

## Opinions for the week of August 15 - August 19, 2016

### **USA v. Terry Taylor** No. 16-1019

Argued August 9, 2016 — Decided August 15, 2016

Case Type: Criminal

Northern District of Illinois, Western Division. No. 04 CR 50038 — **Philip G. Reinhard**, *Judge*.  
Before BAUER, POSNER, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. In 2005 the defendant had been sentenced by Judge Reinhard to 300 months in prison for federal gun-related offenses (namely for possessing a shotgun illegally), but the sentence was later determined to be invalid and in December of last year the defendant was resentenced by Judge Reinhard to 176 months, even though by that time the defendant was 54 years old, had a serious vision problem, and had been a model prisoner during the 140 months that he'd been in prison before he was resentenced. Indeed as a result of his good behavior he was credited with having served 160 months of imprisonment, so that Judge Reinhard's 176-month sentence was effectively a sentence of sixteen more months in prison. The sixteen months will end on December 16 of this year, and the defendant has already been moved from prison to a halfway house in preparation for his imminent release. The 176-month sentence, however little it will affect the defendant's incarceration, was more than double the high end of Taylor's recalculated guidelines range of 70 to 87 months. And so, unsurprisingly, at his resentencing hearing both the probation service and the U.S. Attorney's Office recommended that he be sentenced to time served. Had the judge gone along with the recommendations, the defendant would have been released immediately. The judge refused to take the advice of the U.S. Attorney's Office and the probation service on two grounds: the gravity of the defendant's criminal history before the offenses of which he had been convicted in 2005 (a history mostly predating the twenty-first century) and the fact that the defendant, while he had never threatened any officials, had filed complaints (and one civil suit) critical of judicial behavior by Judge Reinhard and other judges and alleging conspiracies linking judges and various other officials to grievances the defendant had suffered decades ago. Conceivably, Judge Reinhard supposed, the defendant might follow up the complaints with criminal harassment upon his release. The judge thought these two grounds predictive of the likelihood that upon release from prison the defendant will commit further crimes... the district judge did not adequately justify the sentence that he imposed and indeed based it in part on sheer speculation. The sentence is therefore vacated and the case remanded for another round of resentencing—we trust it will be the last. Time is of the essence, since under the sentence that we're vacating Taylor could be expected to be released from the halfway house just four months from now. We are therefore issuing the mandate forthwith and reminding Taylor's attorney that pursuant to 18 U.S.C. § 3143 he can move the district judge, pending resentencing, to release Taylor immediately. VACATED AND REMANDED.

### **USA v. David Mobley** No. 15-2255

Argued May 19, 2016 — Decided August 15, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 161 — **Elaine E. Bucklo**, *Judge*.  
Before WOOD, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. David Mobley says that he is trying to get one bite at the apple, while the government claims he is trying to eat the whole bushel. We are not sure either one is right—both the parties and the district court may be comparing apples and oranges. After pleading guilty, Mobley has now had two sentencing hearings. But he argues that neither one fully comported with *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015). We take this opportunity to clarify what a remand under *Thompson* requires of the district court. Because we cannot determine from the record before us whether Mobley's second sentencing hearing was procedurally sound, we vacate his sentence and remand for him to receive what we hope will be his final sentencing hearing.

**USA v. Charles Thomas** No. 15-1142

Argued April 14, 2016 — Decided August 15, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 11 CR 415 — **Gary Feinerman**, *Judge*.

Before POSNER, KANNE, and HAMILTON, *Circuit Judges*.

KANNE, *Circuit Judge*. Domingo Blount spearheaded a narcotics-trafficking ring with Defendant Charles Thomas serving as security. Ultimately, law enforcement broke up the ring and charged many of its participants, including Thomas. After a series of disagreements with several attorneys, Thomas represented himself at his trial. He called Blount as a witness in his defense, and Blount denied Thomas's involvement in the conspiracy. Nevertheless, the jury convicted Thomas of all counts. Thomas appeals, challenging the district court's denial of his request for substitute counsel, the district court's finding that he waived his right to counsel, and the district court's imposition of a 2-level sentencing enhancement for suborning Blount's perjured testimony. We affirm.

**Walker Whatley v. Dushan Zatecky** No. 14-2534

Argued November 5, 2015 — Decided August 15, 2016

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-00465-JMS-DKL— **Jane E. Magnus-Stinson**, *Judge*.

