

## Opinions for the week of July 5 - July 8, 2016

### **USA v. Conrad LeBeau** No. 16-1289

Submitted June 30, 2016 — Decided July 5, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 10-CR-253 — **C.N. Clevert, Jr.**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

#### **ORDER**

Conrad LeBeau pleaded guilty to selling a drug not approved by the Food and Drug Administration. As a part of a conditional plea agreement, he reserved the right to appeal rulings on pretrial motions in which he unsuccessfully sought to dismiss the charges. He had argued that his product was not a “drug,” obtaining FDA approval was impossible, and the prosecution violated his right to free speech. Because the district court correctly rejected all three arguments as legally baseless, we affirm.

### **USA v. Dion T. Miller** No. 15-3197

Argued June 8, 2016 — Decided July 5, 2016

Case Type: Criminal

Central District of Illinois. No. 1:14-cr-10031-JES-JEH-1 — **James E. Shadid**, *Chief Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

#### **ORDER**

Dion Miller pleaded guilty to possessing crack cocaine with intent to distribute, see 21 U.S.C. § 841(a)(1), but he reserved the right to challenge the district court’s denial of his motion to suppress drugs seized incident to his arrest. Because we conclude that the police had probable cause to arrest Miller, we affirm the district court’s judgment.

### **Jason Myers v. Indiana Department of Correction** No. 15-3196

Submitted June 30, 2016 — Decided July 5, 2016

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:15-cv-00471-TWP-MJD — **Tanya Walton Pratt**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

#### **ORDER**

Jason Myers, an Indiana inmate, sued the Indiana Department of Corrections and several prison officials on two claims: prison officials denied him access to the courts by refusing to deliver mail from Indiana’s court of appeals, and they violated the Eighth Amendment by inadequately cleaning his clothing. See 42 U.S.C. § 1983. The district court screened Myers’s complaint, see 28 U.S.C. § 1915A, and dismissed it for failure to state a claim. We conclude that Myers failed to state an access-to-courts claim because he had no potentially meritorious state-court claim. And we conclude that Myers pleaded himself out of court on his claim of inadequately cleaned clothing. We therefore affirm.

### **Richard Aurand v. Carolyn Colvin** No. 15-2992

Argued June 8, 2016 — Decided July 5, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 3986 — **Sidney I. Schenkier**, *Magistrate Judge*.  
Before WILLIAM J. BAUER, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; MICHAEL S. KANNE,  
*Circuit Judge*.

#### **ORDER**

Richard Aurand applied for Disability Insurance Benefits and Supplemental Security Income claiming disability from mental illness and scarring from burns suffered during a suicide attempt. An administrative law judge denied benefits, and the Appeals Council and district court upheld that decision. The ALJ discounted the opinions of the two examining mental-health experts and concluded that Aurand was exaggerating the extent of his mental and physical limitations. On that basis the ALJ found that Aurand is able to perform unskilled, light work with restrictions. Because this finding is not supported by substantial evidence, we overturn the ALJ's decision and remand for further proceedings.

#### **USA v. Shane Viren No. 15-2078**

Argued June 1, 2016 — Decided July 5, 2016

Case Type: Criminal

Central District of Illinois. No. 4:13-cr-40057-SLD-1 — **Sara Darrow**, *Judge*.  
Before WOOD, *Chief Judge*, and BAUER and FLAUM, *Circuit Judges*.

BAUER, *Circuit Judge*. Defendant-appellant, Shane A. Viren ("Viren"), entered a guilty plea to three counts of sexual exploitation of a minor, violations of 18 U.S.C. § 2251(a), and one count of possession of child pornography, a violation of 18 U.S.C. § 2252A(a)(5)(B). Although the plea agreement limited Viren's sentence to a maximum of 360 months' imprisonment, the district court rejected the plea agreement and sentenced Viren to 600 months (the statutory maximum) each on the three counts of sexual exploitation of a minor, and 240 months (also the statutory maximum) on the possession of child pornography count, to be served concurrently. Viren appeals his sentence, arguing that the district court abused its discretion by failing to explain why it rejected his initial written plea agreement. He also argues that the district court erred in raising his criminal history category from II to V. We reject Viren's arguments and affirm his sentence.

