**Opinions for the week of February 3 – February 7, 2020**

**Jeremy Lowrey v. Andrew Tilden; Scott McCray v. Robert Wilkie** Nos. 19-1365 & 19-3145
Submitted December 12 & 9, 2019 — Decided February 3, 2020
Case Type: Prisoner; Civil
Central District of Illinois. No. 16-cv-1170 — **Jonathan E. Hawley**, *Magistrate Judge*.
Eastern District of Wisconsin. No. 18-cv-1637 — **David E. Jones**, *Magistrate Judge*.
Before WOOD, *Chief Judge,* in chambers.

WOOD, *Chief Judge*. This court takes jurisdictional issues seriously—indeed, it is proud to have a reputation as a jurisdictional hawk. As part of our routine procedure, we screen all briefs filed before oral argument or submission on the briefs to ensure that our jurisdiction is secure and to catch any potential problems. Many such problems can easily be corrected, and when they are, the judges of the court can proceed in confidence to decide the case. Our routine jurisdictional screening sometimes reveals recurrent problems that would benefit from a published opinion. A few years ago, I addressed such an issue, when in *Baez-Sanchez v. Sessions*, 826 F.3d 638 (7th Cir. 2017) (Wood, C.J., in chambers), I reminded attorneys practicing before this court that we rely on accurate jurisdictional statements. In *Baez-Sanchez*, the problem was the failure on the part of many appellees to specify precisely whether, in counsel's view, the appellant's jurisdictional statement was *complete* and *correct*. I emphasized that these are different requirements, and that this is not the place for creative writing. Either the jurisdictional statement is both complete and correct, or appellee must furnish a comprehensive jurisdictional statement of its own… The information provided in each of these appeals fell short of the requirements of Circuit Rule 28. In *Lowrey v. Tilden*, No. 19-1365, the appellees informed the court in their jurisdictional statement that the parties had consented to have a magistrate judge hear the case; they did so after observing that the *pro se* appellant's jurisdictional statement was not complete and correct and appropriately moving on to provide their own complete jurisdictional summary. See Circuit Rule 28(b). But counsel failed to provide the dates of consent of each party to the magistrate judge's jurisdiction. In *McCray v. Wilkie*, No. 19-3145, counsel not only failed to provide the dates of consent, but he also neglected to mention that the decision from which the appeal was being taken had been rendered by a magistrate judge… In each of these cases, counsel shall have seven days in which to file an amended jurisdictional statement that complies in all respect with the rules. *So ordered.*

**Stephanie Dorris v. Unum Life Insurance Company of America** No. 19-1701
Argued November 7, 2019 — Decided February 3, 2020
Case Type: Civil
Southern District of Illinois. No. 3:16-cv-00508 — **Staci M. Yandle**, *Judge*.
Before HAMILTON, SCUDDER, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Courts and practitioners frequently say that § 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a)(1)(B), provides for "de novo review" of certain decisions relating to welfare plan benefits. That phrase is really a misnomer. At least in this circuit, ERISA de novo review requires no review at all, but an independent decision. In such a case, the plaintiff bears the burden of proving not that the plan administrator erred, but that she is entitled to the benefits she seeks. Stephanie Dorris did not fully recognize her burden. After her disability insurance provider, Unum Life Insurance Company of America, terminated her benefits, she fought hard to prove that Unum's explanation for its decision was wrong. She convinced the district court that it was, so the court proceeded to decide whether Dorris was then entitled to benefits. It saw barely a thing in the administrative record going to that question, and no attempt from Dorris to supplement the record. Based on this lack of evidence, the court entered judgment in Unum's favor. On appeal, Dorris contends that some of the evidence proved her entitlement to benefits, or alternatively, that the district court should have given her the opportunity to supplement the record after judgment. Because we see no clear error in the district court's factual findings nor an abuse of discretion in its decision to limit itself to the record before it, we affirm the judgment.

