

## Opinions for the week of February 8 - February 12, 2016

### **Katuska Bravo v. Midland Credit Management, Inc.** No. 15-1231

Argued December 2, 2015 — Decided February 8, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 4510 — **Gary Feinerman**, *Judge*.

Before KANNE, SYKES, *Circuit Judges*, and GILBERT, *District Judge*\*.

GILBERT, *District Judge*. Katuska Bravo first sued Midland Credit Management, Inc. and Midland Funding, LLC (together, “Midland”) in 2014 over its efforts to collect several debts from her. The case settled. After settlement, Midland sent Bravo’s attorney two letters requesting payment of the debts that were resolved in the settlement. Bravo then filed this action alleging that the letters violate the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.* The district court dismissed the complaint for failure to state a claim, and we affirm.

### **Ryan Mathison v. Scott Moats** No. 14-3549

Submitted January 19, 2016— Decided February 8, 2016

Case Type: Prisoner

Central District of Illinois. No. 12 C 1319 — **Joe Billy McDade**, *Judge*.

Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. Ryan Mathison, an inmate at the Federal Correctional Institution in Pekin, Illinois, brought this *Bivens* suit against members of the prison staff and now appeals from the district court’s grant of summary judgment in favor of the defendants. At 3 a.m. one morning Mathison, who suffers from chronic high blood pressure, was awakened by excruciating pain in his chest and left arm and other symptoms of a heart attack. He summoned a guard (defendant Wickman), to whom he explained his symptoms. The guard immediately summoned the supervising lieutenant (defendant Omelson), who in turn called the nurse on call (defendant Wall), who told the lieutenant that Mathison’s condition was not an emergency. Having decided there was no emergency, Wall instructed Mathison (via Omelson) to go to the infirmary in the morning. Mathison went at 6:45 a.m.—almost four hours after he had suffered what was indeed a heart attack. The lieutenant had deferred to Wall’s decision that there was no emergency... The district judge said that Omelson’s and Wall’s inaction had not “denied Plaintiff the minimal civilized measure of life’s necessities.” We think that civilization requires more in a life and death situation, and are left to wonder what the judge thinks the minimum level of care is to which a prisoner who is suffering a heart attack is entitled. We affirm the dismissal of the claims against Wickman and Moats, but reverse the dismissal of the claims against the other two defendants and remand the case for further proceedings consistent with this opinion. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

### **Robert Hoyt v. Michael Benham** No. 12-1581

Argued November 6, 2015 — Decided February 8, 2016

Case Type: Civil

Southern District of Indiana, New Albany Division. No. 08 C 179 — **Richard L. Young**, *Chief Judge*.

Before WOOD, *Chief Judge*, and POSNER and EASTERBROOK, *Circuit Judges*.

POSNER, *Circuit Judge*. Robert Hoyt—owner since 2001 of a 40-acre lot (on which there is a cabin) in a heavily forested region about an hour’s drive from Bloomington in south-western Indiana—has a problem. His lot is surrounded by lots owned by others, and none of the others will allow him to use any part of their land to enable vehicular access to his property. No public roads touch his land. To reach a public road he has to be able to drive through at least one of the lots that surround him. The owner of the lot directly to his north allows him to walk through that lot to and from his lot, but that’s it so far as access

is concerned. So Hoyt has turned to law, thus far unsuccessfully... And that's it for Hoyt. Even if he had an easement over the Forest Service's road, which he doesn't, and an easement over the road abutting the eastern border of the southwestern lot (the Strip), which he also doesn't, he could not reach the West Burma Road (the public road that is the goal of his access quest) because he has no right of access to the road in that lot that runs from the Strip to the West Burma Road. And anyway that little road in the southern lot and the connecting road in the southwestern lot, even if they were once public roads, have been abandoned because there is no evidence of any public use other than by pedestrians since 1990. So plainly there is no public road between Hoyt's lot and the West Burma Road in the southern lot, and equally plainly he has no right to insist on free passage from his lot to the public road over the string of roads discussed in this opinion. There are some other issues, but they are of no general significance and we'll let their resolution by the district court stand without further discussion—with one exception. The owners of the southern lot ask us to award them fees under Fed. R. App. P. 38 to compensate them for the cost of opposing Hoyt's appeal, on the ground that the appeal is frivolous. But to be entitled to such fees they would have had to ask for them in a separate motion, *Heinen v. Northrop Grumman Corp.*, 671 F.3d 669, 671 (7th Cir. 2012), which they failed to do. And so their motion for fees is denied and the judgment of the district court is AFFIRMED