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

ROVNER, *Circuit Judge*. Walker Whatley was convicted under a now-repealed Indiana law of possessing a little more than three grams of cocaine within 1000 feet of a "youth program center." On direct appeal and in federal *habeas corpus* proceedings, Whatley challenged the Indiana law on the ground that the statutory definition of "youth program center" was unconstitutionally vague. Although the Indiana Court of Appeals vacated his conviction on other grounds, the Indiana Supreme Court reinstated it. The district court declined to address his *habeas* claim on the merits after determining that he had defaulted the claim. We conclude that Whatley did not procedurally default his claim, and that his petition should be granted.

**USA v. Anthony Shockey** No. 16-1145

Argued July 6, 2016 — Decided August 16, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 3:15CR16-001 — **Robert L. Miller, Jr.**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Anthony Shockey appeals his within-Guidelines, 40-month sentence for possessing a firearm as a felon, 18 U.S.C. § 922(g)(1). He had sought a sentence below the Guidelines because in his view alcoholism was the root cause of his lengthy criminal history and with treatment he would be unlikely to commit more crimes. The district court rejected this argument and instead sentenced him at the high end of the Guidelines range because there was no evidence that he would remain sober and his alcoholism made him more likely to reoffend. Shockey now contends, contrary to the evidence in the record, that the district court failed to address his argument regarding his alcoholism. We affirm.

**Polly Reed v. Carolyn Colvin** No. 15-3314

Argued July 6, 2016 — Decided August 16, 2016

Case Type: Civil

Northern District of Indiana, Fort Wayne Division. No. 1:14-CV-080 JD — **Jon E. DeGuilio**, *Judge*.  
Before RICHARD A. POSNER, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*; DAVID F. HAMILTON,  
*Circuit Judge*.

#### **ORDER**

Polly Reed applied for Disability Insurance Benefits in 2011 when she was 50 years old. An administrative law judge concluded that the residual effects of injuries to Reed's left leg, sustained in a 2010 motorcycle accident, constituted a severe impairment. But the ALJ also concluded that Reed was exaggerating the physical limitations caused by that impairment and that she retained the residual functional capacity to perform her past relevant work as well as other jobs in the national and Indiana economies. The Appeals Council denied review, and a district judge upheld the denial of benefits. On appeal Reed criticizes the ALJ's assessment of her residual functional capacity, the adverse credibility finding, and the conclusion that she was not disabled for at least 12 months following the accident. We conclude that substantial evidence supports the denial of benefits.

#### **Great West Casualty Company v. Pamela Robbins** No. 15-1181

Argued September 9, 2015 — Decided August 16, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-00198 — **William T. Lawrence**, *Judge*.  
Before EASTERBROOK, KANNE, and WILLIAMS, *Circuit Judges*.

KANNE, *Circuit Judge*. In January 2011, Defendant Linda K. Phillips, an employee of Hoker Trucking, LLC, was driving a semi-truck that struck a vehicle driven by Mike Douglas Robbins in Indiana. Robbins died as a result of the injuries he sustained in the accident. At the time of the accident, the semi-truck driven by Phillips was pulling a trailer Hoker borrowed from Lakeville Motor Express, Inc. Lakeville had purchased an insurance policy from Plaintiff Great West Casualty Company to cover the trailer. This case is not about the liability of Phillips or Hoker for the accident. That action was filed by Robbins's estate in an Indiana state court, and Phillips and Hoker were indemnified by Hoker's insurance policy. To preempt a possible claim against Lakeville's insurance policy, Great West filed this complaint for declaratory judgment against Hoker, Phillips, and Defendant Pamela Robbins, as administratrix of Mike Douglas Robbins's estate, amongst other defendants, seeking an order stating that it did not have to indemnify Hoker and Phillips for any liability in connection with the accident. After Robbins and Great West filed cross-motions for summary judgment, the district court granted summary judgment in favor of Great West and denied Robbins's motion. Finding no error with the district court's decision, we affirm.

#### **USA v. Ruben Paz-Giron** No. 16-1554

Argued August 9, 2016 — Decided August 17, 2016

Case Type: Criminal

Central District of Illinois No. 15-CR-20059-01 — **Colin S. Bruce**, *Judge*.  
Before BAUER, POSNER, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Ruben Paz-Giron, a 46-year-old citizen of Mexico, pleaded guilty to being unlawfully present in the United States after removal, 8 U.S.C. § 1326(a), and was sentenced to 24 months in prison. He claims that the district court misapplied an 8-level upward adjustment in the Sentencing Guidelines for aliens who unlawfully remain in the United States after being convicted of an aggravated felony... we VACATE the sentence and REMAND for resentencing. In light of the exigencies here, the mandate shall issue forthwith and resentencing should be expedited.

