is basically for inmate trust accounts. It's just  
3 an electronic system for having money coming in and out  
4 of the accounts. And we have had that \$10 floor in  
5 there since that database was set up in 2001. But we  
6 think the statute could be read both ways, and we think  
7 it is more consistent with Congress's intention to leave  
8 the \$10 in --

9 JUSTICE SCALIA: Yes, that's probably right.  
10 But how can it be read that way? Tell me how it can be  
11 read that way.

12 MS. SAHARSKY: Right.

13 JUSTICE SCALIA: You're saying you can't  
14 touch \$10. In -- in all cases, \$10 will always remain  
15 in the account. How can you read it that way?

16 MS. SAHARSKY: Well, because when it says  
17 "exceeds \$10," I think you could -- you could read it as  
18 that it can't -- kind of the flip side, that you can't  
19 go below the \$10. Or you could say that you could start  
20 at the --

21 JUSTICE SCALIA: Just read the language.  
22 Read the language. What -- what language produces that  
23 result?

24 MS. SAHARSKY: Right. We think that it  
25 is -- when you say it exceeds \$10 that that means that

1 you can't -- there's the flip side of it that you can't  
2 go below \$10. But to be --

3 JUSTICE SCALIA: That doesn't follow. It --  
4 it says you can take 20 percent if the account exceeds  
5 \$10. If the account exceeds \$10, you take 20 percent of  
6 the account.

7 MS. SAHARSKY: Well, Justice Scalia --

8 JUSTICE SCALIA: That's what it says.

9 MS. SAHARSKY: Right. If -- if you -- we  
10 think that it can read both ways, but this is -- if you  
11 disagreed about that, we don't think that that issue  
12 resolves this case for a number --

13 JUSTICE BREYER: Anyway, why can't you read  
14 it that way? You forward the payment each time the  
15 amount exceeds \$10. Forwarding it consists of pressing  
16 an electronic button. And so the instant you press that  
17 button, it does not exceed \$10. And there we have it.  
18 So there is a way of construing the language which is  
19 consistent with the obvious purpose to me, which is to  
20 leave this prisoner with at least \$10.

21 MS. SAHARSKY: Well, that's what we think.  
22 We think it can be read multiple ways. And so far as we  
23 know about the experience, it has been read multiple  
24 ways. There are cases in the courts of appeals that  
25 have read it one way versus the other. To be clear

1    though, these cases not ones that have gone through any  
2    detailed statutory analysis, not even as much detail as  
3    this Court's discussion at argument today, but have just  
4    said in an offhand line either you can go below the \$10  
5    or can't. They've kind of gone both ways on that.

6                   And in terms of experience, we know from the  
7    Second Circuit's case that's cited in the briefs,  
8    Whitfield, that New York did not go below the \$10. I  
9    asked counsel of record for the States. The States  
10   filed a brief on our side of this case, and -- and the  
11   counsel of record is the Solicitor General of Michigan.  
12   He said that Michigan does not go below the \$10. My  
13   friend on the other side has suggested --

14                   JUSTICE SOTOMAYOR: But does all of this by  
15   all of the States, all of the prisons? Because your  
16   adversary says that some are going below the \$10.

17                   MS. SAHARSKY: I'm not sure that that's  
18   true. He cites two cases. One is -- they're from  
19   Maryland and from Iowa. One of the cases said that  
20   there was -- that it went below the \$10 in a -- in one  
21   case. But it didn't say that was the State policy.  
22   I -- you know, I don't know if it was.

23                   And then the second was an individual  
24   accounting clerk who had gone below the \$10 and who had  
25   done it manually. So I don't know that that represents



1 any kind of policy either.

2 But if I could step back, I think it is not  
3 necessary for this Court to resolve the \$10 issue to  
4 resolve the question presented, because the question is  
5 should an inmate who files more cases have to make  
6 monthly payments?

7 And just as -- and just parenthetically to  
8 highlight why the Court doesn't need to resolve the \$10  
9 issue to resolve this case, this was not an issue that  
10 Petitioner briefed before the D.C. Circuit. It's not  
11 anything that the D.C. Circuit's opinion addressed. And  
12 it's not something that was in the certiorari petition.  
13 So why --

14 JUSTICE SCALIA: And that issue could come  
15 up in the very first payment, couldn't it? If the guy  
16 has \$10 and 1 cent in his account, the very first  
17 payment could raise that issue.