**Phillip Hartsfield v. Stephanie Dorethy** No. 18-1736
Argued January 8, 2020 — Decided February 3, 2020
Case Type: Prisoner
Northern District of Illinois, Eastern Division. No. 14-cv-05816 — **John Robert Blakey**, *Judge*.
Before FLAUM, ROVNER, and SCUDDER, *Circuit Judges*.

FLAUM, *Circuit Judge*. Fifteen years ago, an Illinois jury convicted Phillip Hartsfield of first-degree murder and home invasion. Hartsfield unsuccessfully challenged his convictions on direct appeal and collateral attack in the Illinois courts. In 2014, Hartsfield petitioned a federal district court for a writ of habeas corpus alleging seven claims. The district court denied his petition and Hartsfield appealed. We certified one of the issues Hartsfield presented for review: whether the state court reasonably held that Hartsfield's counsel did not usurp his personal right to testify at trial. We now affirm the judgment of the district court.

**Steven Dotson v. USA** No. 18-1701
Argued October 3, 2019 — Decided February 3, 2020
Case Type: Prisoner
Southern District of Indiana, Indianapolis Division. No. 1:14-cv-1648 — **William T. Lawrence**, *Judge*.
Before WOOD, *Chief Judge*, and BARRETT and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. The Presentence Investigation Report on Steven Dotson listed six prior felony convictions, three of which the Probation Office identified as qualifying him for the enhanced mandatory minimum sentence of 15 years' imprisonment under the Armed Career Criminal Act. The PSR was silent on whether any of Dotson's other three convictions so qualified, and nobody raised the question at sentencing. The district court agreed with the Probation Office and sentenced Dotson as a career offender to 188 months (15 years and 8 months). In recent years, federal courts have seen a floodtide of litigation over what qualifies as an ACCA predicate. Dotson, too, has watched these developments, and he reacted by pursuing post-conviction relief under 28 U.S.C. § 2255. The district court denied relief, determining that Dotson has *four* qualifying ACCA predicates—the three originally designated as such in the PSR and one additional for burglary under Indiana law. Since the district court's decision, the law has continued to evolve and has since knocked out one of the three predicates the Probation Office originally determined qualified Dotson as an armed career criminal. The question presented is whether the government can save the enhanced sentence by substituting another of Dotson's convictions—one listed in the PSR as part of Dotson's criminal history but not designated as or found by the district court to be an ACCA predicate at sentencing. In the circumstances before us, the answer is yes, owing not only to the substituted conviction being included in the indictment and later the PSR, but also to Dotson himself recognizing in legal filings and apparently believing (although mistakenly) that his Indiana burglary conviction had served as an ACCA predicate at his original sentencing. So, while we affirm, our decision is narrow and limited. The record leaves us no doubt Dotson believed his Indiana burglary conviction could serve to support and preserve his enhanced sentence.

**USA v. Tremayne Dozier** No. 18-3447
Argued September 5, 2019 — Decided February 4, 2020
Case Type: Criminal
Central District of Illinois. No. 18-CR-20002-001 — **James E. Shadid**, *Judge*.
Before SYKES, HAMILTON, and SCUDDER, *Circuit Judges*.
HAMILTON, *Circuit Judge*, dissenting.

SYKES, *Circuit Judge*. Tremayne Dozier was arrested in 2017 for trafficking methamphetamine in Decatur, Illinois. A federal grand jury indicted him for conspiracy and possession of methamphetamine with intent to distribute. Under the terms of the Controlled Substances Act then in effect, Dozier faced increased penalties if he had a prior conviction for a "felony drug offense." 21 U.S.C. § 841(b)(1)(A), (b)(1)(B)(viii).1 A "felony drug offense" is a drug-related offense "that is punishable by imprisonment for more than one year under any law of the United States or of a State." *Id.* § 802(44). The government identified one such conviction: in 2006 Dozier was convicted in Texas of unlawful possession of cocaine, a "state jail felony" punishable by imprisonment of six months to two years. Dozier pleaded guilty to the conspiracy count. At sentencing he objected to using the 2006 drug conviction to enhance his sentence. The Texas case had been resolved by plea bargain; in exchange for Dozier's guilty plea, the prosecutor agreed to a nine-month sentence based on section 12.44(a) of the Texas Penal Code, which gives the sentencing judge the discretion to punish a person convicted of a state jail felony by imposing a period of confinement permissible for a Class A misdemeanor—that is, a term not to exceed one year. *See* TEX. PENAL CODE ANN. §§ 12.21, 12.44(a). The Texas court accepted the plea agreement, found Dozier guilty of the state jail felony, and imposed a nine-month sentence. Dozier argued that the Texas conviction was not a qualifying predicate because the terms of his plea agreement exposed him to confinement of not more than one year. The district judge rejected this argument and imposed a sentence of 20 years, the mandatory minimum for an offender with a prior felony drug conviction. On appeal Dozier again argues that his 2006 Texas conviction

