

## **Opinions for the week of August 10 – August 14, 2020**

### **Todd Kurtzhals v. County of Dunn** No. 19-3111

Argued May 28, 2020 — Decided August 10, 2020

Case Type: Civil

Western District of Wisconsin. No. 18 C 247 — **James D. Peterson**, *Chief Judge*.

Before MANION, KANNE, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. Sergeant Todd Kurtzhals worked for the Sheriff's Office of Dunn County, Wisconsin. After he threatened physical violence against one of his fellow officers, Deputy Dennis Rhead, the Office put him on temporary paid administrative leave and ordered him to undergo a fitness-for-duty evaluation. Kurtzhals was convinced that his supervisors took this course of action because they knew that Kurtzhals has a history of Post-Traumatic Stress Disorder (PTSD), not because his conduct violated the County's Workplace Violence Policy and implicated public safety. Acting on that conviction, Kurtzhals sued Dunn County for employment discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112. The district court concluded that no reasonable jury could find that Kurtzhals's PTSD was the "but for" cause of the County's action or that it was plainly unreasonable for Kurtzhals's superiors to believe that a fitness-for-duty examination was warranted, and so it granted summary judgment to the County. We agree with that assessment and affirm.

### **USA v. Earl R. Orr** No. 19-1938

Argued May 21, 2020 — Decided August 10, 2020

Case Type: Criminal

Central District of Illinois. No. 2:16-cr-20052 — **Sara Darrow**, *Chief Judge*.

Before MANION, HAMILTON, and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. A search warrant for illegal drugs at the home of Earl Orr led to his arrest for possessing a firearm as a felon. After a two-day trial, a jury found him guilty. Orr appeals a number of decisions made by the district court before and during that trial. We conclude that the district court properly denied Orr's motion to suppress evidence. But Judge Bruce, who presided over this case at trial, had engaged in improper ex parte communications with the U.S. Attorney's Office in other matters. That cast a pall over certain decisions in this case which required the exercise of substantial discretion. This was not harmless error, so we vacate Orr's conviction and remand for further proceedings before a different judge.

### **Driftless Area Land Conservanc v. Michael Huebsch** No. 20-1350

Submitted July 2, 2020 — Decided August 11, 2020

Case Type: Civil

Western District of Wisconsin. No. 19-cv-1007-wmc — **William M. Conley**, *Judge*.

Before SYKES, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

SYKES, *Chief Judge*. The Wisconsin Public Service Commission issued a permit authorizing the construction of a \$500 million electricity transmission line in southwestern Wisconsin. Two environmental groups sued the Commission to invalidate the permit. The permit holders moved to intervene to protect their interest in the permit; without it the power line cannot be built. The district court denied the motion, and the permit holders appealed. Briefing was completed at the end of June, and we set the case for oral argument on September 22, 2020. The permit holders moved for expedited review without oral argument; they want an earlier ruling because the case continues without them in the district court. The environmental groups responded in opposition, and the matter is ready for decision. We grant the motion. The briefs and record adequately address the single issue raised on appeal, and oral argument would not significantly assist the court. See FED. R. APP. P. 34(a)(2)(C). The case is submitted on the briefs, and

we now reverse the district court. The permit holders are entitled to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure. In many respects this is a paradigmatic case for intervention as of right.

**Ron Morris v. BNSF Railway Company** Nos. 19-2808 & 19-2913

Argued June 5, 2020 — Decided August 11, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-2923 — **Matthew F. Kennelly**, *Judge*.

Before EASTERBROOK, HAMILTON, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Ron Morris worked for nine years as a train conductor for Burlington Northern Santa Fe Railway. The company fired him after he committed two speeding infractions during a single shift. Morris, who is African American, invoked Title VII and brought suit to challenge his termination, alleging that BNSF punished him more severely than non-black employees who committed similar safety violations. His case proceeded to trial and a jury found in his favor. BNSF challenges the district court's decisions at every stage of the case, from the viability of Morris's theory of discrimination and sufficiency of his evidence to discovery rulings and remedies. We see no errors and affirm, on most issues applying a deferential standard of review and respecting the district court's close proximity to questions bearing upon management of the litigation and the admissibility and adequacy of evidence.

**USA v. Latasha Gamble** No. 19-2514

Argued May 27, 2020 — August 11, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:17-cr-00733-1 — **Ronald A. Guzmán**, *Judge*.

