

Opinions for the week of October 3 - October 7, 2016

Exodus Refugee Immigration, Inc. v. Michael Pence No. 16-1509

Argued September 14, 2016 — Decided October 3, 2016

Case Type: Civil

Southern District of Indiana. No. 1:15-cv-01858 — **Tanya Walton Pratt**, *Judge*.

Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The State of Indiana appeals from the grant of a preliminary injunction to a private agency named Exodus that assists refugees, some of whom are Syrian refugees, the state's target. The regulation of immigration to the United States, including by refugees (people who have fled their homeland, and unable to return because of threat of persecution seek to relocate in a country in which they'll be safe), is a federal responsibility codified in the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.* That Act has been amended by the Refugee Act of 1980, which authorizes the President to determine, on the basis of "humanitarian concerns or ... the national interest," how many refugees to admit each year. 8 U.S.C. § 1157(a)(2). The President fixed the number at 85,000 for fiscal year 2016, of whom at least 10,000 were to be persons coming to the United States from Syria, in recognition of the horrendous conditions in Syria resulting from that nation's civil war, now entering its sixth year... The district judge granted a preliminary injunction in favor of Exodus because she believed it likely to prevail in the trial on the merits that is the usual next stage of litigation after the issuance of such an injunction. She was right, and therefore the preliminary injunction is AFFIRMED.

George Meuser v. Carolyn Colvin No. 16-1052

Argued July 7, 2016 — Decided October 3, 2016

Case Type: Civil

Southern District of Indiana, Evansville Division. No. 3:15-cv-32 — **William G. Hussmann, Jr.**, *Magistrate Judge*.

Before WOOD, *Chief Judge*, and BAUER and KANNE, *Circuit Judges*.

PER CURIAM. George Meuser suffers from schizophrenia and applied for Disability Insurance Benefits principally because of that impairment. But an administrative law judge concluded at Step 2 of the 5-step disability analysis that Meuser's schizophrenia was not a severe impairment and denied benefits on that basis. A magistrate judge presiding by consent, *see* 28 U.S.C. § 636(c), upheld that ALJ's decision, but Meuser argues that it rests on a profound misunderstanding of the medical evidence and thus is not supported by substantial evidence. We agree.

Jeffrey Brill v. TransUnion LLC No. 16-1091

Argued September 9, 2016 — Decided October 4, 2016

Case Type: Civil

Western District of Wisconsin. No. 3:15-cv-00300-slc — **Stephen L. Crocker**, *Magistrate Judge*.

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

POSNER, *Circuit Judge*. Credit reporting agencies prepare reports that provide information about a person's finances— such things as bill-payment history, loans, current debt, and other information (such as where the person lives and works and, in some cases, whether he or she has been sued or arrested). The information is intended to help lenders decide whether to extend credit or approve a loan and what interest rate to charge. Prospective employers, insurers, and owners of rental property can obtain the credit reports from the agency. It's important to debtors that they check their credit reports regularly, to ensure that the information in them is correct and that no fraudulent accounts have been opened in their name. A debtor who finds an inaccuracy can take steps to have it corrected. See "Credit Reports and

Scores,” www.usa.gov/credit-reports (visited October 4, 2016, as were the other websites cited in this opinion). TransUnion, one of the three major American credit reporting agencies, prepared a credit report which revealed, on the basis of information that TransUnion had obtained from Toyota, that a man named Jeffrey Brill was in arrears on a 2013 extension of the lease of a car from Toyota. Brill told TransUnion that his signature on the lease extension had been forged by a former girlfriend named Kelly Pfeifer; that upon her signing the extension it had become her lease, not his; and that he therefore owed nothing to the lessor, Toyota. Invoking the Fair Credit Reporting Act he demanded that TransUnion “conduct a reasonable reinvestigation” to determine whose lease it was, Brill’s or Pfeifer’s. See 15 U.S.C. § 1681i(a)(1)(A). TransUnion responded by asking Toyota to confirm the accuracy of its report. Toyota did so, though apparently just by noting that the name of the lessee on the lease extension was Brill; it did not try, and was not asked by TransUnion to try, to determine whether the signature was a forgery... And last, supposing that the signature on the lease extension was determined to be forged (presumably by Pfeifer), what next? Because of the secrecy surrounding Brill’s settlement with Toyota, we know none of its terms, though we can surmise that Brill obtained some money. Toyota has re-ported that it has treated the \$8,795 owed it by Brill under the lease extension (if indeed he was the signatory of that document) as “bad debt,” implying forgiveness. It would not be right to award him damages against TransUnion that duplicated relief he’d obtained from Toyota, but that is something we can’t determine because he will not reveal the terms of the settlement nor, as far as we’re aware, has he asked Toyota to do so. We agree with the district judge that Brill has failed to make a plausible claim against TransUnion. The dismissal of his suit is therefore AFFIRMED.