#### **Bank of America, N.A. v. Dawn Martinson No. 13-3892**

Argued December 1, 2014 — Decided July 5, 2016

Case Type: Civil

Western District of Wisconsin. No. 10-CV-10-wmc — **William M. Conley**, *Chief Judge*.  
Before BAUER, KANNE, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. This appeal turns on an issue of appellate jurisdiction. Based on our court's decision in HSBC Bank USA, N.A. v. Townsend, 793 F.3d 771 (7th Cir. 2015), we conclude that the mortgage foreclosure judgment on appeal is not a final judgment so that the appeal must be dismissed.

#### **Jana Caudill v. Keller Williams Realty, Inc. No. 15-3313**

Argued May 19, 2016 — Decided July 6, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 4693 — **Charles P. Kocoras**, *Judge*.  
Before WOOD, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. Jana Caudill, the principal plaintiff in this diversity suit for breach of contract governed by Texas law, is an Indiana resident who owns a real estate brokerage company named Leaders. The defendant, Keller Williams, is a Texas corporation that franchises real estate firms like the plaintiffs' and in 2001 had franchised Caudill's company, with the result that it operated under the Keller

Williams name. Later she was made a Regional Director of Keller Williams. Their relationship soured, however. Her position was terminated in 2010 and her company's franchise the following year... Her suit, filed in a federal district court in Indiana, was transferred to a federal district court in Texas and settled in 2012. The settlement agreement included a prohibition against disclosure of its terms, including the amount paid Caudill in the settlement. The agreement allowed certain entities, such as tax professionals, insurance carriers, and government agencies, to receive the disclosures, but the recipients had to promise to keep them in confidence... Three months after the court in Texas dismissed Caudill's suit pursuant to the settlement agreement, Keller Williams issued what is called an FDD (Franchise Disclosure Document) to some 2000 existing or potential franchisees and other interested firms or persons. None of the recipients was permitted by the settlement agreement to receive such disclosures... Caudill contends that this widespread dissemination of the FDD was a violation of the confidentiality clause of the settlement agreement, and that since the liquidated damages clause specifies damages of \$10,000 for each breach of the confidentiality clause she is entitled to \$20 million (2000 x \$10,000) in damages. The district judge disagreed... AFFIRMED.

**Eileen Felix v. Wisconsin Department of Transportation No. 15-2047**

Argued February 12, 2016 — Decided July 6, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 1:13-cv-01188-WCG — **William C. Griesbach**, *Chief Judge*.  
Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and BLAKEY, *District Judge*.

ROVNER, *Circuit Judge*. Eileen Felix sued her former employer, the Wisconsin Department of Transportation, under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 et seq., contending that she was discharged solely because of an anxiety disorder and related disabilities. The district court entered summary judgment against Felix, reasoning that the undisputed facts demonstrated that she was discharged not solely because of her disabilities but rather based on workplace behavior that indicated to her employer that she posed a safety risk to herself and others. *Felix v. Wis. Dep't of Transp.*, 104 F. Supp. 3d 945 (E.D. Wis. 2015). We affirm.

**Melvin Phillips v. Sheriff of Cook County Nos. 14-3753 & 15-1616**

Argued February 11, 2016 — Decided July 6, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 1:09-cv-00529 — **Joan Humphrey Lefkow**, *Judge*.  
Before KANNE, RIPPLE, and WILLIAMS, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Plaintiffs Melvin Phillips, Malcolm Patton, Rodell Sanders, and Frank Powicki are current and former detainees of Cook County Jail (the "Jail"). They brought a class action under 42 U.S.C. § 1983 against Cook County, Illinois, and the Sheriff of Cook County (collectively, "Cook County"), claiming that the level of dental care they received at the Jail demonstrated deliberate indifference in violation of the Eighth and Fourteenth Amendments. The district court originally certified two classes of plaintiffs under Federal Rule of Civil Procedure 23. However, the district court subsequently decertified one class, modified the other class, and determined that the detainees' motion for injunctive relief was moot. The detainees timely appealed the district court's decision to decertify. While that appeal was pending, the detainees moved for a new trial under Federal Rule of Civil Procedure 60(b) based on newly discovered evidence, but the district court denied the motion. The detainees timely appealed this denial as well, and we consolidated the two appeals... the district court's judgment in Case Number 14-3753 is AFFIRMED... the appeal in Case Number 15-1616 is DISMISSED. The defendants may recover their costs in this court.