doesn't qualify as a felony drug offense. We disagree. Dozier pleaded guilty to and was convicted of a two-year state jail felony. It does not matter that the sentencing judge accepted the plea bargain and exercised the discretion conferred by state law to sentence Dozier as if he were a misdemeanant. Dozier was, in fact, convicted of a two-year drug felony. We affirm the judgment.

**USA v. Kevin LeBeau and Brian Bodie** Nos. 18-1656 & 18-3366
Argued September 10, 2019 — Decided February 4, 2020
Case Type: Criminal
Northern District of Illinois, Eastern Division. No. 14 CR 488 — **Robert W. Gettleman**, *Judge*.
Before WOOD, *Chief Judge*, and KANNE and BRENNAN, *Circuit Judges*.

WOOD, *Chief Judge*. Intending to transform a failing health club into a mixed-use condominium development, Kevin LeBeau and Brian Bodie obtained a $1,925,000 loan from Amcore Bank in 2004. By the next year, unfortunately, the loan had fallen into default, and so the pair sought and obtained a forbearance agreement (later amended) from Amcore. These measures did not help either. Ultimately the two men were indicted in 2014 on multiple counts of bank fraud and making false statements to the bank in connection with the loan and forbearance agreements. The case went to trial in 2017, and the jury convicted both LeBeau and Bodie on all counts. The court sentenced each one to 36 months' imprisonment and restitution of more than a million dollars; both have appealed. LeBeau raises three arguments in this court: first, that the district court erred by failing to give the jury an instruction on materiality for the bank-fraud offenses; second, that the court should not have admitted evidence related to certain victims' losses in the scheme and their status as prior victims of fraud; and finally, that he received ineffective assistance of counsel at the sentencing stage, where his lawyer failed to challenge the amount of restitution. Bodie contends that his conviction must be thrown out because the superseding indictment was time-barred. He also disputes the sufficiency of the evidence to convict him. Finding no prejudicial error in any of these respects, we affirm the district court's final judgments.

**Shauntae Robertson v. Glendal French** No. 17-3579
Argued September 10, 2019 — Decided February 4, 2020
Case Type: Prisoner
Central District of Illinois. No. 1:14-cv-01272-CSB — **Colin S. Bruce**, *Judge*.
Before WOOD, *Chief Judge*, and KANNE and BRENNAN, *Circuit Judges*.