D.C.V. Imports, L.L.C. v. ATF No. 16-1015

Argued August 9, 2016 — Decided October 4, 2016

Case Type: Agency

Petition for Review of an Order of the Bureau of Alcohol, Tobacco, Firearms and Explosives. No. 3-IL-107-23-3L-00682

Before BAUER, POSNER, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. DCV Imports, LLC, a family-operated fireworks importer in rural Illinois, petitions for review of an order denying renewal of its import license. An administrative law judge found that DCV Imports willfully failed to keep required records of its daily transactions, see 18 U.S.C. § 842(f); 27 C.F.R. § 555.127, and recommended that the company’s license not be renewed. The regional office of the Bureau of Alcohol, Tobacco, Firearms and Explosives accepted that recommendation, and the decision was upheld by the Deputy Director of ATF. We conclude that substantial evidence supports the Deputy Director’s decision and deny the petition for review.

USA v. James Kruger No. 15-3203

Argued September 16, 2016 — Decided October 5, 2016

Case Type: Criminal

Western District of Wisconsin. No. 3:13-cr-00113-wmc-1 — **William M. Conley**, *Chief Judge*.

Before POSNER, RIPPLE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Defendant-appellant James M. Kruger was arrested in 2013 after a day-long crime spree in southwestern Wisconsin during which he robbed his uncle, kidnapped a 69 year-old farmer, stole multiple vehicles, and drove over rural roads at speeds exceeding 100 miles per hour in an ultimately unsuccessful effort to elude capture by the authorities. He pleaded guilty to being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(1), and the district court ordered him to serve a prison term of 180 months. Kruger appeals the sentence, contending that the district court committed plain error in applying the Sentencing Guidelines when it found that he “otherwise used” a firearm to commit a kidnapping, see U.S.S.G. §§ 1B1.1, comment. (n.1(l)) & 2A4.1(b)(3), comment. (n.2), and assigned several points to his criminal history. We find no plain error in the enhancement for use of a firearm, and because any potential error in the calculation of his criminal history

did not affect his advisory Guidelines sentencing range, we do not reach that issue... For the foregoing reasons, we AFFIRM Kruger's sentence.

USA v. C. Gregory Turner No. 15-1175

Argued October 26, 2015 — Decided September 29, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division

Ryan Lord v. High Voltage Software, Incorporated No. 13-3788

Argued January 19, 2016 — Decided October 5, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 09 C 4469 — **James B. Zagel**, *Judge*.

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

ROVNER, *Circuit Judge*, concurring in part, dissenting in part.

SYKES, *Circuit Judge*. Ryan Lord claims that he was sexually harassed by male coworkers at High Voltage Software, Inc., and that High Voltage fired him for complaining about it. High Voltage responds that the conduct Lord complained about wasn't sexual harassment and that it fired Lord for other reasons: failing to properly report his concerns, excessive preoccupation with his coworkers' performance, and insubordination. The district court concluded that Lord's claims under Title VII for hostile work environment and retaliation failed as a matter of law. The judge accordingly entered summary judgment for High Voltage. We affirm. Lord has not shown that he was harassed because of his sex, nor has he called into doubt the sincerity of his employer's justifications for firing him.

USA v. Justin Wykoff No. 16-1307

Submitted September 7, 2016 — Decided October 6, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 14 CR 105 — **Tanya Walton Pratt**, *Judge*.

