

Opinions for the week of August 17 – August 21, 2020

USA v. Kimberly Harrison No. 19-2680

Argued August 4, 2020 — Decided August 17, 2020

Case Type: Criminal

Western District of Wisconsin. No. 3:18CR00105-001 — **James D. Peterson**, *Chief Judge*.

Before DANIEL A. MANION, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*; AMY C. BARRETT, *Circuit Judge*.

ORDER

Kimberly Harrison pleaded guilty to aiding in the preparation of false tax forms. The district court sentenced her to 21 months' imprisonment, but it deferred ruling on the amount of restitution that she owed the government. After Harrison appealed, the court entered a separate order quantifying the restitution. Harrison now argues that the restitution order is void because her notice of appeal divested the court of jurisdiction to enter it. But a district court retains jurisdiction to order restitution even after a defendant appeals a sentence of incarceration, and a defendant must file a second notice of appeal to challenge a deferred restitution order. Because Harrison did not file a second notice of appeal, we dismiss her appeal of the restitution order. And because she does not provide any reason for reversing her conviction or any other aspects of her sentence, we affirm the district court's initial judgment.

Smart Oil, LLC v. DW Mazel, LLC No. 19-2542

Argued May 21, 2020 — Decided August 17, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-08146 — **Harry D. Leinenweber**, *Judge*.

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

BRENNAN, *Circuit Judge*. Smart Oil, LLC agreed to sell thirty parcels of land with gas stations and convenience stores to DW Mazel, LLC ("DWM"). DWM failed to close under the agreement, which by its terms granted Smart Oil the earnest money for the transaction as liquidated damages. But DWM never paid that money, and Smart Oil sued. DWM counter-claimed for breach of contract and fraudulent inducement. The district court granted Smart Oil summary judgment, ruling that DWM breached the agreement by not paying the earnest money, which Smart Oil was entitled to as liquidated damages under Illinois law. The court also ruled that DWM's counterclaims for breach of contract and fraudulent inducement failed for the same reason. DWM appeals. The district court ruled correctly in all respects, so we affirm.

USA v. UCB, Inc. No. 19-2273

Argued January 23, 2020 — Decided August 17, 2020

Case Type: Civil

Southern District of Illinois. No. 3:17-cv-00765-SMY-MAB — **Staci M. Yandle**, *Judge*.

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

SCUDDER, *Circuit Judge*, concurring in the judgment.

HAMILTON, *Circuit Judge*. The False Claims Act allows the United States government to dismiss a relator's qui tam suit over the relator's objection with notice and opportunity for a hearing. 31 U.S.C. § 3730(c)(2)(A). The Act does not indicate how, if at all, the district court is to review the government's decision to dismiss. The D.C. Circuit has said not at all; the Ninth Circuit has said for a rational basis. Compare *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), with *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). In this case, the district court said it agreed with the Ninth Circuit but applied something closer to administrative law's "arbitrary and

capricious” standard and denied dismissal. The government has appealed. The relator contends we should either dismiss for want of appellate jurisdiction or affirm... The decision of the district court is REVERSED and the case is REMANDED with instructions to enter judgment for the defendants on the relator’s claims under the False Claims Act, dismissing those claims with prejudice as to the relator and without prejudice as to the government.

USA v. Blair Cook No. 18-1343

On remand from the United States Supreme Court — Decided August 17, 2020

Case Type: Criminal

Western District of Wisconsin. No. 3:17-cr-00048 — **James D. Peterson**, *Chief Judge*.

