APPENDIX

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19-1616
Jo v. JPMC Specialty Mortgage LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of August, two thousand twenty.

Present:

JON O. NEWMAN,
ROSEMARY S. POOLER,
PETER W. HALL,
Circuit Judges.

BILLIAN JO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MEE JIN-JO,

Plaintiff-Appellant,

v. 19-1616

JPMC SPECIALTY MORTGAGE LLC,

Defendant-Third-Party-Plaintiff-Appellee,

WM SPECIALTY MORTGAGE LLC, DBA WM SPECIALTY MORTGAGE LLC, TRIPLE C TRANSPORTATION SERVICES, INC., DBA ADVANCED MOVING & STORAGE, LLC,

Defendants.

ADVANCED MOVING & STORAGE, LLC,

Third-Party-Defendant.

Appearing for Appellant:	Billian Jo, pro se, Detroit, MI.
Appearing for Appellee:	Kenneth Jude, Flickinger, Eckert, Seamans, Cherin & Mellott, LLC, White Plains, NY.

Appeal from an order of the United States District Court for the Western District of New York (Wolford, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is **AFFIRMED**.

Appellant Billian Jo, proceeding pro se, appeals the district court's March 28, 2019 order denying her Fed. R. Civ. P. 59 motion for a new trial in favor of JPMC Specialty Mortgage LLC. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review evidentiary rulings for abuse of discretion and "will reverse only for manifest error." *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010) (internal quotation marks omitted). "In conducting our review, we are mindful of the wide latitude afforded district courts both in determining whether evidence is admissible, and in controlling the mode and order of its presentation to promote the effective ascertainment of the truth." *Manley v. AmBase Corp.*, 337 F.3d 237, 247 (2d Cir. 2003) (citations and internal quotation marks omitted). In assessing whether the evidentiary ruling affected the outcome of the case, we consider whether the evidence "bore on an issue that is plainly critical to the jury's decision [and] whether that [evidence] was material to the establishment of the critical fact or whether it was instead corroborated and cumulative." *Cameron*, 598 F.3d at 61 (internal quotation marks omitted).

Jo argues that the district court made a host of evidentiary errors during her jury trial, including the court's preclusion of New York Department of Transportation ("NYDOT") records showing that the state had suspended the moving company's operating license at the time of the eviction. That claim is the only one on appeal that merits discussion.

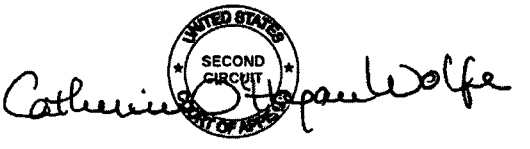
We will assume, for purposes of this appeal, that exclusion of NYDOT documents was error. However, that error was harmless in view of the following circumstances. At trial, the district court admitted into evidence a letter from Jo to defendant (exhibit 21) stating that she had been informed that the moving company's license had been revoked. Second, the court informed Jo that she could refer to the letter in her closing argument. Third, the court told Jo that she could testify that she had learned of the revocation of the moving company's license, and she availed herself of that opportunity. Fourth, the jury heard plaintiff's deposition testimony stating that she "contacted New York State and New York General Attorney and [] found that the moving company license was suspended and they have no legal right to do such business," App. at 68-

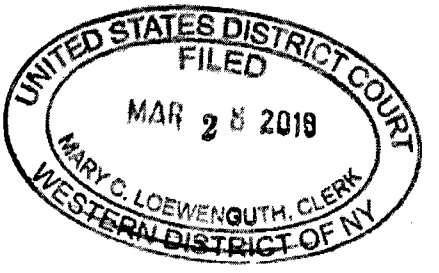
69, and that she wrote to defendant informing it that "the moving company is not licensed," App. at 70. In light of these circumstances and in the absence of any contrary evidence about the revocation of the moving company's license, the preclusion of the NYDOT documents does not warrant a new trial. Accordingly, plaintiff failed to demonstrate in this evidentiary challenge that "it is likely that in some material respect the factfinder's judgment was swayed by the error." *Costantino v. David M. Herzog, M.D., P.C.*, 203 F.3d 164, 174 (2d Cir. 2000) (internal quotation marks omitted).

We recognize that "[a] party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993); *see also Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983), but whether the excluded records warrant a new trial involves no interpretation of procedural rules. Moreover, it is apparent from the record that the district court made extensive efforts throughout the protracted pretrial proceedings to accommodate Jo's pro se status.

We have considered all of the appellant's remaining arguments and find them to be without merit. Accordingly, we affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk





UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BILLIAN JO, *as Personal Representative of the Estate of Mee Jin-Jo*,

Plaintiff,

v.

JPMC SPECIALTY MORTGAGE, LLC,

Defendant.

DECISION AND ORDER

1:08-CV-00230 EAW

INTRODUCTION

Mee Jin-Jo, now deceased and represented in this action by her daughter and personal representative Billian Jo ("Plaintiff"),[1] commenced this *pro se* lawsuit on March 18, 2008, alleging that JPMC Specialty Mortgage, LLC ("Defendant") improperly retained control over her property after she was evicted as a no-fault tenant from her residence. (Dkt. 1). The Court held a jury trial commencing on June 18, 2018. (Dkt. 365). The jury returned a "no cause of action" verdict on June 21, 2018 (Dkt. 372), and judgment was entered in Defendant's favor the same day (Dkt. 373).

Presently before the Court is Plaintiff's motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. (Dkt. 375). Plaintiff takes issue with a number of evidentiary rulings and other determinations made by the Court throughout trial. (Dkt.

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[1] On October 2, 2013, representatives of Mee Jin-Jo filed a notice of her death. (Dkt. 252). On December 19, 2014, Sughe Jo was permitted to proceed on behalf of Mee Jin-Jo's estate. (Dkt. 270). On June 15, 2015, the Court granted a motion to substitute Billian Jo as the personal representative of the estate of Mee Jin-Jo. (Dkt. 287).

375-2). Defendant opposes Plaintiff's motion (Dkt. 379), and Plaintiff has filed reply papers (Dkt. 380). For the following reasons, Plaintiff's motion is denied.