Before EASTERBROOK, HAMILTON, and BRENNAN, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Defendant Latasha Gamble was found guilty of armed bank robbery and sentenced to 151 months in prison. She challenges her sentence on two grounds that revolve around whether she used a real firearm in the robbery. First, she argues that the district court erred in finding that she used a real firearm in the robbery. Second, she argues that the district judge violated her Fifth Amendment privilege against self-incrimination by considering at sentencing his finding that she lied to the FBI about buying and using a fake gun in the robbery and that she did not help recover the discarded gun. We affirm. Ample evidence supported the judge's finding that Gamble used a real firearm in the robbery. Also, Gamble's Fifth Amendment rights were not violated. She did not remain silent but instead chose to tell the FBI where she got the gun and how she got rid of it. She thus waived her Fifth Amendment privilege on those topics. See *Anderson v. Charles*, 447 U.S. 404, 408 (1980). The district judge was entitled to consider her false statements in deciding on her sentence.

**Maria Mercedes Lopez Garcia v. William P. Barr** No. 19-2081

Argued December 2, 2019 — Decided August 11, 2020

Case Type: Agency

Board of Immigration Appeals.

Nos. A206-450-595, A206-450-596, A206-450-597 and A206-450-598.

Before SYKES, Chief Judge, and BAUER and EASTERBROOK, *Circuit Judges*.

BAUER, *Circuit Judge*. Maria Lopez-Garcia and her three minor children, Luisa, Wendy, and Rolando Lopez-Lopez are natives and citizens of Guatemala. We consider whether the Board of Immigration Appeals (BIA) abused its discretion in denying their motions to reconsider and reopen. Upon review, we find no abuse of discretion by the BIA and deny the petition.

**Delores Henry v. Melody Hulett** No. 16-4234

Argued May 14, 2020 — Decided August 11, 2020

Case Type: Prisoner

Central District of Illinois. No. 12-CV-3087 — **Richard Mills**, *Judge*.

Before SYKES, *Chief Judge*, and FLAUM, EASTERBROOK, MANION, KANNE, ROVNER, WOOD, HAMILTON, BARRETT, BRENNAN, SCUDDER, and ST. EVE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*, dissenting.

ST. EVE, *Circuit Judge*. Plaintiffs—a class of more than 200 current and former female inmates at Lincoln Correctional Center—brought this action following mass strip searches conducted as part of a cadet training exercise in 2011. They contend that the circumstances of the searches—particularly the intrusive and degrading manner in which they occurred—violated their Fourth and Eighth Amendment rights. Defendants—various prison officials—moved for summary judgment before the district court, arguing that our circuit’s prior decisions foreclosed Plaintiffs’ Fourth Amendment claim. The district court agreed, concluding that, under *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), and *King v. McCarty*, 781 F.3d 889 (7th Cir. 2015) (per curiam), convicted prisoners do not maintain a privacy interest during visual inspections of their bodies. A divided panel of our court affirmed that decision, following the same reasoning. We granted Plaintiffs’ petition for rehearing en banc and vacated the panel’s opinion and judgment. We hold that the Fourth Amendment protects a right to bodily privacy for convicted prisoners, albeit in a significantly limited way, including during visual inspections. We therefore reverse the district court’s entry of partial summary judgment for Defendants on Plaintiffs’ Fourth Amendment claim and remand for further proceedings.

**Heather Plainse v. Andrew Saul** No. 19-3190

Argued May 22, 2020 — Decided August 12, 2020

Case Type: Civil

Eastern District of Wisconsin. No. 1:18-cv-01381-WCG — **William C. Griesbach**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

**ORDER**

Heather Plainse filed for disability insurance benefits and supplemental security income benefits in early 2015. She claimed disability beginning on June 11, 2014, due to a heart condition and juvenile rheumatoid arthritis. Plainse began working at age seventeen. From 2011 to 2016, she worked for nine different employers but could not sustain employment due to joint pain and severe fatigue. The Social Security Administration denied her claims both initially and upon reconsideration. Plainse requested an administrative hearing and appeared in July 2017... We find no error and AFFIRM the denial of benefits.

**Tyler Jaxson v. Andrew Saul** Nos. 19-3011 & 19-3125

Argued June 5, 2020 — Decided June 26, 2020 — Amended August 12, 2020

Case Type: Civil

Northern District of Illinois, Western Division. No. 17-CV-50090 — **Lisa A. Jensen**, *Magistrate Judge*.