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

POSNER, *Circuit Judge*. Justin Wykoff pleaded guilty to wire-fraud charges growing out of his having solicited bribes and kickbacks while a Bloomington, Indiana, official. The district judge sentenced him to 55 months in prison and to pay restitution of \$446,335 to Bloomington and a \$1,100 assessment, with both payments "to begin immediately." The judge added what she called a "special instruction": "Any unpaid restitution balance during the term of supervision [i.e., the period following release from prison when the defendant would be subject to the conditions of supervised release imposed by the judge at sentencing] shall be paid at a rate of not less than 10% of the defendant's gross monthly income." Soon after the entry of judgment, the government applied to the judge for a writ of garnishment pursuant to 28 U.S.C. § 3205(b)(1). The judge issued the writ to the Indiana pension system because it had an account in Wykoff's name (for remember that he'd been an Indiana official) worth \$47,937. Wykoff requested a hearing under 28 U.S.C. § 3202(d) to determine whether any of the money in the account was exempt. In addition he opposed garnishment on the ground that he had already forfeited two of his homes and the government had seized money from his prison account, and although these assets were not enough to pay all the restitution he owed he argued that the balance should be deferred to his release. He based the argument on the judge's "special instruction," which he interpreted as limiting his restitution payments to 10 percent of his monthly income. But the instruction doesn't say that; it says that 10 percent is the *minimum* amount he must pay to complete restitution. *United States v. Fariduddin*, 469 F.3d 1111, 1113 (7th Cir. 2006)... In fact he has no legal leg to stand on. The federal criminal code *requires* that restitution be paid immediately unless the district court provides otherwise, 18 U.S.C. §

3572(d)(1), which it did not. In *United States v. Sawyer*, 521 F.3d 792, 795 (7th Cir. 2008), we pointed out that at the start of incarceration “any existing assets should be seized promptly. If the restitution debt exceeds a felon’s wealth, then the Mandatory Victim Restitution Act of 1996, 18 U.S.C. §§ 3663A, 3664, demands that this wealth be handed over immediately.” This is an important rule—for who knows what might happen to Wykoff’s assets during his years of imprisonment. He or members of his family or for that matter the Indiana state pension fund might decide that there are better things to do with those not inconsiderable assets than give them to Bloomington. In short, his claim is groundless, and so the district court’s judgment is AFFIRMED.

Daniel Diedrich v. Ocwen Loan Servicing, LLC No. 15-2573

Argued January 5, 2016 — Decided October 6, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 2:13-cv-00693-NJ — **Nancy Joseph**, *Magistrate Judge*.
Before WOOD, *Chief Judge*, and KANNE and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. The Real Estate Settlement Procedures Act (RESPA) sets forth specific procedures that a mortgage lender or mortgage servicing company must follow in response to a borrower’s request for information. Ocwen Loan Servicing, LLC failed to follow the letter of the procedure when responding to the plaintiffs Daniel and Natalie Diedrichs’ request for information. The Diedrichs sued, but the district court granted summary judgment for Ocwen, finding that the Diedrichs had failed to set forth sufficient facts, which, if taken as true, would establish that they were injured by the RESPA violation. The Diedrichs appealed and we affirm.

Illinois Transportation Trade v. City of Chicago Nos. 16-2009, -2077, & -2980

Argued September 19, 2016 — Decided October 7, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:14-cv-00827 — **Sharon Johnson Coleman**, *Judge*.
Before POSNER, WILLIAMS, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. This case, closely parallel to *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, No. 16-1008, also decided today, involves constitutional challenges to the endeavor of a city (Chicago in this case, Milwaukee in the other) to stimulate greater competition in the “for-hire auto transportation market.” That is the market composed of owners of taxicabs that one hails on the street, of livery services, which are usually summoned by phone (as for that matter taxis sometimes are), and of the newer auto-transport services for hire, of which the best known is Uber (the second best known is Lyft); generically these services are known either as Transportation Network Providers (TNPs) or as ridesharing services... The plaintiffs are companies that own and operate either taxicabs or livery vehicles in Chicago or that provide services to such companies, such as loans and insurance. Taxi companies are tightly regulated by the City regarding driver and vehicle qualifications, licensing, fares, and insurance... Uber (which remember we’re treating as representative of the TNPs) is less heavily regulated than the taxi and livery companies (until 2014 it wasn’t regulated at all) and has a different business model. For example, you can’t hail an Uber vehicle on the street; you must use a smartphone app to summon an Uber car. Since 2014 Uber and the other TNPs have been governed by an ordinance, but it is different from the ordinances governing taxi and livery services and more permissive; for example, it allows the companies to set their own fares, and in this and other ways allows them to do by contract some of the things that Chicago ordinances require taxi and livery companies to do. The plaintiffs challenge the ordinance... The judgment of the district court is affirmed in all but that court’s ruling on the plaintiffs’ equal protection claims; that ruling is reversed with instructions to dismiss those claims with prejudice.