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

ROVNER, *Circuit Judge*. A jury convicted Blair Cook of being an unlawful user of a controlled substance (marijuana) in possession of a firearm and ammunition. See 18 U.S.C. §§ 922(g)(3) (proscribing possession of firearm by unlawful user of controlled substance), 924(a)(2) (specifying penalties for one who “knowingly” violates section 922(g)). Cook appealed his conviction, contending that the statute underlying his conviction is facially vague, that it improperly limits his Second Amendment right to possess a firearm, and that the district court did not properly instruct the jury as to who constitutes an unlawful user of a controlled substance. We affirmed Cook’s conviction. *United States v. Cook*, 914 F.3d 545 (7th Cir. 2019). The Supreme Court subsequently held in *Rehaif v. United States*, 139 S. Ct. 2191, 2194, 2200 (2019), that the knowledge element of section 924(a)(2) requires the government to show that the defendant knew not only that he possessed a firearm, but that he belonged to the relevant category of persons barred from possessing a firearm... Upon reconsideration, we now reincorporate our previous decision, with minor modifications, rejecting Cook’s vagueness and Second Amendment challenges to section 922(g)(3) along with his objection to the jury instruction on who constitutes an unlawful user of a controlled substance. But in light of *Rehaif*, we conclude that Cook is entitled to a new trial.

Nicholas Barrett v. Andrew Saul No. 19-3366

Argued August 4, 2020 — Decided August 18, 2020

Case Type: Civil

Central District of Illinois. No. 18-2217 — **Eric I. Long**, *Magistrate Judge*.

Before DANIEL A. MANION, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*; AMY C. BARRETT, *Circuit Judge*.

ORDER

Nicholas Barrett, a 48-year-old man suffering from ankle pain, challenges the denial of his applications for social security benefits. He argues that the administrative law judge improperly discounted his complaints about the intensity and persistence of his ankle pain, so his actual residual functional capacity was more restrictive than what the ALJ found. But because substantial evidence supports the ALJ’s conclusion, we affirm.

Tim Semmerling v. Cheryl Bormann No. 19-3211

Decided August 18, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 18 CV 6640 — **Robert W. Gettleman**, *Judge*.

BRENNAN, *Circuit Judge* (in chambers). Appellee the United States asks this court to summarily affirm the district court’s dismissal of appellant Tim Jon Semmerling’s complaint because his appellate brief does not assert any error in the district court’s decision. Semmerling worked as a contractor for the U.S. Military Commissions Defense Organization as part of the legal team for a person charged as an al-

Qaeda enemy combatant. Semmerling, who is gay, disclosed his sexuality to the lead attorney of that team, and Semmerling alleges that, despite promising secrecy, that attorney disclosed his sexuality to the client and told the client that Semmerling was infatuated with the client and was pursuing that interest. Semmerling sued the lead attorney for state-law torts of defamation, negligence, and intentional infliction of emotional distress, and he sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 2674, for negligence and intentional infliction of emotional distress. Both defendants moved to dismiss the complaint for failure to state a claim, FED. R. CIV. P. 12(b)(6), and the district court granted their motions. Semmerling has appealed and by counsel submitted a seven-page brief that is light on factual details and legal analysis. The United States moves for summary affirmance... The motion for summary affirmance is DENIED without prejudice to renewal of the arguments in the government's brief. Semmerling may, within seven days from this opinion, seek leave to strike his opening brief and to file a brief that complies with Rule 28. If he chooses to do so, this court will reset a briefing schedule, and the appellees may submit, along with their briefs, a request for reasonable attorney's fees— paid by Attorney Wigell—for the work required to produce the first, unnecessary response. *It is so ordered.*

Jesse Perez v. Renee Parker No. 19-1586

Submitted August 17, 2020 — Decided August 18, 2020

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 14-cv-4286 — **Robert M. Dow, Jr.**, *Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

ORDER

Jesse Perez alleges that jail personnel unlawfully beat him and then denied him proper medical care. See 42 U.S.C. § 1983. To resolve a factual dispute on the defense that Perez did not exhaust the jail's administrative remedies before filing this suit, the district court held a hearing, found that Perez had not exhausted, and dismissed the case. Because the court's factual finding that Perez did not exhaust his administrative remedies is not clearly erroneous, we affirm.

