

## **Opinions for the week of January 4 – January 8, 2020**

### **USA v. Edward Bruce** No. 19-3489

Argued December 16, 2020 Decided January 4, 2021

Case Type: Criminal

Northern District of Illinois, Western Division. No. 3:18-CR-50020(1) — **Philip G. Reinhard**, *Judge*.

Before DIANE P. WOOD, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

### **ORDER**

The district court sentenced Edward Bruce to 110 months in prison after he was convicted for drug and gun offenses. Bruce appeals and argues that the court procedurally erred at sentencing because it incorrectly stated that the police found body armor in his house at the time of his arrest. Although the body armor statement was not accurate, the court did not rely on this information when imposing the sentence. Moreover, Bruce did not show a reasonable probability that he would have received a lower sentence if the court had not been under this mistaken assumption. We affirm.

### **Jerry Jellis v. Larry Hale** No. 19-3362

January 4, 2021

Case Type: Prisoner

Southern District of Illinois. No. 3:15-cv-00630-GCS — **Gilbert C. Sison**, *Magistrate Judge*.

Before FRANK H. EASTERBROOK, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

### **ORDER**

All members of the panel have voted to deny the petition for rehearing filed on December 29, 2020. The petition therefore is **DENIED**.

### **Jack Hostetter, Jr. v. Andrew Saul** No. 20-1650

Argued December 15, 2020 — Decided January 5, 2021

Case Type: Civil

Southern District of Illinois. No. 3-19-CV-00505-DGW — **Donald G. Wilkerson**, *Magistrate Judge*.

Before MICHAEL S. KANNE, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*.

### **ORDER**

Plaintiff-appellant Jack Hostetter applied for supplemental security income and disability insurance benefits based on several physical ailments causing chronic foot and back pain. An administrative law judge denied his application, finding that he had the residual functional capacity to perform sedentary work with limitations. The district court upheld that determination. On appeal, Hostetter argues that the ALJ ignored evidence unfavorable to his claim and substituted her judgment for the doctors' in arriving at the residual functional capacity determination. Because substantial evidence supports the ALJ's conclusion, we affirm the judgment.

### **Cheryl Kellogg v. Ball State University** No. 20-1406

Argued November 3, 2020 — Decided January 5, 2021

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 18-cv-02564 — **Tim A. Baker**, *Magistrate Judge*.

Before KANNE, SCUDDER, and ST. EVE, *Circuit Judges*.

KANNE, *Circuit Judge*. Many plaintiffs seeking to redress discriminatory payment decisions cannot marshal evidence of explicit misconduct. But the plaintiff in this case, Cheryl Kellogg, can and has. Kellogg testified that when the Indiana Academy hired her as a teacher in 2006, its director, Dr. David Williams, told her that she “didn’t need any more [starting salary], because he knew [her] husband worked.” Throughout her twelve-year tenure at the Academy, Kellogg suffered the effects of this outdated and improper approach to her starting pay. And in 2018, she sued the Academy for her unjust compensation. Despite this evidence of unequivocal discrimination, the district court granted summary judgment to the Academy because it proffered what the court believed were undisputed gender-neutral explanations for Kellogg’s pay. This decision was not correct. Williams’s statement contradicts the Academy’s explanations for Kellogg’s pay and puts them in dispute. And for several reasons, it does not matter that Williams uttered the statement so long ago, even well outside the statute of limitations period. Under the paycheck accrual rule, Williams’s statement can establish liability because it affected paychecks that Kellogg received within the limitations window. Plus, as an evidentiary matter, Kellogg can rely on Williams’s statement to put the Academy’s explanations in dispute. We thus reverse the decision of the district court granting summary judgment to the Academy and remand this case for further proceedings.

**Hortansia Lothridge v. Andrew Saul** No. 20-1269

Argued November 17, 2020 — Decided January 5, 2021

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:19-cv-00067-JVB — **Joseph S. Van Bokkelen**, *Judge*.