Before EASTERBROOK, HAMILTON, and SCUDDER, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. David Daugherty, an administrative law judge hearing disability-benefits applications for the Social Security Administration, supplemented his salary by taking bribes. Eric Conn, who represented many claimants, paid Daugherty \$400 per favorable decision; Conn himself received \$5,000 or more per case out of the benefits that Daugherty awarded to Conn’s clients. Four physicians, including Frederic Huffnagle, submitted evaluations to support Daugherty’s decisions. Daugherty told Conn what kind of evidence he wanted to see. Conn wrote the reports, which one of the physicians would sign without change even if the applicant for benefits failed to appear for examination. Huffnagle’s

“medical suite” was in Conn’s office... Jaxson’s cross-appeal contends that proceedings on remand must be treated as hearings “on the record” governed by the Administrative Procedure Act. 5 U.S.C. §554(a). The district court deemed this argument forfeited because it had not been adequately developed. That was not an abuse of discretion. What’s more, for the reasons we have given, treating a redetermination as one governed by §554 would not do Jaxson any good. Even the most formal procedures, those used by federal judges, do not guarantee evidentiary hearings on disputes about the admissibility of evidence. The APA provides that “[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled...to an opportunity to show the contrary.” 5 U.S.C. §556(e). We’ve concluded that this is also part of the procedures ordinarily used in informal adjudication: each party is entitled to be heard. The APA would not add to Jaxson’s rights.

**USA v. Lucy Owens** No. 19-2822

Argued August 4, 2020 — Decided August 12, 2020

Case Type: Criminal

Northern District of Indiana, Hammond Division. No. 2:17CR65-001 — **Joseph S. Van Bokkelen**, Judge. Before DANIEL A. MANION, Circuit Judge; DIANE P. WOOD, Circuit Judge; AMY C. BARRETT, Circuit Judge.

**ORDER**

After a jury found Lucy Owens guilty of wire fraud, three psychological reports assessed whether Owens had a mental illness that prevented her from distinguishing reality from fiction. At sentencing, Owens argued that her condition warranted a sentence of house arrest, not prison, but the district court disagreed. Relying on the third report, which said that Owens did not have “hallucinations” or “delusions” (though she had other mental impairments), it imposed a term of 57 months in prison—the top of the Guidelines range. On appeal, Owens argues that the court did not adequately address her arguments about her mental illness. We conclude that the court sufficiently addressed and reasonably rejected Owens’s contention that hallucinations and delusions affected her actions, so we affirm.

**Michael Shakman v. International Brotherhood** No. 19-2772

Argued April 15, 2020 — Decided August 12, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:69-cv-02145 — **Sidney I. Schenkier**, *Magistrate Judge*.

Before MANION, HAMILTON, and BARRETT, *Circuit Judges*.

BARRETT, *Circuit Judge*. Many years ago, a class of plaintiffs sued the Clerk of the Circuit Court of Cook County, alleging that the Clerk was engaging in unlawful political patronage in violation of the First and Fourteenth Amendments of the Constitution. In 1972, the Clerk and the plaintiffs entered into a consent decree that prohibited the Clerk from discriminating against the office’s employees for political reasons, and in 1983, a separate judgment extended that prohibition to hiring practices....The union didn’t necessarily have to remain a bystander to the suit. It could have moved to intervene, and if the magistrate judge had denied the motion, the union could have appealed that order. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950) (“[A]n order denying intervention to a person having an absolute right to intervene is final and appealable.”). Rather than intervening, though, the union simply filed a memorandum in opposition to the plaintiffs’ motion for a declaratory judgment. While intervention would have clothed the union with party status, filing a memorandum did not. See *Gautreaux*, 475 F.3d at 852 (“Unfortunately, permitting CAC to participate in the proceedings by way of a formal motion led to a misapprehension on the part of that nonparty that it could appeal the district court’s decision.”). We lack jurisdiction unless a party invokes it, so this appeal is DISMISSED.

**Shan Fieldman v. Christine Brannon** No. 19-1795

Argued January 16, 2020 — Decided August 12, 2020

Case Type: Prisoner

Southern District of Illinois. No. 15-cv-1389 — **Nancy J. Rosenstengel**, *Chief Judge*.

