

## **Opinions for the week of September 14 – September 18, 2020**

### **Mark Mlsna v. Union Pacific Railroad Company** No. 19-2780

Argued May 27, 2020 — Decided September 14, 2020

Case Type: Civil

Western District of Wisconsin. No. 18-cv-37-wmc — **William M. Conley**, *Judge*.

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

BRENNAN, *Circuit Judge*. When the Federal Railroad Administration put in place new regulations related to hearing, a train conductor—who has been hearing-impaired since youth and has worn hearing aids for years—was caught in a bind. He passed a hearing acuity test, but only when using hearing aids without additional hearing protection. According to the railroad, this placed him in violation of a policy which requires that protection be worn if the employee is exposed to noise above a certain level. The railroad and the conductor could not agree on an accommodation for him to use other hearing devices. The railroad would not recertify the conductor, and he lost his job. The conductor sued arguing that the railroad discriminated against him because of his hearing disability. The district court granted summary judgment to the railroad, finding that the conductor “failed to marshal enough evidence for a reasonable jury to conclude that he could fulfill the essential functions of the train conductor position with a reasonable accommodation.” We view the record differently. Issues of fact exist as to whether wearing hearing protection is an essential function of the plaintiff’s work as a conductor, as well as whether reasonable accommodations for the conductor were properly considered. So we reverse and remand for further proceedings.

### **Eric Conner v. Heather Schwenn** No. 20-1728

Submitted September 2, 2020 — Decided September 15, 2020

Case Type: Prisoner

Western District of Wisconsin. No. 19-cv-921-bbc — **Barbara B. Crabb**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

### **ORDER**

Eric Conner sued officials at the Wisconsin Secure Program Facility in Boscobel to challenge his assignment to administrative confinement. He raises claims about due process, retaliation, conditions of confinement, and equal protection. The district court correctly ruled that Conner failed to state a claim under these theories, and it reasonably severed an unrelated claim about his medical care, so we affirm.

### **Gerald Peeters v. Andrew Saul** No. 19-2530

Argued June 3, 2020 — Decided September 15, 2020

Case Type: Civil

Eastern District of Wisconsin. No. 2:18-cv-00738-WED — **William E. Duffin**, *Magistrate Judge*.

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

BAUER, *Circuit Judge*. Gerald Peeters appeals the denial of his claim for disability insurance benefits. In 2016 and 2018, the Administrative Law Judge (ALJ) determined Peeters was not disabled under the relevant regulations. Peeters sought relief in the district court, which reviewed the ALJ’s opinion and found that the decision was supported by substantial evidence. Peeters contests the ALJ’s weight and application of the opinions given by Dr. Sandra King and state agency psychologists. Because we find the ALJ’s opinion was supported by substantial evidence, we affirm.

**USA v. Hector Uriarte** No. 19-2092

Argued May 13, 2020 — Decided September 15, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:09-cr-00332-3 — **Joan B. Gottschall**, *Judge*.

Before SYKES, *Chief Judge*, and FLAUM, EASTERBROOK, RIPPLE, KANNE, ROVNER, WOOD, HAMILTON, BARRETT, BRENNAN, SCUDDER, and ST. EVE, *Circuit Judges*.

BARRETT, *Circuit Judge*, with whom BRENNAN and SCUDDER, *Circuit Judges*, join, dissenting.

RIPPLE, *Circuit Judge*. Section 403 of the First Step Act of 2018 amended the mandatory minimum sentence for certain firearm offenses. Although sentencing reform is generally prospective, Congress specifically mandated that these amendments were to apply to an offense committed before enactment “if a sentence for the offense has not been imposed as of such date of enactment.” First Step Act of 2018, Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5222 (codified at 18 U.S.C. § 924 note). We vacated, on unrelated grounds, Hector Uriarte’s initial sentence before the enactment of the First Step Act. *United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016). At resentencing, the district court ruled that he was entitled to be sentenced under the provisions of the Act. We agree with the district court and therefore affirm its judgment.

**USA v. Rashod Bethany** No. 19-1754

Argued June 1, 2020 — Decided September 15, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:06-cr-00346-1 — **Harry D. Leinenweber**, *Judge*.

