

Opinions for the week of January 25 – January 29, 2021

USA v. Gregory Sanford No. 20-2445

Submitted January 5, 2021 — Decided January 25, 2021

Case Type: Criminal

Central District of Illinois. No. 12-cr-10069-JES — **James E. Shadid**, *Judge*.

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

SYKES, *Chief Judge*. Gregory Sanford is serving a 15-year sentence in federal prison for a 2014 cocaine-trafficking conviction. He moved for compassionate release under 18 U.S.C. § 3582(c)(1)(A), citing the COVID-19 pandemic. He did not, however, exhaust administrative remedies within the Bureau of Prisons before filing his motion. The government raised the exhaustion problem in the district court and also opposed Sanford's release request on the merits. The judge skipped over the exhaustion question and proceeded directly to the merits, declining to reduce Sanford's sentence. Sanford appealed. The government defends the judge's decision on the merits but again raises the exhaustion problem, arguing that the exhaustion requirement in § 3582(c)(1)(A) is a mandatory claim-processing rule and therefore must be enforced when properly invoked. Three circuits agree and none have held otherwise; we now join the emerging consensus. Sanford failed to comply with the exhaustion requirement before moving for compassionate release. The government properly raised the exhaustion issue in the district court and here. We therefore enforce the requirement and affirm the judgment, though on different grounds.

USA v. Holli Wrice No. 20-2035

Submitted January 22, 2021 — Decided January 25, 2021

Case Type: Criminal

Southern District of Illinois. No. 10-CR-40062-JPG-1 — **J. Phil Gilbert**, *Judge*.

Before DIANE P. WOOD, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Holli Wrice appeals from the district court's denial of her motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). That statute authorizes district courts to modify a term of imprisonment when justified by "extraordinary and compelling reasons." The district court held that § 3582(c)'s trailing paragraph, which says a court may not modify a term of imprisonment unless "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" prevented it from granting relief. After Wrice appealed we held in *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020), that the Sentencing Commission has not yet issued policy statements applicable to a prisoner's motion for compassionate release under the First Step Act. Because there are no applicable policy statements, "the trailing paragraph of § 3582(c)(1)(A) does not curtail a district judge's discretion." *Id.* at 1180... Accordingly, the district court's June 9, 2020, order is VACATED and this case is REMANDED to the district court for further consideration in light of *United States v. Gunn*.

USA v. Alvin Wilkinson No. 20-1037

Submitted January 15, 2021 — Decided January 25, 2021

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:17-CR-00028-1 — **Sharon Johnson Coleman**, *Judge*.

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

HAMILTON, *Circuit Judge*. Hedge-fund manager Alvin Wilkinson operated a Ponzi scheme to hide from his investors the truth that he had lost most of their money in the 2008 financial crisis. The scheme was eventually uncovered and halted in 2016 when the Commodity Futures Trading Commission (CFTC) filed a civil enforcement action against Wilkinson and his funds. In early 2017, Wilkinson was charged by

federal indictment with mail and wire fraud. He pleaded guilty to one count of wire fraud. The government dropped the other charges. At sentencing, the district court applied a four-level sentencing guideline enhancement under U.S.S.G. § 2B1.1(b)(20) because it found that Wilkinson's offense qualified as "a violation of commodities law" by a "commodity pool operator." Wilkinson argues on appeal that the court erred in applying this enhancement because he was not a "commodity pool operator" as that term is defined in the Commodity Exchange Act. We affirm. Wilkinson's plea agreement and presentence investigation report provided facts showing that Wilkinson was a commodity pool operator.

USA v. Byron Blake No. 20-2145

Submitted January 21, 2021 — Decided January 26, 2021

Case Type: Criminal

Southern District of Illinois. No. 3:06-CR-30146-NJR-1 — **Nancy J. Rosenstengel**, *Chief Judge*.

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

EASTERBROOK, *Circuit Judge*... Blake was sentenced before the Fair Sentencing Act of 2010 took effect, and he therefore did not benefit from the changes it made to the rules (both statutes and Sentencing Guidelines) for sentencing persons convicted of crack-cocaine offenses. *Dorsey v. United States*, 567 U.S. 260 (2012). But §404 of the First Step Act of 2018 makes the 2010 Act retroactively applicable to persons who would have been within its scope had they been sentenced after its effective date. Blake then asked the district court for a lower sentence. The district judge concluded, however, that Blake, who has a history of violence, does not deserve a benefit from the 2018 Act whether or not he is eligible for one. *United States v. Blake*, 2020 U.S. Dist. LEXIS 107708 (S.D. Ill. June 19, 2020). We do not consider whether the district judge made a legal error or abused her discretion, because a preliminary procedural issue requires resolution. Blake's lawyer wants to withdraw, and Blake opposes that motion; he contends that we should compel counsel to continue the representation. This poses the question whether Blake has a right to the assistance of counsel at public expense. If not, there is no apparent ground for obliging a lawyer to carry on with an appeal he deems frivolous... Counsel's motion to withdraw is granted, but his proposal to dismiss the appeal (a la *Anders*) is denied, and a new briefing schedule is set.