WOOD, *Chief Judge*. Hoping to find an effective way to curb frivolous lawsuits by prisoners, Congress enacted the Prison Litigation Reform Act ("PLRA") in 1996. Central to the law is its requirement that a prisoner who cannot pay a federal court's filing fee at the time he files a case must pay the fee in installments out of his future income. The PLRA painstakingly spells out the procedure for assessing and collecting those payments. When a prisoner who believes that he is eligible to proceed *in forma pauperis* (IFP) files his case, he must submit an affidavit to the court, 28 U.S.C. § 1915(a); his affidavit must provide a detailed account of all his assets, along with a copy of his prison trust-fund account statement. *Id.* Through the affidavit and account statement, the prisoner must be able to demonstrate that he does not have sufficient assets to pay the court's filing fee. *Id.* § 1915(a)(1). If the court is persuaded that the prisoner has met this burden, it so certifies. At that point, the PLRA requires the prison having custody over the prisoner to forward 20% of the income credited to the prisoner's trust account to the court each month (subject to a floor not pertinent here) until the full amount of the filing fee has been paid. *Id*. § 1915(b)(2). If at any time the court discovers that the prisoner's "allegation of poverty [was] untrue," the court must dismiss the case. *Id*. § 1915(e)(2)(A). The case before us requires us to decide whether a prisoner must disclose an expectation of future income on an IFP application, and if so, whether a failure to do so automatically makes an allegation of poverty "untrue" for purposes of the PLRA, or if instead only deliberate misrepresentations have that effect. We conclude that the best reading of the statute requires only disclosure of assets that may currently be used to pay the filing fee, and in the alternative, even if expected payments should have been included, the affidavit is "untrue" only if the prisoner's statement was a deliberate misrepresentation… The critical question under the PLRA is the prisoner-litigant's financial position at the time he files his complaint. Robertson truthfully disclosed all funds to which he had access at the time he filed his IFP application. Moreover, taking the current record in the light most favorable to Robertson, any failure to disclose the expected $4,000 was at best inadvertent, which is not enough to make it "untrue." Finally, with respect to funds that are deposited into the prison trust account, we are satisfied that this deposit is, in itself, adequate disclosure to the prison authorities of changes in the prisoner's income. We thus conclude that the district court should not have dismissed Robertson's

case for an “untrue” allegation of poverty. We REVERSE the judgment of the district court and REMAND this case for further proceedings consistent with this opinion.

**Matthew Warciak v. Subway Restaurants, Inc.** No. 19-1577
Argued December 12, 2019 — Decided February 5, 2020
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 16 C 08694 — **Charles P. Kocoras**, *Judge.*
Before BAUER, EASTERBROOK, and ST. EVE, *Circuit Judges*.

BAUER, *Circuit Judge.* T-Mobile customers with qualifying plans can participate in a promotional service called “T-Mobile Tuesdays” which offers free items and discounts from various well-known stores. Messages are sent every Tuesday and customers who no longer wish to receive marketing communications may opt-out by contacting T-Mobile’s customer service. In September 2016, a T-Mobile user, Matthew Warciak, received this text message: This T-Mobile Tuesday, score a free 6” Oven Roasted Chicken sub at SUBWAY, just for being w/ T-Mobile. Ltd supply. Get app for details: http://t-mo.co/2bGiBjS. The text message came from T-Mobile and Warciak was not charged for this text. Warciak sued Subway claiming Subway engaged in a common law agency relationship with T-Mobile, and that Subway’s conduct violated the Telephone Consumer Protection Act (“TCPA”) and the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”). T-Mobile is not included in the lawsuit, per the arbitration agreement in its subscriber agreement. Subway filed a 12(b)(6) Motion to Dismiss; the district court dismissed the TCPA claim and declined to exercise jurisdiction over the state law ICFA claim. The district court found the complaint lacked sufficient facts alleging Subway’s conduct to support Warciak’s claims of actual and apparent authority, specifically, control over the timing, content, or recipients of the text message. Further, the district court found that the wireless carrier exemption applied and therefore, no underlying TCPA violation exists. Warciak appeals this dismissal and seeks an opportunity to replead and be assigned a new judge. For the following reasons, we find that the district court properly dismissed Warciak’s claim.

**Ronald Crosby v. City of Chicago** Nos. 18-3693 & 19-1439
Argued December 10, 2019 — Decided February 5, 2020
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 18-cv-4094 — **Virginia M. Kendall**, *Judge*.
Before KANNE, SYKES, and BARRETT, *Circuit Judges*.

BARRETT, *Circuit Judge*. This case is about the scope of a release in a settlement agreement. In 2015, Ronald Crosby settled a lawsuit against Eduardo Gonzalez, a Chicago police officer who allegedly shoved Crosby out of a third-floor window before arresting him. In the settlement stipulation, Crosby released “all claims he had, has, or may have in the future … arising either directly or indirectly out of the incident” against Gonzalez, the City of Chicago, and all future, current, or former City officers. Crosby insists that this release does not bar his new suit against the City and its officers for torts they committed in the course of covering up Gonzalez’s misconduct. We disagree… The district court’s judgment and award of costs are AFFIRMED.