#### **Amglo Kemlite Laboratories v. NLRB** Nos. 15-3695 & 15-1141

Argued February 11, 2016 — Decided August 17, 2016

Case Type: Agency

Petition for Review and Cross-Application for Enforcement of a Decision and Order of the National Labor Relations Board. No. 13-CA-065271

Before BAUER and WILLIAMS, *Circuit Judges*, and ADELMAN, *District Judge*.

WILLIAMS, *Circuit Judge*. Amglo Kemlite Laboratories makes specialty lights, such as those on airplane wings. Its employees in Illinois went on strike to protest low wages. The National Labor Relations Board found that Amglo unlawfully retaliated by transferring some work from Illinois to a separate Amglo facility in Mexico. The Board issued a remedial order. In this case, the Board asks us to enforce its order and Amglo asks us to set it aside. Because the order has a reasonable basis in law and is supported by substantial evidence, we enforce it.

**Ray Fuller v. Loretta Lynch** No. 15-3487

Submitted May 23, 2016 — Decided August 17, 2016

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A077-811-635

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

POSNER, *Circuit Judge*, dissenting.

WOOD, *Chief Judge*. Ray Fuller, a 51-year-old Jamaican citizen, petitions for judicial review of the denial of his applications for withholding of removal under the Immigration and Nationality Act (“INA”) and withholding and deferral of removal under the United Nations Convention Against Torture (“CAT”). Fuller asserted a fear of persecution and torture in Jamaica based upon his claimed bisexuality, but an immigration judge deemed his testimony not worthy of belief and denied relief. We deny the petition.

**Ricardo Glover v. Jonathon Dickey** No. 15-3145

Submitted July 22, 2016 — Decided August 17, 2016

Case Type: Prisoner

Eastern District of Wisconsin. No. 14-C-0087 — **Lynn Adelman**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

## ORDER

Ricardo Glover, a Wisconsin inmate housed at Oshkosh Correctional Institution, filed a suit under 42 U.S.C. § 1983 claiming that Jonathan Dickey, a facility psychologist, denied him equal protection by refusing him a spot in a treatment program for sex offenders. Glover, describing himself as a “class of one,” alleges that Dickey’s decision lacked a rational basis. The district court allowed this claim to proceed through discovery before dismissing it on Dickey’s motion for summary judgment. We affirm the dismissal.

**Andrew Wesley v. Randy Pfister** No. 15-2253

Argued May 26, 2016 — Decided August 17, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 12-CV-02226 — **Joan H. Lefkow**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

## ORDER

Andrew Wesley appeals the denial of his habeas petition under 28 U.S.C. § 2254... we affirm the district court’s denial of his habeas petition.

**James E. Riano v. Robert A. McDonald** No. 15-2043

Argued January 11, 2016 — Decided August 17, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 11-cv-939 — **Charles N. Clevert, Jr.**, *Judge*.

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

WILLIAMS, *Circuit Judge*. James Riano worked as a registered nurse for the Veterans Health Administration, which is part of the U.S. Department of Veterans Affairs. While examining male patients for genital warts, Riano manipulated their penises with his hands, attempting to induce erections. He also used words like “pecker” and “balls,” rather than medical terms. The agency found his examination technique and his language to be inappropriate, so he was fired. He appealed and was given a hearing that included representation by counsel, live testimony from medical experts, written testimony from patients, and a written report from an investigator who had interviewed the patients. The appeals board affirmed his termination... We affirm.

**Robert Jackson & Jeanette Etro v. Blitt & Gaines, P.C.** Nos. 15-1573 & 15-1820

Argued October 27, 2015 — Decided August 17, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division No. 14 C 8625 — **Harry D. Leinenweber**, *Judge*. No. 14 C 8924 – **John Robert Blakey**, *Judge*.

Before KANNE and ROVNER, *Circuit Judges*, and BRUCE, *District Judge*.

KANNE, *Circuit Judge*. At issue in this appeal is whether a wage-garnishment action under Illinois law is a “legal action” on a debt against a consumer under the venue provision of the Fair Debt Collection Practices Act (“FDCPA”). We hold that such actions are not against the consumer and therefore affirm the dismissals made by the respective district courts in this consolidated appeal.