DISCUSSION

I. Legal Standard

Fed. R. Civ. P. 59(a)(1)(A) provides that a court "may, on motion, grant a new trial on all or some of the issues—and to any party—as follows: . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." "Essentially, to grant a Rule 59 motion, a district court 'must conclude that the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice, *i.e.*, it must view the jury's verdict as against the weight of the evidence.'" *Greenaway v. County of Nassau*, 327 F. Supp. 3d 552, 560 (E.D.N.Y. 2018) (quoting *Maureen Christensen v. County of Dutchess, N.Y.*, 548 F. App'x 651, 653 (2d Cir. 2013)); *see Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003) (same).

"[E]rroneous evidentiary rulings may furnish a basis for granting a post-verdict motion for a new trial under Rule 59." *Dreyer v. Ryder Auto. Carrier Grp., Inc.*, No. 98-CV-82A, 2008 WL 754113, at *2 (W.D.N.Y. Mar. 19, 2008) (quoting *LNC Invs., Inc. v. First Fidelity Bank*, 126 F. Supp. 2d 778, 787 (S.D.N.Y. 2001)). However, "[a] trial court has considerable discretion in determining whether to admit or exclude evidence." *Mem'l Drive Consultants, Inc. v. ONY, Inc.*, No. 96-CV-0702E(F), 2001 WL 241781, at *6 (W.D.N.Y. Mar. 7, 2001) (citing *Barrett v. Orange Cty. Human Rights Comm'n*, 194 F.3d 341, 346 (2d Cir. 1999)), *aff'd*, 29 F. App'x 56 (2d Cir. 2002); *see Pace v. Nat'l R.R. Passenger Corp.*, 291 F. Supp. 2d 93, 97 (D. Conn. 2003) ("Evidentiary rulings are

reviewed for an abuse of discretion."). Accordingly, "[a] motion for new trial on the basis of improper evidentiary rulings will be granted only where the improper ruling affects a substantial right of the moving party." *Mem'l Drive Consultants, Inc. v. ONY, Inc.*, 29 F. App'x 56, 61 (2d Cir. 2002) (citing *Malek v. Fed. Ins. Co.*, 994 F.2d 49, 55 (2d Cir. 1993)). "Whether a 'substantial right' has been invaded is dependent on the circumstances of the case, and the proceedings will not be disturbed, on post-trial motion in the district court or on appeal, unless any error of the court was truly harmful." *LNC Invs., Inc.*, 126 F. Supp. 2d at 787 (quoting Wright & Miller, *Fed. Prac. & Proc.* § 2885 pp. 453-54 (1995)).

II. Plaintiff Has Failed to Demonstrate that a New Trial is Warranted

Plaintiff does not challenge the jury's resolution of the evidence presented at trial. (Dkt. 380 at 11 ("Plaintiff is not questioning the jury's verdict.")). In other words, Plaintiff does not challenge the weight the jury gave to the evidence presented at trial. Instead, Plaintiff identifies several issues that she contends prejudiced her ability to present a complete case to the jury.

As an initial matter, Plaintiff fails to provide citations to any relevant excerpts of the trial or pretrial records and appears to submit her motion based upon her own recollection of the various arguments presented and rulings issued at trial and the pretrial conference. Generally speaking, specific reliance upon the trial transcript is necessary to demonstrate one's entitlement to relief on a Rule 59 motion based upon determinations made at trial. *See Ayala v. Rosales*, No. 13 C 4425, 2015 WL 4127915, at *1 (N.D. Ill. July 8, 2015) (noting that "while the Court has attempted to the best of its ability to address [p]laintiff's claims on the merits," the plaintiff's "failure to provide all of the necessary record citations

makes it impossible for this Court to properly address his claims of error," and thus, "any arguments lacking necessary record support are, in the first instances, denied as waived"); *Ratliff v. City of Chicago*, No. 10-CV-739, 2013 WL 3388745, at *1 (N.D. Ill. July 8, 2013) (on a motion for a new trial, "to the extent that citation to the record would be necessary to support a position, [d]efendants' failure to cite to the trial record or the pretrial conference record will not be excused"); *Parr v. Nicholls State Univ.*, No. CIV.A. 09-3576, 2012 WL 1032905, at *3 (E.D. La. Mar. 27, 2012) (denying the motion for a new trial, noting that "without the benefit of citation to the trial transcript, the Court has no basis for determining that any error occurred"); *Terranova v. Torres*, No. 04-CV-2129 (CS), 2010 WL 11507383, at *4 (S.D.N.Y. June 23, 2010) (declining to grant the plaintiffs' motion for a new trial based upon challenged evidentiary rulings where the plaintiff failed to "cite pertinent sections of the trial transcript so as to identify the particular evidentiary rulings to which he refers, and does not provide any legal support for his arguments"), *aff'd sub nom. Terranova v. New York*, 676 F.3d 305 (2d Cir. 2012); *Warren v. Thompson*, 224 F.R.D. 236, 240 n.7 (D.D.C. 2004) ("A trial court is not required to parse through transcripts in an effort to identify the grounds of a post-trial motion." (quotation omitted)), *aff'd sub nom. Warren v. Leavitt*, 264 F. App'x 9 (D.C. Cir. 2008). Nonetheless, the Court has considered the arguments raised in Plaintiff's post-verdict motion and finds that they do not demonstrate entitlement to a new trial.

For example, Plaintiff takes issue with several rulings precluding certain valuations of the personal property allegedly converted by Defendant. (*See, e.g.*, Dkt. 375-2 at 28-31). While the Court maintains that its trial and pretrial rulings were correct, because the

jury issued a "no cause of action" verdict, and never reached the issue of damages, even assuming that such valuations should not have been excluded, any resulting error is harmless because their submission to the jury would not have influenced the verdict. *See Heinemann v. Comput. Assocs. Int'l, Inc.*, 319 F. App'x 591, 597 (9th Cir. 2009) (stating that any error caused by the preclusion of "evidence regarding [the plaintiff's] claims for emotional distress and punitive damages . . . must be harmless because the jury never reached the question of damages"); *Church Ins. Co. v. Trippe Mfg. Co.*, 250 F. App'x 420, 422 (2d Cir. 2007) (stating that any error in the admission of "evidence concerning the amount of fire insurance compensation received by the Cathedral" would have "inevitably been harmless since the jury never reached the question of damages"); *Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 901 (6th Cir. 2004) ("To the extent that the evidence relates to punitive damages, any error was harmless as the jury did not reach the issue of damages."); *Mraovic v. Elgin, Joliet & E. Ry. Co.*, 897 F.2d 268, 271 (7th Cir. 1990) ("[P]resentation of evidence regarding the scope and effect of Mraovic's injuries assists the jury only in determining damages. As a matter of law, such testimony cannot be presumed to have any material effect on the jury's ruling on liability. Because the jury found Elgin not liable, the jury never reached the damages issue and the sanction was irrelevant." (citation omitted)); *accord In re Fosamax Prod. Liab. Litig.*, 509 F. App'x 69, 73 (2d Cir. 2013) ("Because the jury found Merck not liable, it never reached the issue of damages. Accordingly, the failure to instruct on aggravation of a preexisting injury did not affect the jury's verdict.").