Before FLAUM, MANION, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. On July 23, 2010, Shan Fieldman climbed into a truck in a Walmart parking lot and told a hitman that he wanted his ex-wife and her boyfriend killed. The hitman was in fact an undercover police officer who videotaped their conversation. Fieldman was charged and tried in Illinois state court for solicitation of murder for hire. Fieldman defended against the state's charges by contesting his intent (a necessary element of the offense) to have his ex-wife and her boyfriend killed. To that end, because a police informant brokered his meeting with the hitman, Fieldman sought to testify about his interactions with that informant during the five weeks before his conversation with the hitman. Fieldman believed this testimony would provide the jury with critical contextual information about his state of mind and demonstrate that his meeting with the hitman was a charade. But the Illinois trial court did not allow the jury to hear this testimony because the court concluded it was irrelevant. Fieldman was convicted and unsuccessfully appealed his convictions through the Illinois state courts. In this federal collateral attack on his conviction, Fieldman contends the court's exclusion of his testimony deprived him of his federal constitutional right to present a complete defense. We agree. The court's exclusion was contrary to clearly established federal law confirming a defendant's right to testify, on his own behalf, about circumstances bearing directly on his guilt or innocence or the jury's ascertainment of guilt. See *Crane v. Kentucky*, 476 U.S. 683 (1986); *Rock v. Arkansas*, 483 U.S. 44 (1987). And the exclusion of material portions of his testimony had a detrimental effect on his interests because it undercut his entire defense and effectively prevented him from challenging the state's strongest evidence. We therefore affirm the district court's grant of habeas relief

**USA v. Orlando Medina** No. 19-1909

Argued February 12, 2020 — Decided August 13, 2020

Case Type: Criminal

Eastern District of Wisconsin. No. 2:15-cr-00016-PP-1 — **Pamela Pepper**, *Chief Judge*.

Before BAUER, KANNE, and BARRETT, *Circuit Judges*.

BAUER, *Circuit Judge*. Orlando Medina was convicted of conspiracy to distribute 500 grams or more of cocaine. At a bench trial, key evidence included the testimony of police officers from Puerto Rico, four mail receipts, and the testimony of co-conspirator Rodolfo Duenas. Medina argues his conviction must be reversed because the judge should have found this evidence lacked credibility as a matter of law. He also argues this evidence constituted false testimony and violated his due process rights. For the following reasons, we affirm.

**Alejandro Salazar-Marroquin v. William P. Barr** No. 19-1669

Argued December 18, 2019 — Decided August 13, 2020

Case Type: Agency

Board of Immigration Appeals. No. A089-283-631

Before HAMILTON, BRENNAN, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*, concurs.

HAMILTON, *Circuit Judge*. Under immigration law, it can make a big difference whether a non-citizen entered the United States legally or not. For petitioner Alejandro Salazar Marroquin and his family, the difference is whether his marriage to a United States citizen makes him at least legally eligible for an adjustment of status that might allow him to remain in the United States lawfully. 8 U.S.C. § 1255(a). If he is not eligible and is removed after having failed to appear for his removal hearing in 2011, he will be inadmissible to the United States for five years after his removal. 8 U.S.C. § 1182(a)(6)(B).... In finding that the Board misapprehended the basis for petitioner's motion, we say nothing of the merits of his case for the sua sponte reopening of his removal proceedings. But in the first instance the Board should consider whether petitioner's alleged legal entry and his supporting evidence merit reopening of his

removal proceedings. We GRANT the petition for review and REMAND the case to the Board for further proceedings consistent with this opinio

**USA v. Gregory Greene** No. 19-3069

Case Type: Criminal

Argued August 4, 2020 — Decided August 14, 2020

Northern District of Illinois, Western Division. No. 3:17-CR-50054(1) — **Philip G. Reinhard**, *Judge*.

Before MANION, WOOD, and BARRETT, *Circuit Judges*.

MANION, *Circuit Judge*. Gregory Greene pleaded guilty to distributing child pornography, 18 U.S.C. §§ 2252A(a)(1), 2252A(b)(1), and received a within-guidelines prison sentence and a life term of supervised release. On appeal, he argues that the district court committed a procedural error in sentencing him to lifelong supervision because it violated the parsimony provision of the sentencing statute, which requires that a sentence be “sufficient, but not greater than necessary.” See 18 U.S.C. § 3553(a). Specifically, he challenges the district court’s statement that, for him, terms of 10 years and life would be “effectively the same” because his life after prison would be “short.” But the district court considered the guidelines and explained, with reference to the factors under § 3553(a), why it believed that a life term of supervised release was necessary, so we affirm

**Anthony J. Machicote v. Doctor Roethlisberger** No. 19-3009

Submitted July 23, 2020 — Decided August 14, 2020

Case Type: Prisoner

Western District of Wisconsin. No. 3:18-cv-249 — **Barbara B. Crabb**, *Judge*.