18 MS. SAHARSKY: Yes, that's true.

19 JUSTICE SCALIA: So it's not an issue  
20 presented by the -- by the question of whether you use  
21 the per-case or per-prisoner approach.

22 MS. SAHARSKY: I completely agree.

23 JUSTICE SCALIA: It's a problem either way.

24 MR. SULLIVAN: However you resolve the  
25 question presented, that would still be a separate

1 question, one that the courts of appeals have not  
2 considered in any level of detail.

3 The extent --

4 CHIEF JUSTICE ROBERTS: Ms. Saharsky, I  
5 find -- I -- I think others may too. I find the issue  
6 that's before us very difficult to resolve based on the  
7 statutory language. Is there any doctrine tantamount to  
8 the rule of lenity in interpreting a criminal statute  
9 that applies here? Because the thing that strikes me  
10 most is the extreme harshness of your position. We're  
11 talking about earning 23 cents an hour, filing fees of  
12 \$350, \$505. And the money is used to -- for what?  
13 Phone calls to family and friends, stamps for letters,  
14 and to buy books. And you're going to take the last,  
15 you know, whatever so that someone who's in there for 20  
16 years can't even buy a book? That seems very, very  
17 harsh.

18 And you seem to be willing to interpret the  
19 ambiguity in the statute to save the last \$10, but  
20 you're unwilling to interpret what I think at least I  
21 regard as the ambiguity in the statute to allow  
22 prisoners -- I mean, they are prisoners. They're not --  
23 that's perhaps not entitled to any grace, but who in  
24 some States earn 10 cents an hour. You're not willing  
25 to interpret that ambiguity in a way that allows them to

1 keep that so they can pay for phone calls to their  
2 family.

3 MS. SAHARSKY: Well, a couple of answers.  
4 First of all, we think that this is not -- this -- this  
5 question of a person having so little in their money --  
6 money in their the account only arises in the case that  
7 you're talking about someone who has filed five or more  
8 lawsuits, which is not the ordinary case. I mean, it is  
9 obviously a case to consider. But at least in the BOP's  
10 experience, the vast majority of people who have orders  
11 owed are for one lawsuit, two lawsuits. Most of the  
12 court of appeals' cases below are like that, et cetera.

13 Putting that to the side, of course, this  
14 statute never prevents a prisoner from bringing a  
15 meritorious case because of the safety-valve provision.  
16 We also interpret the \$10 amount to leave money in the  
17 account.

18 There's also, of course, administrative  
19 remedies, which administrative exhaustion is required.  
20 So that helps resolve any questions about making sure  
21 that claims are heard. And, in fact, the BOP does have  
22 the discretion to allow phone calls, et cetera, to  
23 indigent prisoner, also stamps, et cetera, et cetera.

24 So in terms of what you potentially perceive  
25 as harshness, this only arises in cases where an inmate

1 is filing so many cases, that potentially a large  
2 portion of his income used to pay filing fees. And  
3 really that's --

4 CHIEF JUSTICE ROBERTS: Just a thought.  
5 Well, if you're there for 20 years, maybe you should let  
6 them buy a book.

7 MS. SAHARSKY: Right. And this -- again,  
8 this situation there -- I think most prisons actually  
9 have libraries that books are available. And like the  
10 Court has had some cases about what libraries --

11 CHIEF JUSTICE ROBERTS: I'm sure they are --  
12 I'm sure they are very good libraries, too.

13 MS. SAHARSKY: Well, just -- just to be  
14 clear, you know, this is a situation that only arises in  
15 the fairly atypical situation. We -- it's true that the  
16 statute does not specifically address the -- the  
17 situation of a prisoner with five lawsuits or six  
18 lawsuits and orders et cetera. But we think the reason  
19 that that is and that the Seventh Circuit suggested in  
20 one of the early opinions after PLRA was enacted is  
21 because Congress thought that the three -- three-strikes  
22 provision was going to prevent all of these lawsuits,  
23 but it --

24 JUSTICE SCALIA: Do a lot of prisoners buy  
25 books? I mean, does Amazon really make a lot of money

1 off these people?