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

HAMILTON, *Circuit Judge*. Plaintiff Hortansia Lothridge suffers from fibromyalgia, chronic obstructive pulmonary disorder, asthma, hypertension, and several mental-health conditions. After an administrative law judge denied her application for disability benefits, a district judge remanded her case for further explanation of how the ALJ considered Lothridge’s periodic non-compliance with treatments. On remand, the ALJ again denied the application, finding that Lothridge could still perform light work with certain limitations. On judicial review, a different district judge upheld that determination, and Lothridge has appealed. In assessing Lothridge’s impairments at step three of the five-step disability analysis, the ALJ found moderate limitations in concentration, persistence, and pace. In determining her residual functional capacity at step four, however, the ALJ failed to take those limitations into account. This oversight was important because the jobs that the ALJ determined that Lothridge could still perform would require the ability to stay on-task for at least 90% of the workday and would have little tolerance for tardiness or absences. The ALJ made no determination one way or another whether Lothridge is capable of meeting these requirements with her deficits in concentration, persistence, and pace. We therefore vacate the judgment and remand the case to the Commissioner of Social Security.

**Tim Semmerling v. Cheryl Bormann** No. 19-3211

Submitted December 10, 2020 — Decided January 5, 2021

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 18-CV-6650 — **Robert W. Gettleman**, *Judge*.

Before DIANE S. SYKES, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

**ORDER**

Tim Jon Semmerling worked in Guantanamo Bay, Cuba, on the legal defense team for Walid bin Attash, an al-Qaeda terrorist and mastermind of the 9/11 attacks. Semmerling is gay. Cheryl Bormann, the lead attorney on the defense team, instructed Semmerling not to disclose his sexual orientation to bin Attash.

She feared that if bin Attash discovered Semmerling's sexual orientation, he would fire the entire team because of his strong political and religious views against homosexuality. In October 2015 Bormann fired Semmerling. He responded with this lawsuit alleging that Bormann informed bin Attash of his sexual orientation and also told him that Semmerling was "pursuing a homosexual interest" and had become "infatuated" with him. Semmerling brought tort claims against Bormann for defamation, negligence, and intentional infliction of emotional distress, and claims against the United States under § 2674 of the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, for negligence and intentional infliction of emotional distress. The district court dismissed the claims against Bormann because they were barred by Illinois's absolute litigation privilege, and it dismissed the claims against the United States for failure to state a claim... Because Semmerling's brief does not remotely comply with Rule 28 and offers no legal basis for disagreeing with the judge's dismissal order, the judgment is **AFFIRMED**

**Sterling National Bank v. Bernard Block** Nos. 19-2300, 19-3122, & 19-3235

Argued September 23, 2020 — Decided January 5, 2021

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:16-cv-09009 — **Harry D. Leinenweber**, *Judge*.  
Before SYKES, *Chief Judge*, and HAMILTON and ST. EVE, *Circuit Judges*.

HAMILTON, *Circuit Judge*. In 2015, plaintiff Sterling National Bank purchased the Damian Services Corporation from its prior owners (the defendant Sellers). The stock purchase agreement set up an escrow of two million dollars available to resolve disputes that might arise after the purchase. The parties dispute here the right to the escrowed money. The issues are governed by the elaborate Stock Purchase Agreement in which the parties set up a comprehensive, custom-tailored set of rights, obligations, remedies, and procedures for resolving disputes. Shortly after the purchase, a disgruntled former Damian employee called some of Damian's clients to tell them of a billing practice that the Sellers had instituted years earlier. When Sterling learned of the situation, it investigated with the help of a law firm and forensic accountant. After several months, Sterling concluded that under the Sellers' management, Damian had overcharged its clients by over one million dollars. Sterling refunded these overpayments to each of its current clients, but not to any former clients. Sterling then demanded indemnification from the escrow. Sterling claimed that the Sellers had misrepresented Damian's liabilities and vulnerability to litigation. The Sellers refused, leading to this lawsuit. The district court granted summary judgment to the Sellers on the theory that Sterling missed the seemingly strict deadline for claiming indemnification under the stock purchase agreement. The district court then denied the Sellers' request for statutory pre- and post-judgment interest on the escrow money. Both sides have appealed. We reverse summary judgment for the Sellers. Whether Sterling's demand for indemnification was late depends at best on disputed facts. Even if the demand was late, however, the agreement's elaborate terms provide that any delay could be held against Sterling only "to the extent that [Sellers] irrevocably forfeit[] rights or defenses by reason of such failure." Undisputed facts show that the Sellers have not irrevocably forfeited any claims or defenses, so the timing of Sterling's demand does not matter. We decline both sides' invitations to decide the merits of Sterling's claims as a matter of law in the first instance. We agree with the district court's denial of pre- and post-judgment interest. We remand to the district court for further proceedings on the merits.