145 Fisk, LLC v. F. William Nicklas No. 20-1868

Argued December 10, 2020 — Decided January 26, 2021

Case Type: Civil

Northern District of Illinois, Western Division. No. 19-cv-50093 — **Philip G. Reinhard**, *Judge*.

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

FLAUM, *Circuit Judge*. Illinois authorizes municipalities to invest in revitalizing areas of "commercial blight." See 65 Ill. Comp. Stat. 5/11-74.4 *et seq.* The City of DeKalb, Illinois (the "City"), entered into a preliminary agreement to allocate just such an incentive to 145 Fisk, LLC ("Fisk"). After more due diligence, however, the City reversed course. Fisk is convinced the City would have proceeded with the funding as planned but for the meddling of City Manager F. William Nicklas. According to Fisk, Nicklas sought to retaliate against it and favor other local developers in violation of its First and Fourteenth Amendment rights. The district court dismissed Fisk's suit for failure to state a claim upon which relief can be granted and relinquished supplemental jurisdiction over the remaining state law claims. Because we agree that Fisk has not plausibly stated grounds for relief, we affirm the judgment of the district court.

E.F.L. v. Bill Prim No. 20-1200

Argued October 29, 2020 — Decided January 26, 2021

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 1:20-cv-00072 — **Steven Charles Seeger**, *Judge*.
Before FLAUM, KANNE, and HAMILTON, *Circuit Judges*.

KANNE, *Circuit Judge*. E.F.L.'s petition for habeas corpus asks that we enjoin the Department of Homeland Security from removing her while her Violence Against Women Act petition is pending. That petition, though, has been approved. So E.F.L.'s request is moot. Plus, Congress has divested us of jurisdiction over such challenges. We thus affirm the district court's decision dismissing E.F.L.'s habeas petition for want of jurisdiction, and we terminate our temporary stay of removal.

Sidney Peterson v. Wexford Health Sources, Inc. No. 19-2592

Argued November 3, 2020 — Decided January 26, 2021

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 19-cv-415 — **Charles P. Kocoras**, *Judge*.
Before KANNE, SCUDDER, and ST. EVE, *Circuit Judges*.

KANNE, *Circuit Judge*. Illinois inmate Sidney Peterson was injured after he personally applied a caustic medication to treat his genital warts. He now seeks to hold the prescribing doctor, the attending nurses, and Wexford Health Sources, Inc., accountable under state and federal law. Peterson's federal claims end here because he failed to state a claim for deliberate indifference against any of the defendants. However, all parties agree that Peterson's state-law negligence claims were timely brought. We agree, and those claims may continue. We affirm the district court's dismissal of Peterson's deliberate indifference claims, and we reverse its dismissal of Peterson's state-law negligence claims and remand for further proceedings.

USA v. Derrick Young No. 20-2651

Submitted January 27, 2021 — Decided January 27, 2021

Case Type: Criminal

Central District of Illinois. No. 09-cr-20067-JES — **James E. Shadid**, *Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Derrick Young, an inmate at the Federal Correctional Institution in Milan, Michigan, who has chronic kidney disease, moved for compassionate release based on his susceptibility to complications from COVID-19. The district court denied the motion, finding that his prison had its coronavirus cases under control. Because the judge considered Young's arguments and the § 3553(a) sentencing factors, we affirm.

USA v. Walter Burnley No. 20-2601

Submitted January 27, 2021 — Decided January 27, 2021

Case Type: Criminal

Western District of Wisconsin. No. 06-cr-141-bbc — **Barbara B. Crabb**, *Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Walter Burnley, a federal inmate convicted of crimes involving threats to kill, moved for compassionate release under 18 U.S.C. § 3582 based on the risk that COVID-19 poses to his compromised immune system. Stipulating that Burnley had shown health conditions that qualify him for early release, the district

court nonetheless denied his request. After considering the factors under 18 U.S.C. § 3553(a), it explained that Burnley remains a danger to the community. Because the court reasonably weighed the relevant considerations of public safety, we affirm.