USA v. Markese D. Smith No. 16-1895

Argued October 6, 2016 — Decided October 7, 2016

Case Type: Criminal

Central District of Illinois. No. 15-20021-001 — **Colin S. Bruce**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

Order

Markese Smith pleaded guilty to possessing heroin with intent to distribute, 21 U.S.C. §841, and was sentenced to 212 months' imprisonment. His plea agreement contains a clause waiving the right to appeal, with an exception if counsel furnished ineffective assistance. Smith makes just such an argument on appeal. The district court enhanced Smith's sentence after concluding that he is a career offender within the scope of U.S.S.G. §4B1.1. Smith now contends that counsel should have contested the conclusion of the presentence report (a conclusion adopted by the district judge) that he has at least two convictions for crimes of violence or controlled substance offenses as defined in §4B1.2. Smith maintains that counsel should have taken advantage of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and contended that the convictions do not count under the residual clause of §4B1.2(a)(2). See *United States v. Hurlburt*, No. 14-3611 (7th Cir. Aug. 29, 2016) (en banc) (applying *Johnson* to the residual clause in §4B1.2(a)(2))... AFFIRMED

Pamela McKinney v. Jeh Johnson No. 16-1624

Argued October 6, 2016 — Decided October 7, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 220 — **Edmond E. Chang**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

Order

Pamela McKinney contends that the Federal Emergency Management Agency terminated her employment in retaliation for a complaint about discrimination. After a trial, the jury returned a verdict for the defendant. McKinney asks for another trial on the grounds that one juror was biased, that one witness contradicted evidence given under oath before the trial, and that her two retained attorneys were incompetent. McKinney presented all three contentions to the district judge, who rejected them in a careful opinion. 2016 U.S. Dist. LEXIS 35696 (N.D. Ill. Mar. 21, 2016). After considering McKinney's briefs and oral argument, we do not find any legal error or abuse of discretion in that decision. For substantially the reasons given by the district judge, the decision is AFFIRMED.

USA v. Harvey Wright No. 16-1527

Argued August 9, 2016 — Decided October 7, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13 CR 916 — **Thomas M. Durkin**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; RICHARD A. POSNER, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

ORDER

Indicted for his role in a mortgage-fraud scheme, Harvey Wright pleaded guilty to one count of wire fraud, see 18 U.S.C. § 1343, and was sentenced below the guidelines to 34 months' imprisonment. Wright challenges his sentence on appeal, arguing that the district court misapplied the factors listed in 18 U.S.C. § 3553(a) and failed to adequately justify the length of the sentence. We affirm.

Joe Sanfelippo Cabs, Inc. v. City of Milwaukee No. 16-1008

Argued September 19, 2016 — Decided October 7, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 2:14-cv-01036-LA — **Lynn Adelman**, *Judge*.

Before POSNER, WILLIAMS, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The issue presented by this appeal, as by the similar appeal in *Illinois Transportation Trade Association, et al. v. City of Chicago, et al.*, Nos. 16-2009, 16-2077 & 16-2980, also decided today, is whether the Fifth Amendment's prohibition against the taking of private property for public use without just compensation forbids Milwaukee, in this case, and Chicago, in the parallel case, to allow competition with established taxi services in the city, whether from new taxi companies (in Milwaukee) or from companies that provide close though not identical substitutes for conventional taxi services, such as Uber Technologies, Inc. (better known just as "Uber") (in Chicago). The intervenors, who support Milwaukee's opposition to the plaintiffs' claims, obtained taxi permits under a new Milwaukee ordinance that is the target of the plaintiff-appellant taxi companies; they could not have afforded to buy taxi permits under the old ordinance that the plaintiffs wish to see reinstated. The district judge dismissed the plaintiffs' suit on the pleadings, precipitating the appeal and the filing of a brief in opposition by the intervenors... The judgment of the district court, rejecting the plaintiffs' claims, is AFFIRMED.