**Alfonso Torres-Chavez v. USA No. 15-1353**

Argued April 27, 2016 — Decided July 7, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 14 C 9405 — **Amy J. St. Eve**, *Judge*.

Before FLAUM, MANION, and WILLIAMS, *Circuit Judges*.

PER CURIAM. Alfonso Torres-Chavez was sentenced to 14 years' imprisonment after a jury found him guilty of conspiring to distribute cocaine, 21 U.S.C. §§ 846, 841(a)(1), possessing with intent to distribute cocaine, id. § 841(a)(1), and using a cellular phone to facilitate the distribution conspiracy, id. § 843(b). After his conviction was affirmed on appeal, Torres-Chavez sought collateral relief under 28 U.S.C. § 2255. Torres-Chavez claims that six months before trial, the government offered a plea agreement that provided for 10 years' imprisonment—the statutory minimum for conspiring to distribute more than 5 kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A)(ii)(II). He alleges that his counsel was constitutionally ineffective for advising him that the government lacked enough evidence to convict him at trial and that he should therefore reject the plea agreement. The district court denied Torres-Chavez's motion without holding an evidentiary hearing, finding that this advice was not objectively unreasonable. But that ruling was premature: the record contains no evidence about what Torres-Chavez's counsel knew about the government's case against his client at the time of the offer, and the government's case at trial was quite strong. So we vacate the district court's dismissal of Torres-Chavez's § 2255 motion and remand for an evidentiary hearing.

**Sheet Metal Workers International v. Horning Investments, LLC** No. 15-1004

Argued November 6, 2015 — Decided July 7, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 12-cv-00830 — **Jane E. Magnus-Stinson**, *Judge*.

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

POSNER, *Circuit Judge*, dissenting.

WOOD, *Chief Judge*. Horning Investments, LLC, is a roofing company, but this case is about a floor—in particular, the lower limit on wages and benefits imposed by the federal Davis-Bacon Act. The dispute concerns a construction project for the U.S. Department of Veterans Affairs. Horning was a subcontractor for the project; its workers are represented by Local 20 of the Sheet Metal Workers International Association (the Union). Believing that Horning had paid its workers less than the Davis-Bacon Act requires, the Union sued. Interestingly, however, it did not pursue relief directly under Davis-Bacon; instead, it filed a qui tam action under the False Claims Act, 31 U.S.C. §§ 3729–3733—the statute at issue in the Supreme Court's recent decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). By choosing the False Claims route, the Union undertook to show that Horning knowingly made false statements (or misleading omissions of the type described in *Universal Health Services*) that were material to the government's payment decision. We conclude that the Union did not proffer enough evidence to permit a reasonable jury to conclude that Horning acted with the requisite knowledge. We thus affirm the judgment of the district court in Horning's favor.

**Vera Putro v. Loretta E. Lynch** No. 14-2430

Argued April 27, 2016 — Decided July 7, 2016

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A099-280-517

Before FLAUM, MANION, AND WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. This case involves the application of an exemption in the immigration laws for an alien seeking to obtain unconditional lawful permanent resident status as a result of her marriage to a U.S. citizen. Vera Putro, a citizen of Latvia, married a U.S. citizen in 2004 and based on that marriage gained conditional permanent residency. Her residency did not become unconditional, however, because her husband passed away before they could petition jointly to remove the conditions. Putro petitioned on

her own to have the conditions removed. U.S. Citizenship and Immigration Services construed the petition as a request for a discretionary waiver of the joint-petition requirement, denied the waiver, and ordered Putro removed. But in fact Putro did not need a waiver because her husband's death during the conditional period exempted her from the joint-filing requirement. In mistakenly evaluating her petition as a request for a waiver, the agency erroneously placed on Putro the burden of proving that the marriage was bona fide. So we grant the petition.

**Jeffrey D. Cochran v. Illinois State Toll Highway** No. 15-2689

Argued April 18, 2016 — Decided July 8, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 9145 — **Manish S. Shah**, *Judge*.  
Before EASTERBROOK and SYKES, *Circuit Judges*, and ADELMAN, *District Judge*.

ADELMAN, *District Judge*. Plaintiff Jeffrey Cochran brings this putative class action under 42 U.S.C. § 1983 against the Illinois State Toll Highway Authority and several of its directors claiming violations of procedural due process and equal protection and asserting related state law claims. Plaintiff's claims arise from fines he incurred while driving on the Illinois tollway. The district court dismissed plaintiff's federal claims for failure to state a claim for relief and declined to exercise supplemental jurisdiction over the state law claims. Plaintiff appeals, and we affirm.