USA v. William Dickerson No. 20-1751

Submitted January 5, 2021 — Decided January 27, 2021

Case Type: Criminal

Central District of Illinois. 04-20055-001 — **Sara Darrow**, *Chief Judge*.

Before DIANE S. SYKES, *Chief Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*.

ORDER

More than a decade after his conviction for conspiring to distribute powder and crack cocaine, William Dickerson sought a sentence reduction under the First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222. The district judge denied relief. Because Dickerson's sentence is currently the statutory minimum, we affirm.

Christopher Macy v. John Galipeau No. 19-3545

Submitted January 27, 2021 — Decided January 27, 2021

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:19-cv-02349-RLY-TAB — **Richard L. Young**, *Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Christopher Macy, an Indiana prisoner, challenged his disciplinary-hearing conviction for possession of a controlled substance in a petition for writ of habeas corpus under 28 U.S.C. § 2254. He appeals the dismissal of his petition. Because Macy is no longer subject to any penalty that affects the duration of his incarceration, the district court properly dismissed the petition as moot, and we do the same with the appeal.

USA v. Salvador Rosales No. 19-3524

Submitted January 27, 2021 — Decided January 27, 2021

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:06-cr-00896 — **Sharon Johnson Coleman**, *Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Years after his conviction for drug offenses, Salvador Rosales moved for a new trial or resentencing based on an alleged error in the government's notice to him before sentencing about his past convictions. Rosales sought relief under Federal Rule of Civil Procedure 60(b)(6), but the district court treated his motion under 28 U.S.C. § 2255 and denied it as untimely. Because the district court correctly handled the motion, we deny Rosales's implied request for a certificate of appealability and dismiss the appeal.

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USA v. Markell Palmer-Tate No. 19-3299

Submitted January 5, 2021 — Decided January 27, 2021

Case Type: Criminal

Northern District of Indiana, Fort Wayne Division. No. 1:16CR78-001 — **Damon R. Leichty**, *Judge*.
Before DIANE S. SYKES, *Chief Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*.

ORDER

Markell Palmer-Tate pleaded guilty to attempted bank robbery, 18 U.S.C. § 2113(a), (d), (e), and was sentenced to 188 months in prison (the bottom of the guidelines range) and three years of supervised release. Although his plea agreement contained a broad appellate waiver, he filed a notice of appeal. His appointed counsel asserts that the appeal is frivolous and moves to withdraw. *See Anders v. California*, 386 U.S. 738, 746 (1967). Palmer-Tate did not respond to counsel's motion. *See* CIR.R. 51(b). Counsel's brief explains the nature of the case and addresses the issues for an appeal of this kind, and we limit our review to these issues. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014)... We GRANT counsel's motion to withdraw and DISMISS the appeal.

USA v. Kenneth R. Morrison No. 19-2762

Submitted January 5, 2021 — Decided January 27, 2021

Case Type: Criminal

Northern District of Indiana, Hammond Division. No. 2:17CR130-001 — **Philip P. Simon**, *Judge*.
Before DIANE S. SYKES, *Chief Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*.

ORDER

Kenneth Morrison dismantled an unused railroad bridge in Indiana and sold it as scrap metal in Illinois. A jury found him guilty of transporting stolen property in interstate commerce. 18 U.S.C. § 2314. The judge imposed a within guidelines sentence of 24 months in prison, followed by two years of supervised release, and ordered Morrison to pay restitution. Morrison appealed, but his appointed counsel asserts that the appeal is frivolous and moves to withdraw under *Anders v. California*, 386 U.S. 738 (1967). Morrison has not responded to counsel's motion. *See* CIR.R. 51(b). Because counsel's analysis appears thorough, we limit our review to the subjects she discusses. *See United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014)... We GRANT counsel's motion to withdraw and DISMISS the appeal.

Fadeel Shuhaiber v. Immigration and Customs Enforcement No. 20-2823

Submitted January 27, 2021 — Decided January 28, 2021

Case Type: Prisoner

Northern District of Illinois, Western Division. No. 20 C 50290 — **Rebecca R. Pallmeyer**, *Chief Judge*.
Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

After failing to appeal his removal order to the Board of Immigration Appeals, Fadeel Shuhaiber, an immigration detainee, sued the immigration judge and others to challenge that order. The district court dismissed the petition for lack of subject-matter jurisdiction because, by statute, district courts may not entertain challenges to removal orders. *See* 8 U.S.C. § 1252(a)(5). We affirm.