Plaintiff also takes issue with what she perceives as inconsistencies between the Court's evidentiary rulings at trial and the decisions issued on the parties' motions *in limine*. (*See, e.g.*, Dkt. 375-2 at 4-5, 7). The denial of a motion *in limine* to preclude evidence in no way eliminates the proponent's burden to lay a proper evidentiary foundation and otherwise demonstrate the admissibility of that evidence at trial. *See Jimenez v. Hernandez*, No. CIV. 06-1501 GAG, 2009 WL 921289, at *1 (D.P.R. Mar. 31, 2009) (denying the defendant's motion *in limine* but explaining that "[t]his, of course, does not exempt in any way plaintiffs' burden a trial of having to lay the proper foundation" and demonstrate the relevance of the proffered evidence); *Sanchez v. Echo, Inc.*, No. CIV. 06-787, 2008 WL 2951339, at *2 (E.D. Pa. Jan. 9, 2008) (denying the plaintiff's motion *in limine* but reminding the defendants "that laying a proper foundation is a necessary precondition of the admissibility of such testimony at trial"). Nor does it preclude a defendant from raising additional objections to the admission of such evidence at the time it is proffered. *See Saenz v. Reeves*, No. 1:09-CV-00057-BAM PC, 2013 WL 2481733, at *8 (E.D. Cal. June 10, 2013) (denying the defendant's motion *in limine* to exclude certain documents but noting that the defendant "is entitled to object to the admission of these documents at trial on other grounds"); *Occidental Fire & Cas. of N.C. v. Intermatic Inc.*, No. 2:09-CV-2207 JCM VCF, 2013 WL 4499005, at *3 (D. Nev. Aug. 15, 2013) (denying an "aspect of plaintiff's motion *in limine*," and noting that the "defendants may attempt to lay a proper foundation for this evidence at trial" and the plaintiff "may object at that time if it is so inclined"). Accordingly, there is no inconsistency or unfair "surprise" arising

from the Court's preclusion or redaction of evidence not otherwise deemed inadmissible before trial.

Plaintiff further contends that the presence of Diane Tiberend ("Tiberend"), acting as Defendant's client representative, was prejudicial to her case. (Dkt. 375-2 at 13-14). Tiberend was permitted to sit with Defendant's counsel as a corporate representative pursuant to Fed. R. Evid. 615. Rule 615 provides that while "the court must order witnesses excluded so that they cannot hear other witnesses' testimony," the Court is not authorized to exclude "an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney." Fed. R. Evid. 615(b). The relationship between AMC Mortgage Services, Inc. and Defendant permitted Defendant's counsel to denote Tiberend as an appropriate corporate representative. (*See* Dkt. 335-1). That Tiberend was also called as a fact witness for Defendant did not prevent Defendant from designating her as its sole corporate representative during trial, nor did it inhibit her from assisting Defendant's counsel of record in trying the case. *See RMH Tech LLC v. PMC Indus., Inc.*, No. 3:18-CV-543 (VAB), 2018 WL 5095676, at *4-5 (D. Conn. Oct. 19, 2018) (noting that the Second Circuit has "held that a corporate representative who is an expert witness may be permitted to remain in the courtroom during testimony," and permitting a designated corporate representative "who is a fact witness to remain in the courtroom during the entire trial" (citing *Trans World Metals, Inc. v. Southwire Co.*, 769 F.2d 902, 910-11 (2d Cir. 1985))); *Minebea Co. v. Papsti*, 374 F. Supp. 2d 231, 237 (D.D.C. 2005) ("As for Mr. Kessler, he was proffered as Papst's corporate representative . . . at a recent status conference. He is Mr. Papst's personal lawyer, but is not an attorney of

record. . . . He is, however, also in-house counsel to Papst, and has been since 1998. The Court concludes that he therefore may be designated as Papst's corporate representative.").

Plaintiff again repeats her argument that Defendant's counsel fabricated a response to Mee Jin-Jo's request for admissions, filed during discovery, because he produced no certificate of service demonstrating that Defendant's response had ever been timely served. (Dkt. 375-2 at 21-23). However, Defendant's counsel, as an officer of the court, provided the Court with a declaration affirming that the responses were timely served upon Mee Jin-Jo on June 9, 2011, at the time she was still party plaintiff to this action. (Dkt. 355; *see* Dkt. 379-5 at 13). The Court is "entitled to 'rel[y] upon the presumption that attorneys, as officers of the court, make truthful representations to the court.'" *United States v. Vendetti*, No. 10-CR-00360-RJA-JJM, 2013 WL 5522860, at *13 (W.D.N.Y. Jan. 22, 2013) (quoting *United States v. Melton*, No. CR. 04-40043-011-JLF, 2006 WL 1722379, at *2 (S.D. Ill. June 21, 2006)), *report and recommendation adopted*, 2013 WL 5522434 (W.D.N.Y. Oct. 3, 2013); *see United States v. Johns*, 336 F. Supp. 2d 411, 424 (M.D. Pa. 2004) ("The court is entitled to rely on the representations of counsel, as officers of the court. . . ."); *see also Theodore v. State of N.H.*, 614 F.2d 817, 822 (1st Cir. 1980) ("Attorneys are officers of the court and a judge has the right, in most circumstances, to rely on their representations to him."). Moreover, Plaintiff was not litigating this case at the time the request for admissions was filed and the responses were served, and thus, she has no personal knowledge of whether the responsive document was, in fact, ever served. Accordingly, her contention that Defendant's counsel has only now fabricated this document in response to her arguments is speculative at best.