**Douglas D. Jackson v. USA** Nos. 20-1444 & 20-1536

Submitted January 5, 2021 — Decided January 6, 2021

Case Type: Prisoner

Northern District of Indiana, South Bend Division. No. 3:15CR06-001 — **Robert L. Miller, Jr.**, *Judge*.  
Before DIANE S. SYKES, *Chief Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*.

**ORDER**

Douglas Jackson stands convicted of sexually trafficking an underage girl. He brings two appeals, which we have consolidated for decision. First, in appeal No. 20-1536, he seeks a certificate of appealability for a collateral challenge to his conviction, arguing that his trial counsel was ineffective for not seeking a judgment of acquittal based on improper venue. Second, in No. 20-1444, Jackson directly appeals his sentence, repeating his objection to venue and also arguing that the district court impermissibly calculated the advisory guidelines range based on facts not found by a jury. We deny his request for a certificate of appealability because venue was proper, and we affirm his sentence because the court correctly computed his guidelines range.

**USA v. Robert Johnson** No. 20-1127

Submitted January 5, 2021 — Decided January 6, 2021

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:18-CR-00252(1) — **Charles R. Norgle**, *Judge*.  
Before DIANE S. SYKES, *Chief Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*.

**ORDER**

Robert Johnson robbed a bank and then led police on a high-speed car chase before being arrested. He pleaded guilty to bank robbery, see 18 U.S.C. § 2113(a), and was sentenced below the guidelines to six years in prison and three years' supervised release. Johnson appealed, but counsel asserts that the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738 (1967). Johnson opposes counsel's motion. See CIR. R. 51(b). Counsel's brief explains the nature of the case and addresses potential issues that an appeal of this kind might involve. Because that analysis appears thorough, we limit our review to the subjects raised by counsel's and Johnson's submissions... Accordingly, we GRANT counsel's motion to withdraw and DISMISS the appeal.

**Brian Hope v. Commissioner of Indiana Department of Correction** No. 19-2523

Argued January 14, 2020 — Decided January 6, 2021

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:16-cv-02865-RLY-TAB — **Richard L. Young**, *Judge*.  
Before ROVNER, WOOD, and ST. EVE, *Circuit Judges*.  
ST. EVE, *Circuit Judge*, dissenting.

ROVNER, *Circuit Judge*. Sex offender registration and notification laws have a unique place at the intersection of criminal and civil law. These civil laws impose cumbersome and often lifelong burdens on former criminal perpetrators, many of whom have finished all forms of imprisonment and post-imprisonment supervision. For this reason, they are frequently challenged as unconstitutional. In this case, the plaintiffs have challenged Indiana's Sex Offender Registration Act (SORA) as it applies to offenders who have relocated to Indiana from other states after the enactment of SORA, and who are forced to register under the law, but would not have been required to do so had they committed their crimes as residents of Indiana prior to the enactment of the relevant portions of SORA and maintained citizenship there. The district court found the registration requirements to be unconstitutional, and we uphold the district court's finding that this application of SORA violates the plaintiffs' right to travel...