James Owens v. John Baldwin No. 19-1386

Submitted August 17, 2020 — Decided August 18, 2020

Case Type: Prisoner

Southern District of Illinois. No. 3:15-cv-1085-NJR-GCS — **Nancy J. Rosenstengel**, *Chief Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

ORDER

James Owens sued Sandra Funk, the transfer coordinator for the Illinois Department of Corrections, alleging that she refused to transfer him to a lower-security prison because of his pending lawsuit against her. The district court allowed him to proceed on a claim of retaliation in violation of the First Amendment, but it ultimately entered summary judgment against Owens because he lacked evidence of a connection between his prior lawsuit and the denial of a transfer. On appeal, Owens contends that the district court should have allowed him to proceed on a claim under the Eighth Amendment, and that various procedural issues should have precluded summary judgment. We affirm because Owens did not plausibly allege any violation of the Eighth Amendment, and the record does not permit the inference that Funk or any of her subordinates knew about Owens's lawsuit before denying his transfer requests.

Shasta Howell v. Shannon Dewey No. 20-1567

Submitted August 17, 2020 — Decided August 19, 2020

Case Type: Civil

Western District of Wisconsin. Nos. 19-cv-415-wmc & 19-cv-468-wmc — **William M. Conley**, *Judge*.
Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD,
Circuit Judge.

ORDER

After a Wisconsin family court denied her petition for custody of her son and terminated her parental rights, Shasta Howell filed a lawsuit under 42 U.S.C. § 1983 against a social worker whose lies, she alleged, led to the order. Asserting that this falsification of evidence against her violated her right to due process, she sought a reversal of the order. The district court dismissed her suit, concluding that Howell failed to state a due-process claim because she did not allege that she lacked an adequate state remedy. But, under the *Rooker-Feldman* doctrine, the district court lacked subject-matter jurisdiction to address the suit on the merits. We therefore affirm the judgment but modify it to reflect a dismissal without prejudice.

Jill Otis v. Kayla Demarasse No. 20-1333

Submitted August 17, 2020 — Decided August 19, 2020

Case Type: Civil

Eastern District of Wisconsin. No. 16-C-0285 — **William C. Griesbach**, *Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD,
Circuit Judge.

ORDER

Jill Otis appeals the denial of her motion to vacate the voluntary dismissal of her civil-rights lawsuit. She maintains that she never agreed to the terms of a mediated settlement that undergirded her decision to dismiss her suit. Because the district court appropriately denied her motion after holding an evidentiary hearing on the issue, we affirm.

La Verne Foster v. Louis DeJoy No. 20-1330

Submitted August 17, 2020 — Decided August 19, 2020

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:17-cv-04271-JRS-DLP — **James R. Sweeney II**,
Judge.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD,
Circuit Judge.

ORDER

La Verne Foster, who is medically restricted from certain repetitive work, sued her former employer, the United States Postal Service, alleging that it discriminated against her based on her disability and violated other workplace laws. The district court entered summary judgment for the Postal Service. Because Foster admitted that she cannot perform repetitive mail-processing work—the only job available at her service location—and does not point to evidence of other legal violations, we affirm.

Paul Rennaker v. Andrew Saul No. 20-1042

Argued August 4, 2020 — Decided August 19, 2020

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:18cv428 — **Robert L. Miller**, *Judge*.

Before DANIEL A. MANION, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*; AMY C. BARRETT, *Circuit Judge*.

ORDER

An administrative law judge denied Paul Rennaker's application for Social Security disability benefits after finding that Rennaker could perform jobs that exist in significant numbers in the national economy. The district court upheld the ALJ's determination. But because the vocational expert did not provide a basis for the reliability of the national numbers he posited, substantial evidence does not support the ALJ's decision. We therefore vacate the judgment and remand for further proceedings.

Paul Ammerman v. Kaleb Singleton No. 19-3304

Submitted August 17, 2020 — Decided August 19, 2020

Case Type: Prisoner

Western District of Wisconsin. No. 17-cv-193-wmc — **William M. Conley**, *Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE P. WOOD, *Circuit Judge*.

ORDER

Paul Ammerman, a Wisconsin inmate, contends that prison staff inadequately treated his mental health and, when he complained, they transferred him to a maximum-security prison as retaliation. The district court entered summary judgment for the defendants. It concluded that prison officials provided Ammerman with adequate treatment, albeit not the treatment that he preferred, and no evidence suggested that his complaint led to his transfer. We agree and affirm.