Plaintiff also contends that she was cross-examined using her own deposition transcript that she never had an opportunity to review before trial. (Dkt. 375-2 at 20-21). Plaintiff was deposed less than 30 days before the trial began, and, according to Defendant, Defendant's counsel emailed her a copy of her deposition transcript on June 8, 2018, ten days before the trial commenced. (Dkt. 379-4; *see* Dkt. 379-5 at 12-13). In her reply papers, Plaintiff does not contend that she never received this email; rather, she argues that "Defendant's email was not properly served." (Dkt. 380 at 17). The Court addressed this issue during the trial, and without the benefit of the trial transcript, it is challenging for the Court to sort through Plaintiff's allegations. However, and in any event, "[t]he burden of showing the harmful error rests with the moving party" on a motion for a new trial. *Hardy v. Saliva Diagnostic Sys., Inc.*, 52 F. Supp. 2d 333, 340 (D. Conn. 1999); *see Henry v. Tracy*, No. 10CV800, 2014 WL 3558021, at *4 (W.D.N.Y. July 18, 2014) (same), *aff'd*, 629 F. App'x 26 (2d Cir. 2015). Because Plaintiff has not established how at all she was prejudiced by the alleged late service of her deposition transcript, the Court finds no reason to grant her request for a new trial on this ground and if there was any error, it was harmless.

To the extent Plaintiff argues that it was improper for the undersigned to caution Plaintiff when she was testifying during trial (Dkt. 375-2 at 31-34), Plaintiff's contentions provide no basis for a new trial. The Court has the authority to exercise reasonable control over the mode and order of how evidence is presented at trial. *See* Fed. R. Evid. 611(a) (providing that the "court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: . . . make those procedures effective for determining the truth . . . avoid wasting time . . . [and] protect witnesses from

harassment or undue embarrassment"). Moreover, the challenged statements occurred outside the presence of the jurors and had no impact on their view of the case. The Second Circuit has observed that in presiding over a trial, a district judge "acts as more than a mere moderator or umpire. [Her] function is to set the tone of the proceedings and exercise sufficient control to insure that the trial will be an orderly one in which the jury will have the evidence clearly presented." *See Anderson v. Great Lakes Dredge & Dock Co.*, 509 F.2d 1119, 1131 (2d Cir. 1974) (citations omitted). "[T]he judge's role is 'to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.'" *Rivas v. Brattesani*, 94 F.3d 802, 807 (2d Cir. 1996) (quoting *Care Travel Co., Ltd. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 991 (2d Cir. 1991)).

To the extent Plaintiff also submits "new evidence" in support of her motion for a new trial (*see* Dkt. 375-2 at 5; Dkt. 375-3 at 19-35), Plaintiff has failed to demonstrate why this evidence was not previously discoverable with due diligence, and thus, the Court fails to see how it warrants a new trial, *see, e.g.*, *Chang v. City of Albany*, 150 F.R.D. 456, 460 (N.D.N.Y. 1993) ("A party must show that (1) the evidence was discovered since the trial; (2) the movant used due diligence in attempting to find the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence is such that it will probably produce a different result upon a new trial.").

Additionally, despite Plaintiff's suggestion to the contrary, no expert witness testimony was elicited at trial from Jordan Manfro. "Lay opinion testimony is governed by Rule 701 and 'must be rationally based on the perception of the witness.'" *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 279 F.R.D. 131, 133-34 (S.D.N.Y. 2011)

(quoting *United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002)). "It is well-established that attorneys may testify as fact witnesses regarding their personal knowledge of the events in question." *Queen v. Schultz*, 310 F.R.D. 10, 26 (D.D.C. 2015), *aff'd*, 671 F. App'x 812 (D.C. Cir. 2016); *see Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 37 n.2 (2009) ("There is wide support in the [c]ase law for the view that an attorney may testify when he has personal knowledge as a fact witness." (collecting cases)); *accord Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 282 (2d Cir. 2004) (denying motion for new trial where an attorney was allowed to "testify merely to facts of which he had personal knowledge"). Manfro was called to testify as an attorney associated with the law firm that was involved in the foreclosure process underlying this case and testified as to the practices and procedures followed by his firm during an eviction. Given his personal knowledge of his employer's procedures, his testimony was a permissible lay opinion, and thus, no expert disclosure was required. *See generally Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 551-52 (5th Cir. 2005) ("Rule 701 does not exclude testimony by corporate officers or business owners on matters that relate to their business affairs, such as industry practices and pricing."); *New Show Studios LLC v. Needle*, No. 2:14-CV-01250-CAS-MRWx, 2014 WL 12495640, at *12 (C.D. Cal. Dec. 29, 2014) (explaining that "opinion testimony of an officer of a business about that business is admitted not because of, training, or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business" (quotation omitted)).

The Court has reviewed the balance of Plaintiff's remaining challenges and finds no reason to conclude that its initial rulings were incorrect. "To the extent that [Plaintiff] seek[s] to rely upon prior arguments made during trial, those arguments are rejected for the reasons already articulated by this Court in connection with its earlier rulings." *Dreyer*, 2008 WL 754113, at *2; *see Ayazi v. N.Y.C. Bd. of Educ.*, No. 98-CV-7461 (MKB), 2013 WL 12366390, at *3 (E.D.N.Y. Feb. 4, 2013) (denying the plaintiff's motion for a new trial where she was "advancing the same arguments made at trial").

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a new trial (Dkt. 375) is denied.

SO ORDERED.

ELIZABETH A. WOLFORD
United States District Judge

Dated: March 28, 2019
Rochester, New York

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of October, two thousand twenty.

Billian Jo, as Personal Representative of the Estate of Mee Jin-Jo,

Plaintiff - Appellant,

ORDER

Docket No: 19-1616

v.

JPMC Specialty Mortgage LLC,

Defendant - Third-Party-Plaintiff - Appellee,

WM Specialty Mortgage LLC, DBA Wm Specialty Mortgage LLC, Triple C Transportation Services, Inc., DBA Advanced Moving & Storage, LLC,

Defendants,

Advanced Moving & Storage, LLC,

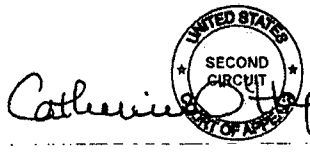
Third-Party-Defendant.