2 MS. SAHARSKY: I can't say, you know --

3 JUSTICE SCALIA: I don't think --

4 MS. SAHARSKY: -- the experience that we have  
5 in this case, for example, might be good to highlight,  
6 which is Pinson, the individual who has filed more than  
7 a hundred cases -- gets regular deposits into his  
8 account, had been using them to buy books and other  
9 materials. Those are in the Joint Appendix starting on  
10 pages 55, 56, et cetera. So it shows that prisoners are  
11 able to -- even Pinson who has filed over a hundred  
12 cases is able to -- to pay those amounts.

13 And just to -- just to clarify, I think the  
14 Court is thinking of a situation of, you know, a  
15 prisoner who has 10 cents of income or \$10 of income.  
16 But we don't think that that is the typical situation.  
17 Pinson's account at the time he filed shows that he  
18 received an average of -- I think it was \$48 a month of  
19 income. I have asked the BOP for statistics just  
20 because I was curious about what is the median income  
21 that's received, what is the median deposit. They said  
22 that for the -- the past fiscal year, the median --  
23 median income an inmate receives is approximately \$120 a  
24 month. So, in fact, with that, if an inmate has 20  
25 percent that he's paying towards filing fees, he could

1 pay them off at a reasonable rate. And we think that  
2 that's just really a much better alternative from what  
3 Congress intended.

4 JUSTICE KAGAN: But that does raise -- I  
5 mean, as Mr. Shelley says, using that exact \$50 number.  
6 If you have \$50 and you have five lawsuits, the \$50 is  
7 gone, assuming that the BOP's policy is not uniform and  
8 maybe is not statutorily authorized.

9 MS. SAHARSKY: Yes, I think that -- I think  
10 that that is the implication of it, and we think that  
11 that is what Congress intended.

12 I am not sure if the Court is interested in  
13 such information, but we actually did go ahead and just  
14 look in our database to see how many inmates have one  
15 PLRA order that they're paying as opposed to five orders  
16 that we're paying. And what we found, just checking  
17 last week, was that inmates -- there are 944 inmates of  
18 the over 200,000 in the federal system who are paying on  
19 one order, and only 60 inmates of the over 200,000 who  
20 are paying on five or more orders or who had six, and  
21 then 42 inmates who have six or more orders.

22 So this actually is a -- a very small  
23 problem, at least federally, and we would not want this  
24 very small tail to wag the dog of this statute that is  
25 clearly -- clearly intended by Congress to make sure

1 that inmates who are filing frivolous lawsuits have a  
2 financial disincentive to do so. And --

3 JUSTICE SOTOMAYOR: Be clear about your  
4 policy. And I think your adversary agrees. Under (a),  
5 the 20 percent has to be paid on all five cases whether  
6 the amount is above 10 or -- the amount in the account  
7 is above 10 or below 10, correct?

8 MS. SAHARSKY: Correct.

9 JUSTICE SOTOMAYOR: So those five cases  
10 would always wipe out the \$10.

11 MS. SAHARSKY: The \$10 is not an impediment  
12 to the initial partial filing fee. It is only in the  
13 second part of it. That --

14 JUSTICE SOTOMAYOR: So -- and so the \$10  
15 floor starts once the account goes up -- you have to --  
16 a bottom. You have always \$10 in your account, but any  
17 dollar that goes into your account after that,  
18 20 percent has to be paid.

19 MS. SAHARSKY: Right. Be we think --  
20 assuming that it's over the \$10. But we think that --  
21 that there's a -- you know, that there's at least \$10 in  
22 the account or would wait until there was \$10 in the  
23 account. So if I'm understanding your question  
24 correctly, we would wait until there was \$10 in the  
25 account as just a matter of --

1 JUSTICE SOTOMAYOR: But you would take  
2 20 percent. Let's say there's \$10 and -- there's \$11.  
3 The one extra dollar is paid to whom?

4 MS. SAHARSKY: To --

5 JUSTICE SOTOMAYOR: Let's assume there's  
6 five cases there.

7 MS. SAHARSKY: We would -- if we can't pay  
8 all of the five cases, as we believe Congress intended,  
9 we would pay the oldest lawsuit. The oldest -- and --  
10 and -- and I don't mean that by filing date. I mean the  
11 oldest order that was --

12 JUSTICE SOTOMAYOR: Would take that entire  
13 \$1?

14 MS. SAHARSKY: Yes. Because the statute  
15 says to pay 20 percent per case, so we would try to do  
16 the closest thing that we -- we could to that.