**Robert Haas v. David Noordeloos** No. 19-3473
Submitted January 30, 2020 — Decided February 6, 2020
Case Type: Prisoner
Northern District of Illinois, Eastern Division. No. 19 C 7300 — **Sharon Johnson Coleman**, *Judge*.
Before KENNETH F. RIPPLE, *Circuit Judge;* ILANA DIAMOND ROVNER, *Circuit Judge;* DAVID F. HAMILTON, *Circuit Judge.*

**ORDER**
This case comes before us on appellant Robert Haas’s motion to proceed in forma pauperis on appeal. Below, we explain why we find it necessary to summarily vacate the district court’s dismissal of Haas’s complaint pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(a) for failing to state a claim on which relief may be granted. Because we vacate the district court’s judgment, we necessarily certify that this appeal is taken in good faith, grant Haas’s motion to proceed in forma pauperis on appeal, and waive the appellate filing fee.

**USA v. Donnell Jehan** No. 19-1975

Argued January 30, 2020 — Decided February 6, 2020
Case Type: Criminal
Northern District of Illinois, Eastern Division. No. 04 CR 464-2 — **Elaine E. Bucklo**, *Judge*.
Before MANION, KANNE, and SYKES, *Circuit Judges*.

PER CURIAM. Donnell Jehan appeals the denial of his second motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) based on the retroactive application of Amendment 782 to the United States Sentencing Guidelines. The district court determined that Jehan was ineligible for a reduction because the amendment did not change his guidelines range. On appeal, Jehan primarily argues that the amendment *did* change his guidelines range, because his binding plea agreement required the district court to find him responsible for quantities of narcotics that, under the amendment, produce a lower guidelines range. Because the district court correctly concluded that Jehan was responsible for greater quantities of narcotics, we affirm.

**Marina Kolchinsky v. Western Dairy Transport, LLC** No. 19-1739
Argued December 17, 2019 — Decided January 6, 2020 — Opinion Issued February 6, 2020
Case Type: Civil
Northern District of Illinois, Eastern Division. No. 15 C 10544 — **Matthew F. Kennelly**, *Judge*.
Before RIPPLE, SYKES, and ST. EVE, *Circuit Judges*.

PER CURIAM. After Marina Kolchinsky and her mother, Lidia Kolchinsky, were severely injured in a car collision with a tractor-trailer in Illinois, they sued the truck driver and the two companies that contracted with him. They filed in federal court based on diversity of citizenship; Illinois law controlled. The district court entered partial summary judgment in favor of Western Dairy Transport, LLC, and WD Logistics, LLC, concluding that the driver was an independent contractor so the Kolchinskys could not hold the companies responsible for the driver's alleged negligence. Because the district court properly classified the driver as an independent contractor, we affirm the summary judgment for the companies.

**Ricardo Glover v. Kevin A. Carr**
Argued November 5, 2019 — Decided February 6, 2020
Case Type: Prisoner
Eastern District of Wisconsin. No. 2:16-cv-01048-LA — **Lynn Adelman**, *Judge.*
Before FLAUM, ROVNER, and HAMILTON, *Circuit Judges*.

ROVNER, *Circuit Judge.* Ricardo Glover, a Wisconsin inmate, sued prison medical staff and Wisconsin Department of Corrections officials for deliberate indifference and for violating his right to equal protection after they denied him medicine prescribed for post-surgical erectile dysfunction. *See* 42 U.S.C. § 1983; *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976) (deliberate indifference to a prisoner's serious medical needs constitutes unnecessary and wanton infliction of pain proscribed by Eighth Amendment). Glover alleges that treatment of his erectile dysfunction was both necessary for penile rehabilitation and time sensitive in the sense that he was at risk of suffering permanent loss of erectile function if his condition was left untreated for too long following surgery. The defendants argued at summary judgment that the Department's then-current medical director was wholly responsible for the challenged decision, but Glover had sued only the former director and other uninvolved parties. Glover moved to substitute the new director as a defendant, but the court (twice) denied the motion. It entered summary judgment for the defendants on Glover's claim for damages and then deemed his claim for injunctive relief voluntarily withdrawn, in order to finalize the decision for appeal. Glover appealed the judgment pro se. Following our review of the initial briefing, we appointed counsel to represent Glover, ordered re-briefing, and set the case for argument. We now conclude that the district court abused its discretion by not allowing Glover to amend his complaint. We vacate the judgment and remand the case in order to allow Glover to proceed against the appropriate medical director in his individual capacity. We affirm the remainder of the judgment.