Scott Hildreth v. Kim Butler No. 18-2660

On Petition for Rehearing and Rehearing En Banc — August 19, 2020

Case Type: Prisoner

Southern District of Illinois. No. 3:15-cv-00831-NJR-DGW — **Nancy J. Rosenstengel**, *Chief Judge*.

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

PER CURIAM. On consideration of plaintiff-appellant's petition for rehearing and rehearing en banc, filed on June 16, 2020, a majority of the panel voted to deny rehearing. A judge in regular active service requested a vote on the petition for rehearing en banc. A majority of judges in regular active service voted to deny the petition for rehearing en banc. Judges Rovner, Wood, Hamilton, and Scudder voted to grant the petition for rehearing en banc. Accordingly, the petition for rehearing and rehearing en banc is DENIED.

Clayton Waagner v. USA No. 19-3008

Argued May 20, 2020 — Decided August 20, 2020

Case Type: Prisoner

Central District of Illinois. No. 2:16-cv-02156 — **Sue E. Myerscough**, *Judge*.

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

RIPPLE, *Circuit Judge*. Clayton Waagner filed a second collateral attack on his sentence under 28 U.S.C. § 2255. He now claims that his classification as an armed career criminal under the Armed Career Criminal Act ("ACCA") is improper in light of the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015). Specifically, he challenges the classifications of his Ohio aggravated burglary convictions and Ohio attempted robbery conviction as violent felonies under the ACCA. The district court denied his motion. It concluded that, although his prior convictions for Ohio aggravated burglary no longer constitute predicate offenses for ACCA purposes under the invalidated residual clause, they still qualify as predicate offenses under the enumerated offenses clause of that statute. We now affirm the judgment of the district court. We agree with Mr. Waagner that the advent of *Johnson* permits him to bring a second motion under § 2255, because prior to *Johnson*, any such challenge would have been futile. Nonetheless, because Ohio aggravated burglary and Ohio attempted robbery are violent felonies as that term is

defined in the ACCA, the sentencing court properly adjudicated Mr. Waagner as an armed career criminal.

Epic Systems Corporation v. Tata Consultancy Services Limi Nos. 19-1528 & 19-1613

Argued January 16, 2020 — Decided August 20, 2020

Case Type: Civil

Western District of Wisconsin. No. 14-cv-748 — **William M. Conley**, *Judge*.

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

KANNE, *Circuit Judge*. Without permission from Epic Systems, Tata Consultancy Services (“TCS”) downloaded, from 2012 to 2014, thousands of documents containing Epic’s confidential information and trade secrets. TCS used some of this information to create a “comparative analysis”—a spreadsheet comparing TCS’s health-record software (called “Med Mantra”) to Epic’s software. TCS’s internal communications show that TCS used this spreadsheet in an attempt to enter the United States health-record-software market, steal Epic’s client, and address key gaps in TCS’s own Med Mantra software. Epic sued TCS, alleging that TCS unlawfully accessed and used Epic’s confidential information and trade secrets. A jury ruled in Epic’s favor on all claims, including multiple Wisconsin tort claims. The jury then awarded Epic \$140 million in compensatory damages, for the benefit TCS received from using the comparative-analysis spreadsheet; \$100 million for the benefit TCS received from using Epic’s other confidential information; and \$700 million in punitive damages for TCS’s conduct. Ruling on TCS’s motions for judgment as a matter of law, the district court upheld the \$140 million compensatory award and vacated the \$100 million award. It then reduced the punitive-damages award to \$280 million, reflecting Wisconsin’s statutory punitive-damages cap. Both parties appealed different aspects of the district court’s rulings. We agree with the district court that there is sufficient evidence for the jury’s \$140 million verdict based on TCS’s use of the comparative analysis, but not for the \$100 million verdict for uses of “other information.” We also agree with the district court that the jury could punish TCS by imposing punitive damages. But the \$280 million punitive-damages award is constitutionally excessive, so we remand to the district court with instructions to reduce the punitive-damages award.

Protect Our Parks, Inc. v. Chicago Park District Nos. 19-2308 & 19-3333

Argued May 21, 2020 — Decided August 21, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:18-cv-3424 — **John Robert Blakey**, *Judge*.