**USA v. Steven Mandell** Nos. 14-3747 and 14-3772

Argued April 1, 2016 — Decided August 17, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 842-1 — **Amy J. St. Eve**, *Judge*.

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

WILLIAMS, *Circuit Judge*. Steven Mandell was convicted for conspiring to kidnap, and for conspiring and attempting to extort, a wealthy businessman. His plan involved a gun, and so he was also convicted for possessing a gun in furtherance of a crime of violence, and for possessing a gun as a convicted felon. The evidence included videos from hidden cameras that the FBI installed at the site of the planned extortion. As required by statute, a federal court authorized the installation of the cameras. Arguing that the court only did so because the FBI’s application was misleading due to certain omissions, Mandell moved to suppress the video evidence. The district judge denied that motion and we affirm because the omissions Mandell complains about are not material. Mandell also moved for a new trial, arguing that the government had withheld important exculpatory information about the source of the gun. We affirm because we agree with the district judge that the information is irrelevant and the evidence supporting Mandell’s gun convictions was overwhelming.

**Patricia Rupcich v. UFCW** No. 14-3377

Argued October 27, 2015 — Decided August 17, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12-CV-6615 — **John Z. Lee**, *Judge*.  
Before KANNE and ROVNER, *Circuit Judges*, and BRUCE, *District Judge*.

KANNE, *Circuit Judge*. Plaintiff Patricia Rupcich was fired from her job of twenty-five years at one of Defendant Jewel Food Stores, Inc.'s stores in January 2012 for wheeling a twenty-five pound bag of birdseed in a grocery cart past the last cash register without paying for it. Rupcich said that she wheeled the birdseed past the last cash register by accident, as she rushed home to care for her sick grandson after her shift ended. That this may in fact be true is irrelevant, according to Jewel, because it claims to define "misappropriation" and theft to be strict liability violations that do not require a showing of intent. Of course, there does not appear to be evidence that Jewel communicated this definition to Rupcich. There is evidence, however, that it relayed this information to Rupcich's union, Defendant United Food and Commercial Workers International, Local 881, which decided not to dispute her termination with Jewel in arbitration or even process it through the collectively bargained grievance procedure. Instead, Local 881 abandoned her case because Rupcich admitted she took the bag of birdseed past the last cash register in her store without paying for it. Local 881 made this decision despite substantial evidence that Rupcich had made an inadvertent mistake in her rush to get her grandson to the doctor... Rupcich appeals the district court's decisions on her claims for breach of the duty of fair representation and breach of the collective bargaining agreement. Finding that a reasonable juror could determine that Local 881's actions in this case were arbitrary and outside the "wide range of reasonableness" afforded unions in the grievance... we reverse the district court's decision granting summary judgment to Local 881 and Jewel on Rupcich's claims against them. We do, however, affirm the district court's decision to deny Rupcich's motions for summary judgment.

**USA v. Duane L. O'Malley** No. 14-2711

Argued May 19, 2016 — Decided August 17, 2016

Case Type: Criminal

Central District of Illinois. No. 10-cr-20042-002 — **James E. Shadid**, *Chief Judge*.  
Before WOOD, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Duane "Butch" O'Malley is serving ten years in prison for violating the Clean Air Act by improperly removing and disposing of insulation containing regulated asbestos... After we upheld his convictions on direct... O'Malley filed in the district court what he dubbed a motion under Federal Rule of Criminal Procedure 33(b)(1) for a new trial based on newly discovered evidence... We conclude that the entirety of O'Malley's submission falls within the scope of Rule 33(b)(1) even if his theories overlap with § 2255, and that the district court should have respected his choice between these available means of relief. We thus vacate the district court's decision and remand for further proceedings.

**USA v. Daniel Haslam** No. 14-2641

Argued September 21, 2015 — Decided August 17, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. Nos. 3:13-CR-013 & 3:13-CR-109 — **Jon E. DeGuilio**,  
*Judge*.

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

SYKES, *Circuit Judge*. Daniel Haslam pleaded guilty under a written plea agreement to manufacturing methamphetamine, possessing unregistered silencers, and possessing a firearm in connection with a drug offense. His presentence report included as relevant conduct an incident in which Haslam held a woman hostage in his apartment on the mistaken belief that she was an undercover police officer. Haslam thinks the government breached the plea agreement by giving this hostage-taking information to the probation office and the court; he moved to withdraw his pleas. The district judge denied the motion

and imposed a sentence of 181 months in prison. Haslam appealed, challenging the denial of his plea-withdrawal motion. We affirm.