Appellant, Billian Jo, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



08/19/2019	25	TRANSCRIPT STATUS UPDATE LETTER, dated 08/13/2019, on behalf of Appellant Billian Jo, informing court of transcript delays, RECEIVED. Service date 08/14/2019 by US mail.[2637488] [19-1616] [Entered: 08/20/2019 04:35 PM]
08/29/2019	26	TRANSCRIPT STATUS UPDATE LETTER, dated 08/26/2019, on behalf of Appellant Billian Jo, informing court of transcript delays, RECEIVED. Service date 08/27/2019 by US mail.[2644566] [19-1616] [Entered: 08/30/2019 11:30 AM]
08/29/2019	29	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellant Billian Jo, informing Court of proposed due date 11/18/2019, RECEIVED. Service date 08/27/2019 by US mail.[2672445] [19-1616] [Entered: 10/04/2019 11:22 AM]
10/04/2019	32	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant Billian Jo Brief due date as 11/18/2019. Joint Appendix due date as 11/18/2019, copy to pro se Appellant, FILED.[2672768] [19-1616] [Entered: 10/04/2019 01:21 PM]
11/04/2019	34	NEW CASE MANAGER, Brenda Mojica, ASSIGNED.[2697575] [19-1616] [Entered: 11/04/2019 03:05 PM]
11/20/2019	35	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Billian Jo, FILED. Service date 11/18/2019 by US mail. [2712790] [19-1616] [Entered: 11/21/2019 04:35 PM]
11/20/2019	36	APPENDIX, volume 1 of 1, (pp. 1-207), on behalf of Appellant Billian Jo, FILED. Service date 11/18/2019 by US mail.[2712802] [19-1616] [Entered: 11/21/2019 04:38 PM]
11/20/2019	47	APPENDIX, volume 2 of 2, (pp. 205-346), on behalf of Appellant Billian Jo, FILED. Service date 11/18/2019 by US mail.[2725862] [19-1616] [Entered: 12/10/2019 03:20 PM]
12/06/2019	43	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellee JPMC Specialty Mortgage LLC, informing Court of proposed due date 02/19/2020, RECEIVED. Service date 12/05/2019 by CM/ECF, email.[2723356] [19-1616] [Entered: 12/06/2019 12:58 PM]
12/11/2019	49	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee JPMC Specialty Mortgage LLC Brief due date as 02/19/2020,copy to pro se, FILED.[2726080] [19-1616] [Entered: 12/11/2019 08:54 AM]

PACER Service Center

Transaction Receipt

02/05/2020 19:40:18

PACER Login:	cw2949	**Client Code:**	
Description:	Case Summary	**Search Criteria:**	19-1616
Billable Pages:	1	**Cost:**	0.10

Appendix D
17A

11/20/2019	35	BRIEF & SPECIAL APPENDIX, on behalf of Appellant Billian Jo, FILED. Service date 11/18/2019 by US mail. [2712790] [19-1616] [Entered: 11/21/2019 04:35 PM]
11/20/2019	36	APPENDIX, volume 1 of 1, (pp. 1-207), on behalf of Appellant Billian Jo, FILED. Service date 11/18/2019 by US mail.[2712802] [19-1616] [Entered: 11/21/2019 04:38 PM]
11/20/2019	47	APPENDIX, volume 2 of 2, (pp. 205-346), on behalf of Appellant Billian Jo, FILED. Service date 11/18/2019 by US mail.[2725862] [19-1616] [Entered: 12/10/2019 03:20 PM]
12/06/2019	43	LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellee JPMC Specialty Mortgage LLC, informing Court of proposed due date 02/19/2020, RECEIVED. Service date 12/05/2019 by CM/ECF, email.[2723356] [19-1616] [Entered: 12/06/2019 12:58 PM]
12/11/2019	49	SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee JPMC Specialty Mortgage LLC Brief due date as 02/19/2020,copy to pro se, FILED.[2726080] [19-1616] [Entered: 12/11/2019 08:54 AM]
02/19/2020	50	BRIEF, on behalf of Appellee JPMC Specialty Mortgage LLC, FILED. Service date 02/19/2020 by 3rd party. [2781909] [19-1616] [Entered: 02/19/2020 04:06 PM]
02/19/2020	51	SUPPLEMENTAL APPENDIX, on behalf of Appellee JPMC Specialty Mortgage LLC, FILED. Service date 02/19/2020 by 3rd party. [2781923] [19-1616] [Entered: 02/19/2020 04:12 PM]
03/13/2020	55	REPLY BRIEF, on behalf of Appellant Billian Jo, FILED. Service date 03/10/2020 by US mail. [2805725] [19-1616] [Entered: 03/19/2020 03:21 PM]
03/30/2020	58	MOTION, for stay of review, on behalf of Appellant Billian Jo, FILED. Service date 03/25/2020 by US mail.[2812339] [19-1616] [Entered: 04/01/2020 02:39 PM]
04/02/2020	61	MOTION ORDER, denying as unnecessary motion to "stay review" of this appeal [58] filed by Appellant Billian Jo. The reply brief Appellant submitted to the Court is now attached to docket entry 55, copy to pro se, FILED. [2812805][61] [19-1616] [Entered: 04/02/2020 10:56 AM]

PACER Service Center

Transaction Receipt

05/02/2020 16:06:51

PACER Login:	cw2949	**Client Code:**	
Description:	Case Summary	**Search Criteria:**	19-1616
Billable Pages:	1	**Cost:**	0.10

Appendix E
18A

12 – 0000

UNITED STATES COURTS OF APPEALS

FOR THE SECOND CIRCUIT

CHARLES W. MCGILL

Plaintiff – Appellant

v.