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

BARRETT, *Circuit Judge*. This case is about the plaintiffs’ quest to halt construction of the Obama Presidential Center in Chicago’s Jackson Park. First developed as the site for the Chicago World’s Fair in 1893, Jackson Park has a storied place in Chicago history, and as public land, it must remain dedicated to a public purpose. The City made the judgment that hosting a center devoted to the achievements of America’s first African-American President, who has a longstanding connection to Chicago, fit that bill. Vehemently disagreeing, the plaintiffs sued the City of Chicago and the Chicago Park District to stop the project. They brought a host of federal and state claims, all asserting variants of the theory that the Obama Presidential Center does not serve the public interest but rather the private interest of its sponsor, the Barack Obama Foundation. The district court granted summary judgment to the defendants across the board, and the plaintiffs appeal. We affirm the district court’s judgment as to the federal claims, but we hold that it should have dismissed the state claims for lack of jurisdiction. Federal courts are only permitted to adjudicate claims that have allegedly caused the plaintiff a concrete injury; a plaintiff cannot come to federal court simply to air a generalized policy grievance. The federal claims allege a concrete injury, albeit one that, as it turns out, the law does not recognize. The state claims, however, allege only policy disagreements with Chicago and the Park District, so neither we nor the district court has jurisdiction to decide them.

USA v. Arthur Friedman No. 19-2004

Argued June 2, 2020 — Decided August 21, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:15-cr-00675-2 — **Amy J. St. Eve** and **Virginia M. Kendall**, *Judges*.
Before FLAUM, KANNE, and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. To keep his car dealership afloat, Arthur Friedman secured loans for fake buyers of a phony inventory of cars. The scheme resulted in a bank fraud conviction, a 108-month prison sentence, and an order to pay roughly \$5 million in restitution. We have cautioned against raising too many issues on appeal; Friedman raises nine to his conviction and his sentence. The district court ruled correctly in all respects, so we affirm.

Leonid Burlaka v. Contract Transport Services LLC No. 19-1703

Argued September 18, 2019 — Decided August 21, 2020

Case Type: Civil

Eastern District of Wisconsin. No. 1:17-cv-1126 — **William C. Griesbach**, *Judge*.

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

BARRETT, *Circuit Judge*. Leonid Burlaka, Timothy Keuken, Travis Frischmann, and Roger Robinson are truck drivers who brought individual, collective, and class action claims against Contract Transport Services (CTS), their former employer, for failing to provide overtime pay in violation of the Fair Labor Standards Act (FLSA), which requires overtime pay for any employee who works more than forty hours in a workweek. 29 U.S.C. § 207(a)(1). The entitlement to overtime pay, however, is not absolute: as relevant here, the statute exempts employees who are subject to the Secretary of Transportation's jurisdiction under the Motor Carrier Act (MCA). 29 U.S.C. § 213(b)(1). This carveout is known as the "MCA exemption," and its rationale is safety. It is dangerous for drivers to spend too many hours behind the wheel, and "a requirement of pay that is higher for overtime service than for regular service tends to ... encourage employees to seek" overtime work... The plaintiffs seem to imagine that a continuous journey must resemble a relay race, in which the next driver immediately picks up exactly where the other left off. But that is neither how interstate shipments work nor what the MCA requires. Because the evidence establishes that plaintiffs were subject to performing spotting duties that comprised one leg of a continuous interstate journey, the district court's grant of summary judgment is AFFIRMED.

USA v. Scott Ginsberg No. 19-1305

Argued February 13, 2020 — Decided August 21, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:14-CR-00462(1) — **Sara L. Ellis**, *Judge*.

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

MANION, *Circuit Judge*. A jury found Scott Ginsberg guilty of bank fraud. On appeal, he argues there was insufficient evidence that he knowingly defrauded the banks. He also argues the district court erred by allowing certain testimony by a closer. Ginsberg is the only defendant in this case. Whether or not there are other people who might have deserved blame, or other transactions that might have been illegal, they are not before us. We focus on Ginsberg... In sum, the judge committed none of the claimed evidentiary errors. And any of the claimed evidentiary errors would have been harmless anyway, given the substantial independent evidence of guilt. We affirm.

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](#).