17 And as Justice Ginsburg said, you can't get  
18 blood out of a stone. There comes a point at which, if  
19 there's not funds, we can't pay. But as we understand  
20 the statute, and we think it makes perfect sense in  
21 terms of what Congress wanted, if you have money  
22 available and you continue to file more lawsuits and get  
23 orders entered, that you -- the inmate should have to  
24 pay for them.

25 So at the end of the day, we think that the



1 D.C. Circuit got it right, that both when you look at  
2 the specific text of this provision, which is  
3 Subsection (b) about filing fees but really the entire  
4 statute written from the perspective of a single case, a  
5 checklist for a single case, that Congress wanted  
6 inmates who were filing more lawsuits to pay more.

7           And we think that that makes sense and that  
8 also -- and I want -- this is, I think, a partial answer  
9 to one of the prior questions of the Chief Justice in  
10 terms of interpretative canons, etc., that it's  
11 consistent with what this Court did last term in the  
12 Coleman case.

13           In the Coleman case the Court was  
14 considering the three-strikes provision, but it  
15 recognized that that provision is written from the  
16 perspective of a single case, a single action, or  
17 appeal. You could get a strike for the action. You  
18 could get a strike for the appeal.

19           And the same thing we think is true for the  
20 filing fees. You could owe the filing fees for the  
21 action. You could owe the filing fees for the appeal.  
22 And we think that that makes complete sense.

23           So unless there are further questions, we  
24 would urge the Court to affirm the decision of the  
25 D.C. Circuit.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 Oh, you have four minutes remaining.

3 REBUTTAL ARGUMENT OF ANTHONY F. SHELLEY  
4 ON BEHALF OF THE PETITIONER

5 MR. SHELLEY: Thank you, Mr. Chief Justice.  
6 First of all, with respect to the -- the  
7 hypothetical that Justice Sotomayor asked, in fact, I  
8 think if the account had \$11 in it, the government's  
9 position would lead to none of the clerks of the courts  
10 being paid because the first payment would take the --  
11 the balance under \$10. So that seems, again, as a  
12 number of justices have mentioned, other than  
13 Justice Breyer, a perverse reading of the \$10 rule.

14 But I also want to take on the idea that  
15 this is the only provision in the statute that provides  
16 for a financial effect on the prisoner when filing a  
17 lawsuit. No -- as the Chief Justice mentioned, the  
18 initial partial filing fee applies in every case. No  
19 \$10 rule. No minimum.

20 So that is a -- an immediate financial  
21 incentive not to file a frivolous lawsuit because money  
22 is going to go immediately. And if it doesn't go  
23 immediately, it's a debt that gets paid sequentially,  
24 much like the per-prisoner approach would adopt for  
25 (b) (2). But (b) (2) then takes a longer-term point of

1 view. (b) (1) is an immediate financial disincentive.

2 (b) (2) is the longer financial disincentive month after  
3 month with the installment payments.

4 I also want to take on the idea that "fees"  
5 and "filing fee" appear interchangeably in the statute.  
6 They do not. Ms. Saharsky mentioned the word "fees,"  
7 but "fees" unadorned with the word "filing" in front of  
8 it appears differently than does the word "filing fees."

9 The plural "filing fees" appears in exactly  
10 two spots: (b) (2). And then in the cross-reference to  
11 the cost section, I believe it's (f) -- in the (f)  
12 section where it says that costs shall be charged the  
13 same way as filing fees. They both use the plural  
14 "filing fees."

15 So this was purposeful. Congress used the  
16 plural "filing fees" only twice. And that's because, I  
17 think, they were talking about the -- the numerous cases  
18 being paid to a single clerk.

19 And finally, I'd like to say, it has often  
20 been said that the measure of a society is not how it  
21 treats it's outstanding citizens but how it treats  
22 weakest.

23 Here there's no -- it's criminals. Here  
24 there's no real reason to pile on to prisoners with this  
25 additional onerous financial incentive when the other

1 aspects of the PLRA do the work of deterring frivolous  
2 lawsuits along with the disincentive that's provided  
3 under the per-prisoner approach.

4 We would ask that the Court reverse the  
5 D.C. Circuit.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:41 a.m., the case in the  
9 above-entitled matter was submitted.)

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