**Arlington Capital, LLC v. Bainton McCarthy, LLP** No. 15-2543

Argued January 6, 2016 — Decided July 8, 2016

Case Type: Bankruptcy from District Court

Northern District of Indiana, Fort Wayne Division. No. 1:14-CV-98 — **Theresa L. Springmann**, *Judge*.  
Before POSNER and WILLIAMS, *Circuit Judges*, and PALLMEYER, *District Judge*.

WILLIAMS, *Circuit Judge*. The appellees in this case, who we refer to as the "Law Firms," performed legal services for a bankrupt estate and asked the bankruptcy court to approve their fees. The appellant, Arlington Capital, LLC, is a general unsecured creditor of the estate. Arlington objected to the fee petitions, arguing that the Law Firms should not be paid because their work never had a chance of benefiting the estate. The bankruptcy court approved the petitions and the district court affirmed. Arlington wants us to reverse but it has not shown that it stands to benefit if the Law Firms' fees are denied. So we remand and instruct the district court to dismiss the case for lack of standing.

**Ira Holtzman v. Gregory Turza** No. Nos. 15-2164 & 15-2256

Argued January 11, 2016 — Decided July 8, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 08 C 2014 — **Robert W. Gettleman**, *Judge*.  
Before EASTERBROOK, WILLIAMS, and SYKES, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Attorney Gregory Turza tried to solicit business by sending fax advertisements to accountants. Three years ago we held that these faxes violated the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227. *Ira Holtzman, C.P.A., & Associates, Ltd. v. Turza*, 728 F.3d 682 (7th Cir. 2013). The district judge had ordered Turza to post a fund of about \$4.2 million, stating that he planned to distribute this sum to the class members and donate any remainder to a charity. We reversed that part of the district court's order. We held that "this action stems from discrete injuries suffered by each recipient of the faxes; it does not create a common fund." 728 F.3d at 688. We remanded the case to the district court for further proceedings... The judgment is affirmed in part (on the class's appeal) and reversed in part (on Turza's appeal), and the case is remanded for the entry of judgment consistent with this opinion.

**USA v. Marshall Payne** No. 15-2161

Argued January 4, 2016 — Decided July 8, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13 CR 174 — **Sharon Johnson Coleman**, *Judge*.  
Before WILLIAM J. BAUER, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE  
WILLIAMS, *Circuit Judge*.

**ORDER**

In November 2012, law-enforcement officials arrested Marshall Payne (Marshall) and found two handguns in his car. Because Marshall had previously been convicted of a crime punishable by a term of imprisonment exceeding one year, he was charged with knowingly possessing the handguns in violation of 18 U.S.C. § 922(g)(1). Marshall moved to suppress evidence relating to the discovery of the handguns, but the district court denied the motion. Marshall challenges this denial on appeal on the ground that the police lacked probable cause to arrest him. We find, however, that the police reasonably believed that a crime was afoot, based on information they had gathered during their investigation and on seeing Marshall run away from them shortly after he noticed them. We also reject Marshall's argument that the police lacked probable cause to search his car after arresting him, since his flight from officers and his inculpatory post-arrest statements indicated that his car contained contraband. Marshall insists that these statements are inadmissible but we disagree: they were made voluntarily and without prompting by police. So we affirm the district court's denial of Marshall's motion to suppress.

**USA v. Joseph Banks** No. 14-3461

Argued December 4, 2015 — Decided July 8, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 08 CR 688 — **Rebecca R. Pallmeyer**, *Judge*.  
Before POSNER, FLAUM, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Defendant Joseph Banks was convicted of committing or attempting to commit four separate robberies over a 12-month period between 2007 and 2008, and was sentenced to 432 months' imprisonment. On appeal, Banks challenges both his conviction and his sentence. He claims that the district court violated his right to counsel under the Sixth Amendment not only by permitting him to waive his right to counsel and proceed pro se on the eve of trial, but also by not rescinding the waiver when it became clear during trial that he would forgo participating in most of the trial proceedings. We disagree. The district court permitted Banks to proceed pro se only after concluding that his waiver of his right to trial counsel was both knowing and voluntary... We AFFIRM the district court's judgment.

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](#).