**Micah Stern v. Michael Meisner** No. 15-2558

Argued January 4, 2016 — Decided February 9, 2016

Case Type: Prisoner

Eastern District of Wisconsin. No. 2:13-cv-01376-NJ — **Nancy Joseph**, *Magistrate Judge*.

Before BAUER, ROVNER, and WILLIAMS, *Circuit Judges*.

BAUER, *Circuit Judge*. Petitioner-appellant, Micah D. Stern ("Stern"), appeals the district court's denial of his petition for writ of habeas corpus, filed pursuant to 28

U.S.C. § 2254. A jury convicted Stern of one count of using a computer to facilitate a sex crime against a child, in violation of Wis. Stat. § 948.075(1r) (2011-12) (the "Statute"). As a result, Stern is currently incarcerated in Wisconsin on a 25-year sentence, 10 years being served in custody and the remaining 15 years on

extended supervision. Stern argues that his conviction is unconstitutional because the Wisconsin appellate court's unforeseeable interpretation of the belief and intent elements of the Statute violated his due process rights by depriving him of fair notice of such elements. Both the Wisconsin appellate court and the district court rejected Stern's argument. For the following reasons, we likewise reject Stern's argument and affirm the denial of the petition and the dismissal of the case.

**Debbie Stage v. Carolyn Colvin** No. 15-1837

Argued November 17, 2015 — Decided February 9, 2016

Case Type: Civil

Northern District of Indiana, Hammond Division. No. 2:13-CV-414-JVB — **Joseph S. Van Bokkelen**, *Judge*.

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

HAMILTON, *Circuit Judge*. Debbie Stage appeals the district court's judgment upholding the denial of her application for supplemental security income, disability insurance benefits, and disabled widow's benefits. Stage was 56 years old at the time of the decision. She suffers from chronic back and hip problems exacerbated by obesity, caused in turn by hypothyroidism. She argues that the administrative law judge erred by discounting significant new evidence she submitted after an agency doctor had reviewed her medical records, by giving little weight to her treating physician's opinion, by discrediting her testimony about her pain without adequate support, and by overstating her residual functional capacity. We agree with Stage that the ALJ's evaluation of her medical evidence was unreasonable and that substantial evidence does not support his finding that she remained capable of performing light work. We reverse the district court's judgment and remand this case to the agency for further consideration.

**USA v. Armel Richardson** No. 15-1403

Argued January 26, 2016— Decided February 9, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13 CR 109-1— **Gary S. Feinerman**, *Judge*.  
Before WOOD, *Chief Judge*, and BAUER and POSNER, *Circuit Judges*.

POSNER, *Circuit Judge*. The defendant pleaded guilty to conspiracy to distribute an illegal drug, in violation of 21 U.S.C. §§ 846, 841(a), and was sentenced to 114 months in prison. His appeal challenges only the length of his sentence, which he contends was based on unreliable evidence consisting of police reports of previous crimes that he'd committed... What is true is that "a sentencing court may not consider police reports to determine whether a prior conviction meets the definition of a crime of violence or a controlled substance offense for purposes of classifying a defendant as a career offender." *United States v. Durham*, 645 F.3d 883, 896 (7th Cir. 2011), summarizing *Shepard v. United States*, 544 U.S. 13 (2005). But that was not what the district judge did. The classification of the defendant as a career offender is not contested. The only issue is whether a sentencing judge can allow his exercise of sentencing discretion to be influenced by a summary of police reports in the presentence report prepared by the Probation Service. He can. Judges routinely rely on information found in such reports, even though much of that information is hearsay. The rules of evidence do not apply to sentencing, and so the sentencing judge is free to consider hearsay found in presentence reports provided that "it is well supported and appears reliable." *United States v. Heckel*, 570 F.3d 791, 795 (7th Cir. 2009). The only hearsay in the presentence report relating to the defendant's 2001 and 2005 offenses was the amount of drugs plus a statement that he'd been found with a digital scale containing crack cocaine residue, along with \$7,515 in cash, when he was arrested in 2005—his convictions and sentences were matters of public record, and the sentences of 27 months for the 3-gram offense and 98 months for the 25-gram offense were consistent with the drug amounts; and as the defendant presented no evidence that the police reports were inaccurate in any respect relevant to this case, the judge was not required to disregard those amounts. AFFIRMED