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

SCUDDER, *Circuit Judge*, concurring.

RIPPLE, *Circuit Judge*. Rashod Bethany participated in a conspiracy to distribute crack cocaine in Chicago. He was sentenced originally in 2013, but that sentence was vacated, and he was resentenced in 2019 after the enactment of the First Step Act of 2018. He now appeals from that sentence. He submits that, in imposing the 2019 sentence, the district court should have applied to him two sections of the First Step Act, as well as three retroactive amendments to the Sentencing Guidelines. We hold that Mr. Bethany is entitled to the benefit of § 401 of the First Step Act, but the record leaves us in doubt as to whether he would have received the same sentence if he had the benefit of that provision. Accordingly, we order a limited remand to the district court to ascertain whether the district court is inclined to impose a different sentence in light of our decision today. *See United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005).

**John Myers v. Ron Neal** No. 19-3158

Argued May 26, 2020 — Decided August 4, 2020 — Amended September 16, 2020

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:16-cv-2023 — **James R. Sweeney, II**, *Judge*.

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

SCUDDER, *Circuit Judge*. Indiana University student Jill Behrman went for a bike ride one morning but never returned. The police later found her bicycle less than a mile from the home of John Myers II, on the north side of Bloomington. Two years later a woman named Wendy Owings came forward confessing to the murder, but the case was reopened when a hunter came upon Behrman’s remains far from the location Owings described. A renewed investigation led the authorities to Myers, who was eventually charged with the murder. Six years after Behrman’s disappearance, a jury convicted him. Multiple Indiana courts affirmed. Myers then sought relief in federal court, and the district court granted his application for a writ of habeas corpus, concluding that Myers’s counsel performed so deficiently at trial as to undermine confidence in the jury’s guilty verdict. We reverse.

**John Myers v. Ron Neal** No. 19-3158

September 16, 2020

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:16-cv-2023 — **James R. Sweeney, II**, *Judge*.

Before JOEL M. FLAUM, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*.

Petitioner-appellee filed a petition for rehearing and rehearing *en banc* on September 1, 2020. No judge in regular active service has requested a vote on the petition for rehearing *en banc* and all members of the original panel have voted to deny rehearing and to issue an amended opinion. The court's opinion dated August 4, 2020 is amended by the attached opinion, which includes changes on pages 30 and 31. Accordingly, IT IS ORDERED that the petition for rehearing and rehearing *en banc* is therefore DENIED.

**USA v. Matthew Moultrie** No. 19-2896

Argued May 13, 2020 — Decided September 16, 2020

Case Type: Criminal

Central District of Illinois. No. 4:18-cr-40055-SLD-1 — **Sara Darrow**, *Chief Judge*.

Before RIPPLE, BARRETT, and BRENNAN, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Matthew Moultrie was charged with, and pleaded guilty to, being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The probation office's final presentence report calculated Mr. Moultrie's offense level at 21; this calculation included enhancements for possessing a firearm with an obliterated serial number, for discharging his firearm in a manner that endangered others, and for obstructing justice by both fleeing and engaging in a standoff with law enforcement. The presentence report also determined that Mr. Moultrie had a criminal history category of III. The resulting guidelines range was 46 to 57 months' imprisonment. At sentencing, the district court employed Mr. Moultrie's offense level and criminal history category as baselines. However, the court determined that, applying the factors set forth in 18 U.S.C. § 3553(a), Mr. Moultrie's offense level did not account adequately for the dangerous situations that his actions had created, nor did it account for his post-arrest behavior, which included attempting to dissuade witnesses from testifying against him. According to the court, an offense level of 23, as opposed to 21, was more appropriate. Additionally, the court determined that Mr. Moultrie's criminal history category did not account for the rapid escalation in his criminal activity or his risk of recidivism. The court believed a criminal history category of IV better captured the risk that he posed. These levels yielded a guidelines range of 70 to 87 months, and the court imposed a sentence of 84 months. On appeal, Mr. Moultrie challenges only the substantive reasonableness of his sentence. Concluding that the district court acted well within its discretion, we now affirm the judgment.