**USA v. Frank Caira** No. 14-1003

Argued February 11, 2016 — Decided August 17, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 08 CR 1052-1 — **Rebecca R. Pallmeyer**, *Judge*.  
Before RIPPLE, KANNE, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Someone used the email address gslabs@hotmail.com to contact a Vietnamese website in an attempt to buy sassafras oil—a chemical that can be used to make the illegal drug known as ecstasy. The website was being monitored by the Drug Enforcement Administration, which began an investigation that culminated in Frank Caira being convicted on drug charges. A key step in the investigation was learning that Caira was the person behind the gslabs@hotmail.com address. The DEA made that discovery by issuing administrative subpoenas to technology companies, without getting a warrant. Arguing that the DEA conducted an “unreasonable search” in violation of the Fourth Amendment, Caira moved to suppress much of the evidence against him. The district court denied his motion and we affirm.

**Marcia Ransom v. United States of America** No. 16-1443

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15cv6108 — **James B. Zagel**, *Judge*.  
Before RICHARD A. POSNER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

**ORDER**

Marcia Ransom, a civilian, worked for the federal government at a Navy Exchange, a discount store serving primarily members of the Navy. She was fired in early 2014 for shopping at the store, something that civilians generally may not do... Ransom filed an administrative claim with the Navy—a prerequisite to filing this suit under the Federal Tort Claims Act, see 28 U.S.C. § 2675(a)—stating that her supervisor had slandered her by accusing her of shopping. The Navy denied the claim and advised her that she had “six months from the date of mailing” of the denial letter “to file suit in the appropriate Federal district court.” See *id.* § 2401(b). Five days after the six months had run, Ransom filed this action against the federal government. She alleged that two of her supervisors had slandered her by falsely telling her manager that she had shopped at the Navy Exchange without authorization. She described her injuries as “[s]evere mental and emotional stress, financial hardship and relapse of [her] depression.” The district court granted the government’s motion to dismiss... AFFIRMED.

**USA v. Kyle Langner** No. 16-1270

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Criminal

Western District of Wisconsin. No. 3:15CR00104-001 — **James D. Peterson**, *Judge*.  
Before RICHARD A. POSNER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

**ORDER**

Kyle Langner was the getaway driver for his half-brother and friend, who robbed banks by pointing guns at tellers and demanding money. On at least one occasion Langner’s gun was used, and he admitted that he expected it to be shown during the robbery. Langner pleaded guilty to two counts of armed bank

robbery, 18 U.S.C. § 2113(a), (d), and one count of brandishing a firearm during a crime of violence, id. § 924(c)(1)(A)(ii). He was sentenced to a total of 114 months' imprisonment—30 months on each bank-robbery count, to run concurrently, plus a statutorily required consecutive 84 months on the brandishing count. Langner filed a notice of appeal, but his appointed attorney asserts that the appeal is frivolous and moves to withdraw... we GRANT counsel's motion to withdraw and DISMISS the appeal.

**Kelvin Merritt v. Thomas Baker** No. 15-3244

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Prisoner

Central District of Illinois. No. 13-3377 — **Colin S. Bruce**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

**ORDER**

Kelvin Merritt, an Illinois inmate, appeals the grant of summary judgment against him in this suit under 42 U.S.C. § 1983 asserting that a prison doctor, Thomas Baker, was deliberately indifferent to his rib injury and that Wexford Health Sources, Inc., which contracts with the Illinois Department of Corrections to provide medical care for inmates, had a policy of delaying medical treatment in an effort to save money. We affirm.

