

Opinions for the week of November 23 – November 27, 2020

Jose Vargas v. Louis DeJoy No. 20-1116

Argued September 16, 2020 — Decided November 23, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:17-cv-05085 — **Charles R. Norgle**, *Judge*.

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

MANION, *Circuit Judge*. Jose Vargas, a mail carrier for the U.S. Postal Service, aggravated an old foot injury on the job in early 2011. He was placed on work restrictions that prohibited him from lifting and carrying heavy weights. This created a problem for Vargas because his duties included carrying heavy loads and packages. Vargas asked his employer for accommodations, but without any alternative jobs for him to do, his request was denied. As a result, Vargas had to take paid sick leave for several weeks and eventually went on leave without pay. Vargas sued his employer under Title VII and for disability-based discrimination. Apparently, his endgame is to re-store the paid sick leave hours he took. He's not out any wages—he received backpay through workers' compensation for the time spent on leave without pay—and he still works for the Postal Service. The district court granted summary judgment for the Postal Service. We affirm because Vargas could not perform the only job available to him, with or without a reasonable accommodation, and the record is devoid of evidence indicating he was treated differently because of his race or that he suffered unlawful workplace retaliation.

Monta Anderson v. USA No. 19-1257

Argued October 29, 2020 — Decided November 23, 2020

Case Type: Prisoner

Central District of Illinois. No. 1:17-cv-01542 — **Michael M. Mihm**, *Judge*.

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

FLAUM, *Circuit Judge*. Petitioner-appellant Monta Anderson pleaded guilty to conspiracy to distribute heroin. Because he stipulated as part of his plea agreement that heroin he distributed through the conspiracy caused the death of James Reader, the district court applied a statutory sentencing enhancement that mandates a minimum sentence of twenty years' imprisonment for a drug offense that resulted in death. Anderson ultimately received a below-Guidelines sentence of 223 months' imprisonment and ten years of supervised release. He thereafter petitioned for collateral relief under 28 U.S.C. § 2255, arguing that his counsel provided ineffective assistance in the plea-bargaining process. The district court denied Anderson's § 2255 petition without an evidentiary hearing, holding that Anderson's counsel was not ineffective. Based on the record and circumstances of this case, we find that Anderson was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. We therefore vacate the district court's denial of Anderson's petition and remand for a hearing.

Larry Dunn, Jr. v. Cathy Jess No. 20-1168

Argued September 23, 2020 — Decided November 24, 2020

Case Type: Prisoner

Eastern District of Wisconsin. No. 18-cv-700 — **William C. Griesbach**, *Judge*.

Before SYKES, *Chief Judge*, and HAMILTON and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Larry Dunn slapped Andrew Schuckman in a bar's parking lot, causing him to fall to the ground. Witnesses reported seeing Schuckman upright and apparently unharmed afterward, but hours later, he was found dead on the bar's back patio. The state charged Dunn and his friend Michael Crochet with felony murder, battery, and theft from a corpse for stealing Schuckman's cell phone. A key issue in the case was whether Dunn's slap caused Schuckman's death. In preparation for trial, Dunn's counsel consulted with a forensic pathologist... In state postconviction proceedings, Dunn asserted that

his trial counsel had been ineffective for failing to investigate and present evidence that supported a no-causation defense to felony murder. The state appellate court concluded that Dunn's trial counsel did not perform deficiently. Dunn then filed a habeas petition in federal court, which the district court granted. It reasoned that Dunn's trial counsel provided ineffective assistance by failing to investigate and offer evidence to support a no-causation defense. Federal courts "do not lightly grant petitions for a writ of habeas corpus brought by state prisoners," and "if the 'standard [for relief] is difficult to meet, that is because it was meant to be.'" *Cook v. Foster*, 948 F.3d 896, 899 (7th Cir. 2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). Here, we agree with the district court that Dunn has met this high bar—he is entitled to relief because he was prejudiced by his trial counsel's deficient performance. We therefore affirm.

Chic Zoch v. Andrew Saul No. 20-1166

Argued November 17, 2020 — Decided November 24, 2020

Case Type: Civil

Central District of Illinois. No. 18-cv-2142 — **Colin S. Bruce**, *Judge*.

Before EASTERBROOK, HAMILTON, and ST. EVE, *Circuit Judges*.

PER CURIAM. Alleging debilitating pain in her back, legs, and hands, Chic Zoch seeks disability insurance benefits. An administrative law judge ruled that, based on the opinions of three of her four treating physicians, a consulting physician, and the objective medical evidence, she could perform sedentary work. The ALJ thus denied her application, a ruling upheld by the district court. On appeal, Zoch argues that the ALJ improperly discounted her assertions, and an opinion by a physician who relied on those assertions, that pain disabled her from performing sedentary work. Substantial evidence supports the ALJ's decision, so we affirm.