**USA v. Daniel Spitzer** No. 15-1278

Argued February 8, 2016 — Decided February 10, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 10 CR 651 — **James B. Zagel**, *Judge*.  
Before POSNER, EASTERBROOK, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Daniel Spitzer pleaded guilty to ten counts of mail fraud, confessing liability for a scheme that took in about \$106 million—all of which Spitzer promised to invest for his clients' benefit—but returned only \$72 million or so to investors. Less than \$30 million ever was invested. The remainder was used, after the fashion of Ponzi schemes, to pay earlier investors, or was siphoned off by Spitzer and others. The presentence report calculated a Guideline range of 292 to 365 months' imprisonment, which flowed from an offense level of 40 and a criminal history category I. The base offense level was 7. See U.S.S.G. §2B1.1(a)(1). A loss of approximately \$34 million added 22 levels, and the existence of more than 250 victims added a further six. The PSR proposed two levels for use of sophisticated means, two because Spitzer personally took more than \$1 million out of the kitty, and another four because Spitzer claimed to have acted as an investment adviser. Take three off for acceptance of responsibility, and the result is level 40... The task of determining the right sentence, given the statutory factors, demands more judgment than the task of calculating the offense level, which in a case such as this is close to mechanical. That is why we require the judge to evaluate, on the record, the defendant's substantial arguments for lenience. See, e.g., *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005); *United States v. Ramirez-Fuentes*, 703 F.3d 1038, 1047–49 (7th Cir. 2013). By contrast, a simple statement of agreement with the PSR shows why the judge approves the offense level that has been explained in the PSR: the judge thinks that the staff got it right. And what would be the point of a

remand? Since Spitzer does not now contend that his offense level is less than 40, all a remand could do would be to produce empty words en route to an inevitable outcome. AFFIRMED

**USA v. Travis Maxfield** No. 15-2339

Argued January 27, 2016 — Decided February 11, 2016

Case Type: Criminal

Southern District of Illinois. No. 14-CR-30197-2 — **Nancy J. Rosenstengel**, *Judge*.

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

PER CURIAM. Travis Maxfield challenges the 188-month prison sentence imposed on him for his convictions related to his manufacture and distribution of methamphetamine. He contends that the sentencing court erred by denying his request for a downward departure based on his argument that one of the felonies used to designate him a career offender, though technically a crime of violence, was not in fact violent. But the district court considered Maxfield's argument both as a request to depart downward and within the discussion of the sentencing factors in 18 U.S.C. § 3553(a). Thus, we affirm the sentence.

**USA v. Orlando Rosales** No. 15-1580

Argued November 10, 2015 — Decided February 11, 2016

Case Type: Criminal

Western District of Wisconsin No. 3:14-cr-00114-bbc-1 — **Barbara B. Crabb**, *Judge*.

Before POSNER, EASTERBROOK, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Orlando Rosales pleaded guilty to a charge that he conspired to possess, with intent to distribute, 500 grams or more of cocaine, and was sentenced to a term of 120 months in prison. He appeals the sentence, contending that the district court committed procedural error by not giving adequate reasons for rejecting his contention that he should not be sentenced as a career offender. We affirm.

**USA v. Van Jackson** No. 15-2189

Submitted February 11, 2016 — Decided February 12, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:99CR00083-001 — **Larry J. McKinney**, *Judge*.

Before DIANE P. WOOD, *Chief Judge* RICHARD A. POSNER, *Circuit Judge* ANN CLAIRE WILLIAMS, *Circuit Judge*

**ORDER**

Van Jackson, a federal prisoner, appeals the denial of his motion under 18 U.S.C. § 3582(c)(2) for a sentence reduction based on the retroactive application of Amendment 782 to the United States Sentencing Guidelines. 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](#).