**USA v. Rumael Green** No. 19-2330

Argued May 22, 2020 — Decided September 16, 2020

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 17 CR 00625-1 — **Jorge L. Alonso**, *Judge*.

Before BAUER, EASTERBROOK, and WOOD, *Circuit Judges*.

BAUER, *Circuit Judge*. Rumael Green was indicted for possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). A security guard stopped and searched Green at a Chicago Housing Authority (CHA) public housing unit. After recovering a handgun, the security guard called the Chicago Police Department. At trial, Green moved to suppress the gun. The district court ruled that the security guard was not a state actor subject to the Fourth Amendment. Green entered a conditional guilty plea, reserving the right to appeal the denial of his motion. For the following reasons, we affirm.

**Donald Mains v. Andrew Saul** No. 20-1362

Submitted September 17, 2020 — Decided September 17, 2020

Case Type: Civil

Western District of Wisconsin. No. 3:18-cv-881-bbc — **Barbara B. Crabb**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

Donald Mains believes that the Social Security Administration discriminated against him based on his disability by shortchanging his retirement benefits. He sued the agency for what he regarded as a miscalculation of his monthly benefit amount (he thought the amount should be calculated based on gross earnings from self-employment rather than net earnings). Because the district court could not discern how Mains's claim challenged a "final decision" of the agency "made after a hearing," 42 U.S.C. § 405(g), the court ordered him to show cause why his action should not be dismissed for lack of subject-matter jurisdiction... As the district court pointed out, Mains could have challenged his retirement benefits by seeking reconsideration of the initial agency decision within sixty days of the January 2015 award, see 20 C.F.R. § 404.909(a)(1), but he failed to do so. **AFFIRMED**

**Christopher Andre Vialva v. T. J. Watson** No. 20-2710

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division. No. 2:20-cv-00413-JMS-DLP — **Jane Magnus-Stinson**, *Chief Judge*.

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

PER CURIAM. Christopher Vialva has been sentenced to death for murders he committed in 1999. In this proceeding under 28 U.S.C. §2241 he seeks a stay of his execution, which is scheduled for September 24. The district court denied that request, ruling that resort to §2241 is forbidden by 28 U.S.C. §2255(e), which provides: "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." The district court held that §2255 is adequate to resolve Vialva's legal claims. After reviewing the parties' briefs, which address the merits as well as the request for a stay, we agree with that conclusion... The motion for a stay of execution is denied, and the judgment of the district court is summarily affirmed.

**USA v. Donald Heisler** No. 20-1895

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Criminal

Western District of Wisconsin. No. 02-cr-135-bbc — **Barbara B. Crabb**, *Judge*

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

Donald Heisler, a federal prisoner, moved for compassionate release based on his susceptibility to COVID-19 and desire to care for his ailing mother. Initially, the district court denied his motion without prejudice to renewing it once he exhausted his administrative remedies. After the government conceded that he had done so, the district court denied Heisler's motion on the merits. In the meantime, Heisler had

mailed a notice of appeal from the first order. We lack jurisdiction over his appeal, however: Heisler has already received the relief he sought concerning the first order—a ruling on the merits—and he did not perfect an appeal of the second. Therefore, we dismiss his appeal as moot.

**Vickey Davidson v. State Collection Service, Inc.** No. 20-1773

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Civil

Western District of Wisconsin. No. 18-cv-1064-jdp — **James D. Peterson**, *Chief Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

Vickey Davidson worked as a customer service representative for State Collection Service, Inc. until her employment ended shortly before a scheduled back surgery. Davidson sued her former employer for permitting a hostile work environment based on her race and unlawfully firing her because of her race and disability. The district court granted State Collection's motion for summary judgment on all claims. Because no reasonable jury could find that Davidson's work environment was hostile, and she did not present evidence that State Collection unlawfully terminated her employment, we affirm.