Before RIPPLE, HAMILTON, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Anthony Machicote is a Wisconsin inmate who had a surgery that left him in extreme pain necessitating strong medication at regular intervals. He faced delays and interruptions in receiving those drugs and experienced significant pain as a result. That led him to invoke 42 U.S.C. § 1983 and file a lawsuit against several physicians, a health services manager, and a nurse who worked at the New Lisbon Correctional Institution. The district court entered summary judgment for all defendants, concluding that Machicote had not shown that any of them were deliberately indifferent to his suffering. We agree with respect to most of the defendants and affirm the judgments in their favor. But Machicote has persuaded us that a factual issue remains as to the deliberate indifference of the nurse. We therefore vacate the judgment as to only that defendant and remand for a trial.

**Shannon Lewandowski v. City of Milwaukee** No. 19-2995

Submitted April 7, 2020 — Decided August 14, 2020

Case Type: Civil

Eastern District of Wisconsin. No. 2:16-cv-01089-WED — **William E. Duffin**, *Magistrate Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*; AMY C. BARRETT, *Circuit Judge*.

**ORDER**

Plaintiff Shannon Lewandowski, a former Milwaukee police officer, alleged that the Milwaukee Police Department violated Title VII of the Civil Rights Act of 1964 by discriminating against her on the basis of sex and retaliating against her for opposing sex discrimination. The district court granted summary judgment for the City of Milwaukee. We affirm. Our decision should not be interpreted as saying that the City has definitively shown that no discrimination or retaliation occurred. Rather, Lewandowski’s litigating tactics have failed to engage with the district court’s reasoning, and she has failed to show a reversible error on any issue she presented fairly to the district court.

**Reginald Pittman v. Madison County, Illinois** No. 19-2956

Argued May 18, 2020 — Decided August 14, 2020

Case Type: Civil

Southern District of Illinois. No. 3:08-cv-00890-SMY-DGW — **Staci M. Yandle**, Judge.

Before WOOD, BARRETT, and SCUDDER, *Circuit Judges*.

BARRETT, *Circuit Judge*. Reginald Pittman attempted suicide at the Madison County jail in 2007. Although the attempt failed, it left him in a vegetative state. Through his guardian, Pittman filed this § 1983 suit against Madison County and then-Madison County jail employees, Sergeant Randy Eaton and Deputy Matthew Werner, alleging that they violated the Fourteenth Amendment by failing to provide him with adequate medical care. In 2018, the suit went to trial for the second time, and the jury returned a verdict in favor of the defendants. We reverse the district court's denial of Pittman's motion for a new trial and remand because we conclude that one of the jury instructions erroneously directed the jury to evaluate Pittman's Fourteenth Amendment claim according to a subjective rather than objective standard.

**USA v. Sevon Thomas** No. 19-2129

Argued June 1, 2020 — Decided August 14, 2020

Case Type: Criminal

Southern District of Indiana, New Albany Division. No. 4:17-cr-13 — **Tanya Walton Pratt**, Judge.

Before RIPPLE, WOOD, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Sevon Thomas found himself charged with possessing a firearm in connection with a drug trafficking crime after he agreed to sell methamphetamine to a government cooperator. Once Thomas drove to the prearranged delivery time and place, the police arrested him and searched his car. When police opened the glove compartment, out fell two firearms and a bag of methamphetamine. At trial Thomas claimed that he used the guns for lawful purposes unrelated to drug dealing and therefore did not possess them "in furtherance of" a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). A jury disagreed and found Thomas guilty. On appeal Thomas argues that the district court made two errors at trial: improperly admitting so-called "dual-role" (both expert and lay) testimony from a federal agent and bungling the jury instructions. But Thomas raised neither challenge below, so he had to show a plain error necessitating reversal of his conviction. He falls short, so we affirm.

**Aaron Brace v. Andrew M. Saul** No. 19-2029

Argued January 30, 2020 — Decided August 14, 2020

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:18cv216 — **William C. Lee**, Judge

Before SYKES, *Chief Judge*, and MANION and KANNE, *Circuit Judges*.

SYKES, *Chief Judge*. Aaron Brace applied for Social Security disability benefits based on a number of chronic conditions—primarily back and neck pain due to degenerative disc disease. An administrative law judge denied his application after crediting testimony from a vocational expert that jobs are available in significant numbers in the national economy for a person with Brace's limitations. Brace's lawyer had asked the vocational expert to explain how he arrived at his job estimates. The expert's answer was inscrutable. The ALJ accepted his testimony anyway and on that basis rejected Brace's claim for benefits. That approach does not satisfy the substantial-evidence standard. See *Chavez v. Berryhill*, 895 F.3d 962, 968–70 (7th Cir. 2018). We reverse and remand to the agency for further proceedings.

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Only the text of the opinions is used. No editorial comment is added. For back issues or to send a comment, please contact [Sonja Simpson](#).