**Lee Till v. Dolgencorp, LLC** No. 19-2566
Argued January 8, 2020 — Decided February 7, 2020
Case Type: Civil
Southern District of Indiana, Indianapolis Division. No. 1:18-cv-00127 — **Tanya Walton Pratt**, *Judge*.

Before JOEL M. FLAUM, *Circuit Judge;* ILANA DIAMOND ROVNER, *Circuit Judge;* MICHAEL Y. SCUDDER, *Circuit Judge*

**ORDER**
Lee Till filed this negligence action against discount merchandiser Dollar General after he was injured delivering merchandise to one of its stores. The district court entered summary judgment for Dollar General. *Till v. Dolgencorp, LLC*, 2019 WL 3208121 (S.D. Ind. July 16, 2019). Till appeals, but because he has not shown that Dollar General owed him a duty of care, we affirm.

**Gail Martin v. Andrew M. Saul** No. 19-1957
Argued December 3, 2019 — Decided February 7, 2020
Case Type: Civil
Northern District of Indiana, Fort Wayne Division. No. 1:18-cv-33 — **Susan L. Collins**, *Magistrate Judge*.
Before WOOD, *Chief Judge*, and HAMILTON and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. Gail Martin suffers from serious back pain and psychiatric conditions. Two administrative law judges have considered her application for disability benefits under the Social Security Act. The first ALJ determined that Martin's severe impairments left her capable of performing only a limited range of sedentary jobs. On appeal the district court remanded for a more thorough consideration of Martin's mental health problems. A new ALJ then entered the mix and found that Martin had no physical limitations—none whatsoever—and declined to award disability benefits. Because the second ALJ's decision is not supported by substantial evidence, we reverse. We also take the rare step of ordering the award of benefits.

**Vanessa Robertson v. Wisconsin Department of Health** No. 19-1179
Argued November 8, 2019 — Decided February 7, 2020
Case Type: Civil
Eastern District of Wisconsin. No. 2:18-cv-00116-JPS — **J. P. Stadtmueller**, *Judge*.
Before RIPPLE, ROVNER, and SYKES, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Vanessa Robertson appeals the district court's grant of summary judgment to the State of Wisconsin's Department of Health Services ("DHS"). In her complaint, Ms. Robertson set forth claims under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1983, alleging retaliation for complaining of discrimination in the workplace. She named as defendants DHS and two DHS employees, Marlia Mattke and Tonya Evans. The defendants moved for summary judgment. In her opposition to that motion, Ms. Robertson did not defend her equal protection claim, and the district court deemed that claim abandoned and dismissed it.2 The district court dismissed the Title VII claims against Ms. Evans and Ms. Mattke because Title VII authorizes suit only against an employer as an entity, not against individuals. The district court then granted the summary judgment motion. It first held that Ms. Robertson's retaliation claim against DHS for failing to promote her to the director position failed because she could not prove a "but-for" causal link between her protected activity—reporting discrimination—and DHS's decision not to promote her. With respect to her second retaliation claim, alleging that DHS continued the retaliation against her through Ms. Evans, the court held that Ms. Robertson had failed to establish that she suffered an adverse action. Accordingly, the district court granted the defendants' motion and dismissed all claims. Ms. Robertson filed a timely notice of appeal. She seeks reversal of the district court's grant of summary judgment. We now affirm the district court's judgment.