**Eddie Patton, Jr. v. Jennifer Kestel** No. 15-2879

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Prisoner

Central District of Illinois. No. 15-C-1273 — **Harold A. Baker**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

**ORDER**

Eddie Patton, Jr., an Illinois prisoner, filed this action under 42 U.S.C. § 1983 claiming that Lutheran Social Services and several of its caseworkers, supervisors, and therapists were interfering with his parental rights. According to the complaint, the defendants had refused to allow Patton's children to visit him in prison, blocked the children from communicating with him, and withheld information about the children's health and welfare. He asked that Lutheran "be investigated" and that his children be "returned home" to relatives. At screening, see 28 U.S.C. § 1915A, the district court addressed Patton in open court and announced that his suit was being dismissed for lack of subject-matter jurisdiction because a "custody fight" was ongoing in state court. A later written decision attributes the dismissal, however, to a failure to state a claim as well as a lack of jurisdiction. Patton appeals the dismissal... Patton has filed a frivolous appeal of a frivolous suit... and thus he has incurred two strikes under the Prison Litigation Reform Act, see 28 U.S.C. § 1915(g). A further strike will bar him from bringing suits *in forma pauperis*... The district court appeared to recognize that it lacked subject-matter jurisdiction over Patton's lawsuit, even though the court's written decision and judgment include references to Federal Rule of Civil Procedure 12(b)(6) and failure to state a claim. To eliminate any ambiguity, we MODIFY the judgment to reflect a dismissal for lack of jurisdiction rather than on the merits, and as modified the judgment is AFFIRMED.

**Jarvis Postlewaite v. Stephen Duncan** No. 15-2480

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Prisoner

Southern District of Illinois. No. 14-cv-0839-MJR-SCW — **Michael J. Reagan**, *Chief Judge*.

Before RICHARD A. POSNER, *Circuit Judge*;FRANK H. EASTERBROOK, *Circuit Judge*;DIANE S. SYKES, *Circuit Judge*.

#### **ORDER**

Jarvis Postlewaite, an Illinois prisoner, brought this suit under 42 U.S.C. § 1983 alleging constitutionally deficient medical treatment. The district court granted summary judgment for the defendants, finding that Postlewaite had failed to exhaust his administrative remedies before suing. Because Postlewaite sought and obtained leave to proceed with this appeal knowing that he already had “struck out” under the Prison Litigation Reform Act, we dismiss the appeal.

#### **USA v. Bacilio Lopez-Rios** No. 15-2472

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 00695-2 — **John J. Tharp, Jr.**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*;FRANK H. EASTERBROOK, *Circuit Judge*;DIANE S. SYKES, *Circuit Judge*.

#### **ORDER**

Bacilio Lopez-Rios was caught selling cocaine in Chicago, Illinois, and later pleaded guilty to conspiracy to possess and distribute a controlled substance, see 21 U.S.C. §§ 846, 841(a)(1). The district court sentenced Lopez-Rios to 78 months’ imprisonment. Lopez-Rios filed a notice of appeal, but his appointed lawyer has moved to withdraw on the ground that the appeal is frivolous... we GRANT counsel’s motion to withdraw and DISMISS the appeal.

#### **Lazerrick Coffee v. Edward Lewis** No. 15-1936

Submitted August 18, 2016 — Decided August 18, 2016

Case Type: Prisoner

Central District of Illinois. No. 12-C-1416 — **James E. Shadid**, *Chief Judge*.

Before RICHARD A. POSNER, *Circuit Judge*;FRANK H. EASTERBROOK, *Circuit Judge*;DIANE S. SYKES, *Circuit Judge*.

#### **ORDER**

Lazerrick Coffee, an Illinois inmate, sued several correctional officers under 42 U.S.C. § 1983, claiming that they violated the Eighth Amendment during a cell extraction. The district court granted summary judgment to one defendant and after Coffee presented his case-in-chief to a jury, granted judgment as a matter of law to the remaining defendants... Coffee appeals only the grant of judgment as a matter of law... Coffee’s appeal is DISMISSED.

#### **USA v. Charles Lemle** No. 15-3699

Argued August 9, 2016 — Decided August 19, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 14 CR 465 — **John Z. Lee**, *Judge*.

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

#### **ORDER**

Charles Lemle pleaded guilty to possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), and was sentenced to 151 months’ imprisonment. On appeal Lemle argues that the district court wrongly applied a four-level upward adjustment under the sentencing Guidelines. See U.S.S.G. § 2K2.1(b)(6)(B). That Guideline applies if Lemle used the firearm “in connection with another felony,” *id.*, but Lemle argues that

he committed no felony other than unlawful possession of a weapon. Because Lemle did commit another felony with the gun—the reckless discharge of it—we affirm the judgment.

**USA v. Richard Harrington** No. 15-3486

Argued August 9, 2016 — Decided August 19, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 09 CR 814-1 — **Amy J. St. Eve**, *Judge*.