AFFIRMED

**Benjamin Levy v. Robert Wilkie** No. 20-1877

Argued December 16, 2020 — Decided January 7, 2021

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 18 C 1255 — **Gary Feinerman**, *Judge*.

Before DIANE P. WOOD, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

#### **ORDER**

Two police officers who worked at a hospital run by the Department of Veterans Affairs were accused of sexual harassment. Benjamin Levy, who is African-American and had previously complained of discrimination, was suspended, while a white officer reporting to the same supervisor was never disciplined and later promoted. Believing that the Department's disparate treatment was based on his race, Levy sued the Department for racial discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000e–2(a)(1), 2000e–3(a). The district court entered summary judgment for the Department. We conclude, however, that a reasonable jury could find that Levy was similarly situated to but punished more severely than the white officer, and so we vacate the judgment and remand for further proceedings. Because Levy appeals from the entry of summary judgment, we recount the factual record in the light most favorable to him.

#### **Raphael Driver v. Indiana Parole Board No. 20-1622**

Submitted January 5, 2021 — Decided January 7, 2021

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:20-cv-140-JRS-TAB — **James R. Sweeney II**, *Judge*.

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

#### **ORDER**

A hearing officer at Indiana's New Castle Correctional Facility found Raphael Driver guilty of assaulting a guard and a case manager. The prison sanctioned him with six months of disciplinary segregation and a temporary suspension of phone and commissary privileges. Driver, who says he has paranoid personality disorder and post-traumatic stress disorder, maintains he is innocent of those charges and asserts that the hearing officer disregarded witness testimony and his mental-health evidence. He petitioned for a writ of habeas corpus, 28 U.S.C. § 2254, contending that he was punished without due process because there was insufficient evidence to support the violation. The district court dismissed his petition, concluding that his allegations could not lead to relief under § 2254 because they did not concern the loss of good-time credits and therefore did not affect the duration of his state custody. Driver has since been released on parole, so we must first determine whether his petition is now moot... Even if he had been paroled in November 2019, therefore, his time in custody would have still lasted until April 2021. Because a favorable decision could provide him no redress with respect to his time in custody, his case is moot. Accordingly, we VACATE the decision and REMAND with the instruction to dismiss the petition as moot. See *Munsingwear*, 340 U.S. at 39.

#### **Samterious Gordon v. Drew Cross No. 20-1139**

Submitted January 5, 2021 — Decided January 7, 2021

Case Type: Prisoner

Western District of Wisconsin. No. 3:18-cv-00176-wmc — **William M. Conley**, *Judge*.

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

#### **ORDER**

After complaining to a nurse about pain from his tooth, Samterious Gordon suffered dental complications that required a prison dentist to extract it a month later. He sued several prison officials for violating his rights under the Eighth Amendment and state law by not immediately responding to his request for dental treatment. The district court permitted him to proceed to trial on claims against the nurse and two correctional officers, and a jury later found against him. Gordon appeals, challenging several of the district

court's pretrial decisions and asserting that the jury's verdict is against the weight of the evidence. We affirm.

**USA v. Maurice Gardner** No. 19-3456

Submitted December 15, 2020 — Decided January 8, 2021

Case Type: Criminal

Southern District of Indiana, Evansville Division. No. 3:17-cr-00030-001 — **Richard L. Young**, *Judge*.  
Before MICHAEL S. KANNE, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B.  
BRENNAN, *Circuit Judge*.

**ORDER**

A jury convicted Maurice Gardner of trafficking methamphetamine and possessing a gun during that offense. Evidence against Gardner included his admission that he was trying to sell drugs, scales and bags of methamphetamine found on him, and expert testimony from an officer who opined that Gardner's text messages discussed drug sales in coded language. Gardner challenges only the expert testimony, arguing it was not properly admitted under Federal Rule of Evidence 702. We conclude the district court permissibly ruled that the officer was qualified to translate the coded texts, and that given the other evidence at his jury trial, Gardner cannot show he was prejudiced by the testimony. So we affirm.

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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](#)