USA v. Charles Schrode No. 15-3522

Argued April 12, 2016 — Decided October 7, 2016

Case Type: Criminal

Central District of Illinois. No. 14-cr-30014 — **Sue E. Myerscough**, *Judge*.

Before WOOD, *Chief Judge*, and FLAUM and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Charles Schrode was convicted in state court for predatory criminal assault of a four-year-old family member. He later pled guilty in federal court to videotaping assaults of the same child on two other dates, and receiving and possessing child pornography of other victims. He was sentenced to 630 months' imprisonment for the federal offenses, some of which was to run consecutively to his state sentence. On appeal, Schrode argues that none of his federal sentence should run consecutively to his state sentence. But we affirm Schrode's sentence. The district court did not err in applying some of his federal sentence to run consecutively to his state sentence, because it did not clearly err in finding that his state offense was not relevant conduct for all of his federal offenses.

USA v. Daniel T. Lee No. 15-3345

Submitted May 26, 2016 — Decided October 7, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 2:12-cr-00095-CNC-1 — **C.N. Clevert, Jr.**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

This appeal concerns a ruling on a motion to suppress evidence. Daniel Lee was charged with robbing four pharmacies, 18 U.S.C. § 1951(a), possessing a firearm as a felon, *id.* § 922(g)(1), and possessing prescription narcotics with intent to distribute, 21 U.S.C. § 841(a)(1). The district court allowed Lee to represent himself at trial, but it prohibited him from doing so at the pretrial suppression hearing, which he lost. After he was convicted at trial, the district court sentenced him to 780 months' imprisonment. During Lee's first appeal, we vacated his conviction on the ground that the district court should have allowed Lee to represent himself at the suppression hearing. We ordered a new hearing and, only if the district court granted suppression, a new trial. *See United States v. Lee*, 760 F.3d 692 (7th Cir. 2014). After a new hearing, the district court again denied Lee's motion to suppress and reinstated its previous judgment. Lee appeals again, challenging how the district court handled the remand. Because probable cause and a

valid warrant justified the police activity that led to the discovery of the evidence that Lee wants suppressed, we affirm.

Matthew Schaefer v. Universal Scaffolding & Equipment No. 15-2393

Argued January 14, 2016 — Decided October 7, 2016

Case Type: Civil

Southern District of Illinois. No. 10-cv-791 — **Philip M. Frazier**, *Magistrate Judge*.

Before FLAUM and RIPPLE, *Circuit Judges*, and PETERSON, *District Judge*.

PETERSON, *District Judge*. This diversity case requires us to review the district court's application of Illinois tort law, particularly concerning spoliation of evidence. Matthew Schaefer, a construction worker, alleges that he was seriously injured when a defective piece of scaffolding fell and struck him on the head. So, in addition to bringing a workers' compensation claim against his employer, Schaefer sued the scaffolding manufacturer, Universal Scaffolding & Equipment, LLC. When he learned that the piece of scaffolding that hit him had been lost, he added claims for negligent spoliation of evidence against his employer, Brand Energy Services, LLC, and against Dynegy Midwest Generation, LLC, the company that had engaged Brand to build scaffolding at a Dynegy power plant. Schaefer also alleged claims for construction negligence and failure to warn against Dynegy. Schaefer's wife joined his claims for negligent spoliation and brought claims for loss of consortium against each of the defendants. In a series of decisions, the district court granted summary judgment for defendants. At the heart of the case is the missing piece of scaffolding, which had been lost while in Dynegy's possession, before anyone had tested it for defects. The district court held that without the missing piece, Schaefer could not prove his product liability claims against Universal. The district court also held that Dynegy was not liable for any defects or negligence in the construction of the scaffolding. We affirm these decisions.

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](#).