Vince Buzzelli

Defendants – Appellees

On Appeal from the United States District Court

For the Southern District of New York

Brief of Appellant Charles W. McGill

Charles W. McGill, Pro Se

12 Brooklyn street

Rochester, New York 14613

(585)353-4203

USPS Tracking®

FAQs >

Track Another Package +

Tracking Number: 9481703699300038206156

Remove X

Scheduled Delivery by

THURSDAY

10 SEPTEMBER 2020 ⓘ

by **12:00pm** ⓘ

USPS Premium Tracking™ Available

Feedback

Delivered

September 10, 2020 at 12:04 pm
Delivered
NEW YORK, NY 10007

Get Updates

Text & Email Updates

Proof of Delivery

Tracking History

September 10, 2020, 12:04 pm
Delivered
NEW YORK, NY 10007
Your item was delivered at 12:04 pm on September 10, 2020 in NEW YORK, NY 10007 to 40 FOLEY SQ.
The item was signed for G MILLS.

Appendix G
20A

September 10, 2020, 10:32 am
Arrived at Post Office
NEW YORK, NY 10007

September 10, 2020, 10:29 am
Delivery Attempted - No Access to Delivery Location
NEW YORK, NY 10007

September 9, 2020, 4:53 pm
Delivery Attempted - No Access to Delivery Location
NEW YORK, NY 10007

September 9, 2020, 1:10 pm
Out for Delivery
NEW YORK, NY 10007

September 9, 2020, 9:01 am
Arrived at USPS Regional Destination Facility
NEW YORK NY DISTRIBUTION CENTER

September 8, 2020, 6:59 pm
Departed Post Office
ROYAL OAK, MI 48068

September 8, 2020, 6:19 pm
USPS in possession of item
ROYAL OAK, MI 48068

September 8, 2020, 4:16 pm
Arrived at USPS Origin Facility
DETROIT, MI 48242

Premium Tracking

Product Information

21A

19-1616

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BILLIAN JO,

Plaintiff-Appellant,

v.

JPMC Specialty Mortgage LLC,

Defendant-Appelee

On Appeal from the United States District Court
for the Western District of New York

Petition for En Banc Review

Billian Jo, pro se
666 W Robinwood St
Detroit, MI 48203
313-310-7769

ALD-004 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2098

DAVID ANTOINE LUSTER,
Appellant

v.

WARDEN MCKEAN FCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 1-19-cv-00012)
District Judge: Honorable Susan Paradise Baxter

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
October 1, 2020

Before: MCKEE, GREENAWAY, JR., and BIBAS, Circuit Judges

(Opinion filed: December 8, 2020)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Pro se appellant David Antoine Luster appeals the District Court's dismissal of his habeas petition filed pursuant to 28 U.S.C. § 2241. Because the appeal fails to present a substantial question, we will summarily affirm the District Court's judgment. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

Luster, a federal prisoner currently confined at FCI McKean in Pennsylvania, entered a guilty plea in the United States District Court for the Middle District of Georgia in five separate cases to eight counts of bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (counts I and III), and two counts of using or carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (counts II and IV). He was sentenced to 535 months' imprisonment, which included a mandatory 25-year consecutive sentence on the second § 924(c) conviction. The Eleventh Circuit Court of Appeals affirmed Luster's judgment of sentence on direct appeal. See United States v. Luster, 129 F. App'x 598 (11th Cir. 2005) (table); 129 F. App'x 599 (11th Cir. 2005) (table).

Since then, Luster has sought to collaterally attack his conviction and sentence numerous times, including by filing five motions to vacate his sentence pursuant to 28 U.S.C. § 2255, 10 motions to file a second or successive § 2255 motion pursuant to 28 U.S.C. §§ 2244 and 2255(h), and five prior § 2241 petitions. See Mag. J. R. & R. at 2. In January 2019, he filed the § 2241 petition at issue here, arguing that his sentence on the second § 924(c) conviction was invalidated by the First Step Act of 2018. In an addendum to that petition, he asserted that he was actually innocent of the § 924(c) convictions, and that his judgment of restitution is null and void, pursuant to the Supreme

Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). The District Court dismissed the petition for lack of jurisdiction, and this appeal ensued.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. In reviewing the District Court's dismissal of the § 2241 petition, we exercise plenary review over its legal conclusions and review its factual findings for clear error. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam).

Generally, the execution or carrying out of an initially valid confinement is within the purview of a § 2241 proceeding, as attacks on the validity of a conviction or sentence must be asserted under § 2255. See Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir.2001); Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002). Luster may not pursue a collateral attack on his conviction and sentence by way of § 2241 unless he can show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Under this "safety valve" provision, a prior unsuccessful § 2255 motion or the inability to meet the statute's stringent gatekeeping requirements does not render § 2255 inadequate or ineffective. See In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). Rather, the exception is narrow, limited to extraordinary circumstances such as where the petitioner "had no earlier opportunity" to present his claims and has been convicted for conduct which is no longer deemed criminal. Id.

Luster challenges the validity of his conviction and sentence on count IV, the second § 924(c) conviction, in light of the First Step Act (FSA), Pub. L. No. 115-391, 132 Stat. 5194 (2018). Specifically, he relies on § 403(a) of the FSA, which removed the

mandatory 25-year sentence for a second or subsequent § 924(c) offense committed before the first § 924(c) conviction was final. See id. at § 403(a), 132 Stat. at 5222. Contrary to his argument on appeal, prior to the FSA, a defendant like Luster who was convicted of multiple § 924(c) convictions in a single prosecution was subject to a 25-year sentence on the second or subsequent violation. See United States v. Davis, 139 S. Ct. 2319, 2324 n.1 (2019) (citing Deal v. United States, 508 U.S. 129, 132 (1993)).

Luster reasons that he should be allowed to seek relief on his FSA claim under § 2241's "saving[s] clause" because Congress "merely clarified" the meaning of § 924(c), making clear that his conviction and sentence on count IV were void ab initio. For support, he relies on Fiore v. White, 531 U.S. 225, 228 (2001), in which the Supreme Court held that a defendant's conviction violated due process where a subsequent Pennsylvania Supreme Court decision interpreting the criminal statute clarified that the conduct for which he was convicted was not criminal. As the District Court explained here, the FSA did not decriminalize the conduct for which Luster was convicted. Moreover, § 403(a) of the FSA does not apply retroactively to defendants, like Luster, who were convicted and sentenced prior to its enactment. See Pub. L. No. 115-391, 403(b) (applying the change only to "any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment"); United States v. Hodge, 948 F.3d 160, 163 (3d Cir. 2020). Accordingly, even assuming this type of innocence-of-the-sentence claim may be properly asserted in a § 2241 proceeding, see generally United States v. Doe, 810 F.3d 132, 160-61 (3d Cir.