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

POSNER, *Circuit Judge*. Richard Harrington is a former client of the well-known Chicago-based criminal defense lawyer Beau Brindley, who last year was acquitted in a bench trial presided over by Judge Leinenweber of the Northern District of Illinois of charges that Brindley had encouraged Harrington, a drug dealer, and other clients to lie on the stand during their criminal trials. Harrington managed to elude conviction in his own trial, but having pleaded guilty to other charges was sentenced by Judge St. Eve, also of the Northern District of Illinois, to 264 months in prison, subsequently reduced because of a retroactive change in the Sentencing Guidelines to 212 months. Just over a year after Harrington was sentenced, the government asked for his cooperation in its investigation of Brindley. After meeting with prosecutors several times, he testified as a government witness first before the grand jury and then for an entire day during Brindley's two-week trial. Despite Brindley's acquittal the government filed a motion under Federal Rule of Criminal Procedure 35(b)(2)(C) asking Judge St. Eve to reduce Harrington's sentence by 25 percent as a reward for his substantial assistance in investigating and prosecuting Brindley. But the judge granted only a 14 percent reduction, precipitating this appeal by Harrington... VACATED AND REMANDED.

**USA v. Dominic Miller** No. 15-2856

Argued February 17, 2016 — Decided August 19, 2016

Case Type: Criminal

Western District of Wisconsin. No. 15 CR 30 — **Barbara B. Crabb**, *Judge*.

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

WILLIAMS, *Circuit Judge*. In late 2014, Defendant Dominic Miller and Amy Wagner used and sold methamphetamine together in northwestern Wisconsin. After law enforcement learned of the couple's illicit activity, Miller pled guilty to possessing methamphetamine with the intent to distribute it. The district judge found that Miller and Wagner were jointly engaged in the distribution of between 500 grams and 1.5 kilograms of methamphetamine and sentenced Miller to eight years in prison. On appeal, Miller argues that the district judge's drug quantity finding was erroneous, principally on the ground that he sold only a small portion of the drugs in question... The district court's judgment is AFFIRMED.

**Henry Ortiz v. Werner Enterprises, Inc.** No. 15-2574

Argued February 8, 2016 — Decided August 19, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 8270 — **John W. Darrah**, *Judge*.

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

EASTERBROOK, *Circuit Judge*. Henry Ortiz worked as a freight broker for Werner Enterprises, Inc., for seven years until his discharge in 2012. Werner says that it fired Ortiz for falsifying business records. Ortiz says that Werner fired him because of his Mexican ethnicity, and he sued Werner under 42 U.S.C. §1981 and the Illinois Human Rights Act... The district court granted summary judgment to Werner... It dismissed Ortiz's claim of a hostile work environment for failure to exhaust his administrative remedies, a ruling Ortiz does not contest on appeal... The judgment is reversed, and the case is remanded for trial.

**Construction and General Labor v. Town of Grand Chute, Wisconsin** No. 15-1932

Argued November 6, 2015 — Decided August 19, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 14-C-455 — **William C. Griesbach**, *Chief Judge*.

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

POSNER, *Circuit Judge*, concurring and dissenting.

EASTERBROOK, *Circuit Judge*. Rats. This case is about rats. Giant, inflatable rats, which unions use to demonstrate their unhappiness with employers that do not pay union-scale wages. Cats too—inflatable fat cats, wearing business suits and pinkie rings, strangling workers... deployed during a labor dispute in the Town of Grand Chute, Wisconsin... As the pictures show, the rat and the cat are staked to the ground, to prevent the wind from blowing them away. Those stakes led to this litigation. Grand Chute forbids private signs on the public way... that conveys a message. Municipal Code §535-105. Picket signs and sandwich boards are lawful under this definition, and the Town did not interfere with the Union's use of them. But the Union inflated its rat and cat in the median of a highway, and because they were staked to the ground the Town treated them as structures. If picketers had held them down by ropes, there would not have been a problem under the Town's rules. Likewise if they had been inflated with helium and floated six inches above the ground. The Town suggested that the protesters mount the cat and rat on a flatbed truck, which would not be a structure; the Union declined. Staked to the ground on the public way, as they were, they were forbidden. The Union removed them when directed to do so and filed this suit under 42 U.S.C. §1983, contending that the local ordinance violates the Constitution's First Amendment, applied to the states through the Fourteenth. The district court denied the Union's motion for a preliminary Injunction... The judgment is vacated, and the case is remanded for proceedings consistent with this opinion.

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](#).