Luis Barrados-Zarate v. William Barr No. 20-1040

Argued November 17, 2020 — Decided November 24, 2020

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A089-280-474

Before EASTERBROOK, HAMILTON, and ST. EVE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Luis Barrados-Zarate, a citizen of Mexico, lacks any claim of legal authority to be in the United States. By 2009, when he was served with a notice to appear under 8 U.S.C. §1229(a)(1), he had been here for more than a decade. This entitled him to apply for cancellation of removal under 8 U.S.C. §1229b(b)(1). He has two children who were born in the United States, and he contends that his "removal would result in exceptional and extremely unusual hardship to ... [a] child, who is a citizen of the United States" (§1229b(b)(1)(D))... The Board of Immigration Appeals dismissed the appeal, explaining that the children will receive a free public education, do not appear to be in special need of medical care that may be unavailable, and will have the support of Barrados-Zarate's extended family... The petition for review is dismissed for want of jurisdiction to the extent that Barrados-Zarate is attempting a covert attack on the substance of the agency's decision and is denied to the extent that Barrados-Zarate attacks the Board's silence about the effect of criminal violence in Mexico.

USA v. Glenn McDonald No. 19-3222

Argued November 17, 2020 — Decided November 24, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:16-CR-00078(1) — **John Robert Blakey**, *Judge*.

Before EASTERBROOK, HAMILTON, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Glenn McDonald appeals his within-guidelines sentence of 156 months in prison, arguing that it is substantively unreasonable because his age and poor health make it likely that he will die there. But McDonald failed to present evidence of a shortened life expectancy to the district court, and the court otherwise considered McDonald's age and medical conditions, along with the other factors enumerated in 18 U.S.C. § 3553(a), when it selected his sentence. We affirm.

Dennis Troyer v. National Futures Association No. 20-1422

Submitted October 29, 2020 — Decided November 25, 2020

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:16-cv-00146 — **Susan L. Collins**, *Magistrate Judge*.

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

FLAUM, *Circuit Judge*. Plaintiff-appellant Dennis Troyer brought this claim against the National Futures Association ("NFA") under Section 25(b) of the Commodities Exchange Act. 7 U.S.C. § 25(b). On appeal, he challenges the district court's findings on each element of the action under § 25(b): failure to enforce a required by law, bad faith, and causation. Because this Court agrees that NFA Bylaw 301 is not applicable in this case, we affirm the district court's denial of Troyer's motion for summary judgment and grant of NFA's cross-motion for summary judgment.

BRC Rubber & Plastics, Inc. v. Continental Carbon Company

Argued October 2, 2020 — Decided November 25, 2020

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:11-cv-00190-SLC — **Susan L. Collins**, *Magistrate Judge*.

Before RIPPLE, KANNE, AND HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. This appeal presents two classic contract issues under Article 2 of the Uniform Commercial Code: (1) whether a seller of goods repudiated a supply contract by failing to give adequate assurance of its performance under § 2-609, and (2) whether the buyer acted reasonably in "covering" to replace the breaching seller's goods under § 2-712. The product was carbon black, used to manufacture rubber products. After a bench trial, the district court ordered seller Continental Carbon Company to pay damages to buyer BRC Rubber & Plastics, Inc. The court resolved sharply disputed factual issues, finding that Continental had repudiated the parties' supply contract and that BRC acted reasonably in buying carbon black from different suppliers for the remaining years of the contract. The court also awarded prejudgment interest to BRC for the cost of the "cover," i.e., replacing the lost supply at higher prices. *BRC Rubber & Plastics, Inc. v. Continental Carbon Co.*, 2019 WL 3985900 (N.D. Ind. Aug. 22, 2019). In this third, and we hope final, appeal in this case, we affirm.

USA v. Brennen Smith No. 18-3696

Argued November 8, 2019—Decided November 25, 2020

Case Type: Criminal

Central District of Illinois. No. 4:17-cr-40039-001 — **Sara Darrow**, *Chief Judge*.

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

SYKES, *Chief Judge*. Brennen Smith stole a pickup truck in Iowa, drove it across the Mississippi River into Illinois, then crashed into a median and fled the scene, leaving a stolen handgun inside. Because he has a felony record and the stolen truck crossed state lines, Smith faced federal charges of unlawfully possessing a firearm as a felon and possession of stolen goods. He pleaded guilty to both counts... Smith's 2008 conviction rests on section 708.2(3) of the Iowa Code. Under that statute, "[a] person who

commits an assault, as defined in section 708.1, and uses or displays a dangerous weapon in connection with the assault” is guilty of the crime of aggravated assault. Smith observes, correctly enough, that some variants of the simple assault offense as defined in section 708.1 do not require the use or threat of physical force. We recently held, however, that section 708.1 is divisible—that is, the separate subsections in the statute define separate crimes, each with different elements. *United States v. Carter*, 961 F.3d 953, 957 (7th Cir. 2020). That requires us to look to the charging document or similar court records to determine which crime, with what elements, Smith was convicted of. Smith’s court records show that he was convicted under a subsection of the assault statute that requires a threat of physical force—indeed, the same part of the Iowa statute that we addressed in *Carter*. *Id.* at 957–58. It follows from *Carter* that the judge properly relied on Smith’s 2008 aggravated-assault conviction to elevate his base offense level under § 2K2.1(a)(2). 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](#)