**David Cain, Jr. v. Chris Rivers** Nos. 20-1421 & 20-1765

Submitted September 17, 2020 — Decided September 18, 2020

Case type: Prisoner

Northern District of Illinois, Eastern Division. No. 19 C 3748 — **Gary Feinerman**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

David Cain, Jr., was convicted in the Western District of New York of racketeering and related offenses. After a failed appeal and an unsuccessful collateral attack under 28 U.S.C. § 2255, Cain now seeks relief under § 2241 from three convictions for extortion under the Hobbs Act. See 18 U.S.C. § 1951. He argues that under *Ocasio v. United States*, 136 S. Ct. 1423 (2016), and a Second Circuit decision that followed, he is innocent because he never obtained "property" from his victims with their "consent," as required by the statute. The district court rejected his arguments and denied his § 2241 petition. We affirm, for a different reason: Because Cain does not rely on a new rule of statutory interpretation, and he already raised the same arguments in his direct appeal and his original petition under § 2255, he cannot use § 2241 to seek relief.

**Gary Pansier v. USA** No. 20-1404

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Bankruptcy from District Court

Eastern District of Wisconsin. No. 19-C-1431 — **William C. Griesbach**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

Joan Pansier challenges a district court's order affirming a bankruptcy court's denial of damages for an alleged violation of a stay on collecting debts. Because she and her husband Gary (who died several months ago) did not timely appeal the bankruptcy court's decision, we vacate the district court's judgment and remand with instructions to dismiss that appeal for lack of jurisdiction.

**Milan Knox v. Timothy Byrne** No. 20-1316

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 19-cv-00342 — **Manish S. Shah**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

In 2014, Milan Knox sued a deputy sheriff who, he asserted, had arrested him using excessive force and without probable cause. The district court dismissed his suit with prejudice as a sanction for Knox's "attempted ... fraud on the court"—in his complaint and application for leave to proceed in forma pauperis, Knox had misrepresented his litigation history and cash receipt of a recent settlement. Five years later, he again sued the deputy sheriff, this time for wrongful pretrial detention, stemming, in part, from the same arrest. The district court found that res judicata barred this suit because it arose from the same conduct and issues litigated in his 2014 suit, so it entered judgment on the pleadings for the deputy sheriff... DISMISSED

**Miranda Chaudhry v. Amazon.com, Incorporated** No. 20-1315

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 19 C 5659 — **Matthew F. Kennelly**, *Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

Miranda Chaudhry sued her former employer, Amazon.com, Inc., in state court for violations of workplace laws. Amazon removed the case to federal court, arguing that Chaudhry asserted claims arising under federal law. Her claims were dismissed on the merits. On appeal, Chaudhry argues that the district court should have remanded the case to state court and that she received inadequate notice of removal. But because her complaint sought relief under at least three federal laws, thereby authorizing removal, and any notice defect was harmless, we affirm.

**Jerry Hudson, Sr. v. Samuel Nwaobasi** No. 19-3044

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Prisoner

Southern District of Illinois. No. 3:18-CV-01356-NJR-GCS — **Nancy J. Rosenstengel**, *Chief Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

**ORDER**

Jerry Hudson, an Illinois inmate, appeals the dismissal of his deliberate- indifference suit against a prison doctor under the applicable two-year statute of limitations. The district court explained that his suit was untimely because he brought it four years after the events in question and no theory of tolling applied. We affirm.

**USA v. Edward Johnson** No. 19-2854

Submitted September 17, 2020 — Decided September 18, 2020

Case Type: Criminal

Northern District of Illinois, Western Division. No. 3:16-CR-50020(1) — **Rebecca R. Pallmeyer**, *Chief Judge*.

Before DAVID F. HAMILTON, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

## ORDER

A jury convicted Edward Johnson of one count of robbing a bank with a dangerous weapon. The statute he violated, 18 U.S.C. § 2113, prohibits bank theft “by force and violence, or by intimidation.” Johnson moved for a judgment of acquittal. He principally argued that the verdict was flawed because the indictment, which cited the statute correctly, added a narrative with the conjunctive phrase “*and* by intimidation” (emphasis added). The district court correctly ruled that no harm resulted from this addition and that Johnson’s other challenges were meritless, 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](#).