2015), this claim does not otherwise satisfy the conditions required to proceed under the savings clause of § 2255(e). See Bruce v. Warden Lewisburg USP, 868 F.3d 170, 177-80 (3d Cir. 2017) (noting that the saving clause applies "when there is a change in statutory caselaw that applies retroactively in cases on collateral review.").

Luster also challenges the validity of his § 924 convictions (and resulting sentence) under Dimaya, in which the Supreme Court held that the definition of a "crime of violence" in 18 U.S.C. § 16(b) is unconstitutionally vague.[1] See 138 S. Ct. at 1213. Luster argues that because the essential text of § 16(b) is replicated in the definition of "crime of violence" set forth in § 924(c)(3)(B), that provision is also void for vagueness, and his convictions are therefore unconstitutional. After Dimaya, the Supreme Court held that § 924(c)(3)(B) is unconstitutionally vague. See Davis, 139 S. Ct. at 2336. But this is clearly not a situation in which Luster "had no earlier opportunity to challenge his conviction[s]" based on this claim. Dorsainvil, 119 F.3d at 251. This is precisely the type of constitutional claim that can be pursued in a second or successive § 2255 motion, and, indeed, Luster presented it to the Eleventh Circuit in a § 2244 application, prior to the decision in Davis. That Court denied authorization to file a second or

[1] Pertinent here, § 924(c) "authorizes heightened criminal penalties for using or carrying a firearm 'during and in relation to,' or possessing a firearm 'in furtherance of,' any federal 'crime of violence.'" Davis, 139 S. Ct. at 2324. The statute defines "crime of violence" as an offense that either "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3).

successive § 2255 motion; it concluded that, although Luster's convictions may not be valid under § 924(c)(3)(B) (the residual clause), armed robbery is a crime of violence under 924(c)(3)(A) (the elements clause). See Judgment Order, C.A. No. 18-11799 (11th Cir. Nov. 9, 2018) (citing In re Hines, 824 F.3d 1334, 1337 (11th Cir. 2016)); accord United States v. Johnson, 899 F.3d 191, 204 (3d Cir. 2018). The mere fact that Luster's § 2244 application was denied does not render § 2555 inadequate or ineffective. See Gardner v. Warden Lewisburg USP, 845 F.3d 99, 102 (3d Cir. 2017).[2]

For the foregoing reasons, the District Court correctly ruled that it lacked jurisdiction to entertain the § 2241 petition. Accordingly, because no "substantial question" is presented as to the petition's dismissal, we will summarily affirm the judgment of the District Court. See 3d Cir. LAR 27.4; 3d Cir. I.O.P. 10.6. Luster's motion to expedite the appeal is denied.[3]

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[2] To the extent Luster also sought to challenge his § 924(c) convictions based on decisions rendered by the First and Ninth Circuit courts of appeals, the claim does not fit within the Dorsainvil exception because the opinions he cites do not present a change in substantive law and are not controlling on this Court.

[3] Luster sought expedited consideration of his appeal based on his erroneous belief that his appeal was meritorious, and in light of the impact of the COVID-19 pandemic on prison facilities. We note that Luster has made clear that he is not seeking compassionate release, see 18 U.S.C. § 3582(c)(1)(A)(i).

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0027n.06

No. 20-1332

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 13, 2021
DEBORAH S. HUNT, Clerk

JOANNA M. PERKIN; AMY L. GISH, Plaintiffs-Appellants, v. JACKSON PUBLIC SCHOOLS, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: SILER, GIBBONS, and KETHLEDGE, Circuit Judges.

KETHLEDGE, Circuit Judge. Joanna Perkin and Amy Gish (plaintiffs) sued Jackson Public Schools under 42 U.S.C. § 1983, alleging that Jackson violated their Fourteenth Amendment rights under the Due Process Clause. The district court granted summary judgment to Jackson. We affirm.

Plaintiffs are teachers who worked at the Fourth Street Learning Center—a middle school that provides early intervention to students with behavioral or academic challenges. The Center provides specialized resources for these students and expressly bars the students themselves from engaging in "threatening behavior" toward a staff member. Yet plaintiffs allege that the Center presented a tempestuous environment for students and teacher alike. Each plaintiff alleges that students threatened her, and Gish claims that students purposely bumped into her and threw coins, food, and pencils at her, and verbally threatened to assault her. Plaintiffs allege that they repeatedly

asked Jackson to provide better security, but that Jackson ignored their complaints. Each plaintiff eventually chose to leave the Center and the employ of Jackson Public Schools.

Perkin and Gish thereafter brought this suit against Jackson, claiming under 42 U.S.C. § 1983 that Jackson violated their rights under the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment to Jackson, holding that plaintiffs had neither alleged nor presented evidence that Jackson had violated their constitutional rights. We review that decision de novo. *See Fox v. Amazon.com, Inc.*, 930 F.3d 415, 421 (6th Cir. 2019).

Plaintiffs' briefing leaves unclear what Due Process right, exactly, they claim Jackson violated. They do argue more generally, however, that Jackson ignored their complaints about conditions at the Center and that their claim arises "under the state created danger doctrine[.]" But the Due Process Clause does not guarantee a right to a safe workplace. *See Collins v. City of Harker Heights*, 503 U.S. 115, 117 (1992). And Jackson "has no constitutional duty to protect individuals who are not in its custody"—which obviously they were not. *Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020). Plaintiffs therefore have not identified any right whose violation could support a claim under § 1983.

Plaintiffs offer (in many different formulations) just one counterargument: that Jackson's "deliberate indifference" to the plight of the teachers at the Center was so bad as to "shock the contemporary conscience." *Id.* at 933 (internal quotations omitted). Regrettable as the alleged conditions at the Center might have been, however, they are not analogous to having one's stomach forcibly pumped. *See Rochin v. California*, 342 U.S. 165, 172 (1952). We therefore agree with the district court that plaintiffs have not shown any entitlement to proceed with their § 1983 claim.

The district court's judgment is affirmed.