Parvinder Singh v. Monty Wilkinson No. 20-1448

Submitted January 27, 2021 — Decided January 28, 2021

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A202-010-180
Before MICHAEL S. KANNE, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Parvinder Singh, an Indian citizen belonging to a Sikh-dominated political party, petitions for review of an order of the Board of Immigration Appeals denying his motion to reopen his immigration proceedings based on changed country conditions — namely, increased police efforts to target him for his past political activity. The Board denied Singh's motion to reopen because he failed to show a material change in country conditions sufficient to warrant reopening. We deny the petition for review.

Richard Anderson v. Weinert Enterprises, Inc. No. 20-1030

Argued September 21, 2020 — Decided January 28, 2021

Case Type: Civil

Eastern District of Wisconsin. No. 1:18-cv-00901 — **William C. Griesbach**, *Judge*.

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

SCUDDER, *Circuit Judge*. Ample ink has been spilled discussing class action litigation and Federal Rule of Civil Procedure 23. Rare are the cases analyzing the Rule's numerosity requirement. This is one of those cases. Richard Anderson worked in northeast Wisconsin for a local roofing company called Weinert Enterprises. Following a dispute with the company over how Weinert calculated overtime wages, Anderson brought suit in federal court in Wisconsin. After his collective action under the Fair Labor Standards Act failed to attract enough employee support, Anderson withdrew the federal claim. But he still sought to pursue Wisconsin state law claims as a class action. The district court determined that Anderson's proposed class would include no more than 37 members and, after finding that joinder of those 37 members was not impracticable, denied the class certification motion for failing to meet Rule 23's numerosity requirement. We affirm.

Gary Hatter v. Gloria Williams No. 19-2453

Submitted January 27, 2021 — Decided January 28, 2021

Case Type: Civil

Central District of Illinois. No. 17-CV-2141 — **Colin S. Bruce**, *Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

After determining that Gary Hatter had misrepresented his financial assets, the Housing Authority of Champaign County, Illinois, stopped his rental assistance. Hatter then sued the agency and three of its employees, asserting that they discriminated and retaliated against him based on his disability and race as well as deprived him of due process. The district court entered summary judgment for the defendants. Because Hatter marshaled no evidence that the alleged violations occurred, we affirm.

Gregory Jones v. Dustin Bayler No. 19-2323

Submitted January 27, 2021 — Decided January 28, 2021

Case Type: Prisoner

Central District of Illinois. No. 1:17-cv-01344 — **Eric I. Long**, *Magistrate Judge*.

Before MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

ORDER

Gregory Jones, an inmate at the Pontiac Correctional Center in Illinois, appeals the dismissal of this suit under 42 U.S.C. § 1983. The district court dismissed the suit for failure to exhaust administrative remedies. Jones had filed “emergency” grievances, alleging that he feared an officer would harm him because he was assisting with an investigation into whether another guard had murdered a prisoner. When the warden replied that the grievances were not emergencies, Jones appealed to the prison’s Administrative Review Board, which told him to use the non-emergency process. In *Williams v. Wexford Health Sources, Inc.*, 957 F.3d 828, 835 (7th Cir. 2020), we ruled that, before April 1, 2017, when Pontiac’s rules did not require resort to the standard process for rejected “emergency” grievances, the prison could not require an inmate to do so in order to exhaust. Because Jones filed and appealed two grievances before April 1, 2017, under *Williams* he exhausted his claim against the officer. So, we reverse in part, but otherwise we affirm.

Ireneo Conwi v. Monty Wilkinson No. 20-1369

Argued January 26, 2021 — Decided January 29, 2021

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A076-766-590

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; THOMAS L. KIRSCH II, *Circuit Judge*.

ORDER

Ireneo Conwi, a citizen of the Philippines, came to the United States in 1991 under an assumed name, with a false passport, and overstayed his six-month visa. He did not seek asylum until 2009, after federal officials detected his unauthorized presence and began removal proceedings. In 2011 an immigration judge denied that request as untimely, see 8 U.S.C. §1158(a)(2)(B), and also declined to afford Conwi withholding of removal or relief under the Convention Against Torture. The Board of Immigration Appeals affirmed in 2013, and Conwi did not seek judicial review. Neither did he comply with the order to depart. In 2019 he asked the Board to reopen his proceedings. That motion was timely only if a change in conditions in the Philippines now justifies asylum. 8 U.S.C. §1229a(c)(7)(C)(ii)... The Board denied the motion to reopen... Conwi also sought relief on the basis of an approved visa petition filed by his wife. The Board denied that request with the observation that the statutory exception to the time for seeking asylum or reopening applies only to asylum and not other subjects... The petition for review is denied to the extent that it seeks review of the Board’s decision concerning asylum and otherwise is dismissed for want of jurisdiction.

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](#).