In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1376

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEREMY HOGENKAMP,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 11-cr-131-bbc — **Barbara B. Crabb**, *Judge.*

SUBMITTED NOVEMBER 2, 2020 — DECIDED NOVEMBER 6, 2020

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

PER CURIAM. Jeremy Hogenkamp pleaded guilty to a federal crime and was sentenced to 10 years' imprisonment plus 25 years' supervised release. Fourteen months before the anticipated end of his custodial time (April 2021), he asked the district court to modify the terms of his supervised release. The judge denied this motion, deeming it premature, and invited Hogenkamp to "discuss the terms of his supervised release with his probation officer" later—"[a]t the time that

defendant is released"—and "ask the court for a modification of the terms ... at that time."

To the extent that the judge believed it appropriate to defer consideration of Hogenkamp's motion until after his release, the decision is mistaken. A prisoner is "entitled to know, *before* he leaves prison, what terms and conditions govern his supervised release." *United States v. Williams*, 840 F.3d 865 (7th Cir. 2016) (emphasis added). See also *United States v. Siegel*, 753 F.3d 705, 716–17 (7th Cir. 2014). The terms of release govern matters including where a person may live, with whom he may associate, and what jobs he may hold. All of these (and other terms too) affect him on the day he walks out of prison. The need for pre-release knowledge of the rules is among the reasons why the terms are included in the judgment of conviction. People must be able to plan their lives.

Federal judges may alter the terms and conditions of supervised release at any time. 18 U.S.C. §3583(e)(2). To the extent that Hogenkamp believes that he is entitled to a judicial decision whenever he requests, he is mistaken. *Williams* holds that a judge may defer acting until the arguments pro and con, and the effects of the terms originally established, have become clearer. One sentence in *Williams* states that it is appropriate to make this assessment in the year or two before release, 840 F.3d at 865, but we did not compel a judge to rule immediately on every motion filed during those 24 months. A district judge has discretion to determine the apt time for decision—provided that a motion made a reasonable time in advance of release is resolved before supervised release begins. Similarly, the judge has discretion to decide

whether an evidentiary hearing is called for, or whether instead the motion can be resolved on the papers.

Despite the language in the district court's order suggesting that Hogenkamp wait until after his release to begin the process of seeking a change in the terms of his supervision, we treat the court's bottom line as an exercise of its authority to defer decision until a time closer to Hogenkamp's scheduled release. As that date is closing in, however, further delay in making a decision would be appropriate only if the court has some concrete reason to think that more or better information will be available in the next two or three months.

Hogenkamp wants us to instruct the judge to make the changes he proposes, but the district court must address any substantive issues in the first instance.

Rather than affirming and forcing Hogenkamp to start over in the district court, we think it appropriate to remand so that the district judge can exercise, without undue delay, the discretion she possesses and make a decision in advance of Hogenkamp's scheduled release. See 28 U.S.C. §2106.

United States Court of Appeals
For the Eighth Circuit

No. 20-1255

Bereket T. Kassu

Plaintiff - Appellant

v.

Fairview Health Services

Defendant - Appellee

Appeal from United States District Court
for the District of Minnesota

Submitted: December 15, 2020
Filed: January 15, 2021
[Unpublished]

Before GRUENDER, ERICKSON, and KOBES, Circuit Judges.

PER CURIAM.

Bereket Kassu filed this action asserting race discrimination under 42 U.S.C. § 1981 nearly four years after he was fired by Fairview Health Services. He appeals the district court's[1] dismissal of his case under Fed. R. Civ. P. 12(b)(6) for failure to

[1]The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

plead facts that make his allegation of race discrimination plausible. Upon careful review of the record, we find no error of law and no basis for reversing the district court.

We affirm the judgment of the district court. *See* 8th Cir. R. 47B.

FIFTH CIRCUIT RULE 27

27.1 Clerk May Rule on Certain Motions. Under FED. R. APP. P. 27(b), the clerk has discretion to act on, in accordance with the standards set forth in the applicable rules, or to refer to the court, the procedural motions listed below. The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by FED. R. APP. P. 40.

27.1.1 To extend the time for: filing answers or replies to pending motions; paying filing fees; filing motions to proceed in forma pauperis; filing petitions for panel rehearing and rehearing en banc, and for reconsideration of single judge orders, for not longer than 14 days, 30 days if the applicant for extension is a prisoner proceeding pro se; filing briefs as permitted by 5TH CIR. R. 31.4; filing bills of costs; and filing applications under the Equal Access to Justice Act.

27.1.2 To rule on motions to file briefs out of time.

27.1.3 To stay further proceedings in appeals.

27.1.4 To correct briefs or pleadings filed in this court at counsel's request.

27.1.5 To stay the issuance of mandates pending certiorari in civil cases only, for no more than 30 days, provided the court has not ordered the mandate issued earlier.

27.1.6 To reinstate appeals dismissed by the clerk.

27.1.7 To enter and issue consent decrees in labor board and other government agency review cases.

27.1.8 To enter CJA Form 20 orders continuing trial court appointment of counsel on appeal for purposes of compensation.

27.1.9 To consolidate appeals.

27.1.10 To withdraw appearances.

27.1.11 To supplement or correct records.

27.1.12 To incorporate records or briefs on former appeals.

27.1.13 To file reply or supplemental briefs in addition to the single reply brief permitted by FED. R. APP. P. 28(c) prior to submission to the court.

27.1.14 To file an amicus curiae brief under FED. R. APP. P. 29 (see 5TH CIR. R. 29.4).

27.1.15 To enlarge the number of pages of optional contents in record excerpts.

27.1.16 To extend the length limits for: briefs under FED. R. APP. P. 32(a)(7) and 5TH CIR. R. 32; petitions for rehearing en banc and panel rehearing under FED. R. APP. P. 35(b)(2), and 40(b); certificates of appealability and motions for permission to file second or successive habeas corpus

applications under 28 U.S.C. §§ 2254 and 2255, under 5TH CIR. R. 22; petitions for permission to appeal under 5TH CIR. R. 5; and petitions for mandamus and extraordinary writs under 5TH CIR. R. 21.

27.1.17 To proceed in forma pauperis, see FED. R. APP. P. 24 and 28 U.S.C. § 1915.

27.1.18 To appoint counsel or to permit appointed counsel to withdraw.

27.1.19 To obtain transcripts at government expense.

27.1.20 To rule on an unopposed motion by the government or a defendant in a direct criminal appeal to gain access to matters sealed in a case and for the use in prosecution of its appeal.