

## Opinions for the week of March 7 - March 11, 2016

### **Orvil Hassebrock v. Robert Bernhoft** No. 14-2943

Argued April 6, 2015 — Decided March 7, 2016

Case Type: Civil

Southern District of Illinois. No. 10-CV-0679-NJR-DGW — **Nancy J. Rosenstengel**, *Judge*.  
Before POSNER and SYKES, *Circuit Judge*, and SIMON, *Chief District Judge*.

SYKES, *Circuit Judge*. Orvil and Evelyn Hassebrock sued their former attorneys and accountants for professional malpractice, but they waited until after discovery closed to file their expert-witness disclosure. They belatedly moved for an extension of time, but the district court denied the motion and disallowed the expert. Without expert testimony, the Hassebrocks could not prove their claims against either the attorneys or the accountants. The court entered summary judgment for the defendants. On appeal the Hassebrocks insist that the judge should have applied the disclosure deadline specified in Rule 26(a)(2)(D) of the Federal Rules of Civil Procedure rather than the discovery deadline set by court order. They also challenge the judge's summary-judgment ruling. We affirm. The disclosure deadline specified in Rule 26(a)(2)(D) is just a default deadline; the court's scheduling order controls. And it was well within the judge's discretion to reject the excuses offered by the Hassebrocks to explain their tardy disclosure. Finally, because expert testimony is necessary to prove professional malpractice, summary judgment was proper as to all defendants.

### **USA v. Rex Black** No. 13-3908

Argued February 11, 2015 — Decided August 17, 2015 — Amended March 7, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 06 CR 00219 — **James F. Holderman**, *Judge*.  
Before FLAUM, WILLIAMS, and HAMILTON, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Rex Black repeatedly tried to pay off a more than \$5 million tax debt with checks drawn on checking accounts that he knew were closed to prevent the Internal Revenue Service ("IRS") from collecting taxes from him. A jury convicted Black of one count of obstructing and impeding the IRS from collecting taxes and four counts of passing and presenting fictitious financial instruments with intent to defraud. The district court sentenced Black to 71 months in prison. Black now appeals arguing that the district court erred in determining his sentencing range under the United States Sentencing Guidelines ("U.S.S.G.") § 2T1.1, improperly calculating the tax loss by aggregating the face value of the fraudulent checks. We agree, the district court misinterpreted and misapplied the tax loss definition to the facts of this case. Additionally, we conclude, contrary to Black's assertions, that penalties and interest may be included in the tax loss calculation, and the district court did not err by failing to consider audit errors and apply available deductions because Black could not establish that he was entitled to any reduction in taxes owed. Therefore, we vacate Black's sentence and remand for resentencing.

### **USA v. James Thomas** No. 15-1731

Argued February 24, 2016 — Decided March 8, 2016

Case Type: Criminal

Northern District of Indiana, Fort Wayne Division. No. 1:11-CR-22-TLS — **Theresa L. Springmann**, *Judge*.  
Before EASTERBROOK, ROVNER, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. James Thomas pleaded guilty to possessing cocaine with intent to distribute and was sentenced to 235 months' imprisonment—a term below the Guideline range of 292 to 365 months for someone with his criminal history who distributed as much cocaine as he did. His appeal

does not contest the length of his sentence but does maintain that the procedure the judge used to arrive at the sentence violated the Due Process Clause of the Fifth Amendment... The Due Process Clause requires notice and an opportunity for a hearing. See, e.g., *Jones v. Flowers*, 547 U.S. 220 (2006). The procedure the district judge used gave Thomas *more* notice than Rule 32 requires, and *more* opportunities to be heard than Rules 32 and 43 require. It eliminated any dispute about the terms of supervised release, which have bedeviled district courts (and this court) in recent years. See, e.g., *United States v. Orozco-Sanchez*, No. 15-1252 (7th Cir. Feb. 26, 2016); *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015). The early announcement of an inclination to deduct two offense levels allowed everyone to prepare for a focused argument on just where in the 235- to 293-month range the sentence should fall, without extinguishing the prosecutor's opportunity to argue for a sentence higher than 293 months or the defense's opportunity to ask for fewer than 235 months. Both sides used that opportunity. The procedure made everyone better off. Philosophers and economists might call it a Pareto-superior, if not a Pareto-optimal, approach to sentencing. Other district judges may deem it worthy of emulation; it is enough for us to call it constitutional. AFFIRMED

**USA v. Brandon Lomax** Nos. 14-2811, 14-3189, 14-3684

Argued November 30, 2015 — Decided March 8, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. Nos. 12-CR-00189-1,-2,-3 — **Sarah Evans Barker**, *Judge*.

Before ROVNER and WILLIAMS, *Circuit Judges*, and SHAH, *District Judge*.

WILLIAMS, *Circuit Judge*. A jury found Anthony Lomax, Brandon Lomax, and Demond Glover guilty of conspiring to possess with the intent to distribute and to distribute 1,000 grams or more of heroin. 21 U.S.C. § 841(a)(1). On appeal, the defendants argue that the evidence did not prove beyond a reasonable doubt that they joined the conspiracy with the intent to further the goals of the conspiracy. They maintain they were running three separate heroin businesses. We reject this argument. Anthony Lomax separately argues that he was not a part of the conspiracy, but instead had a buyer-seller relationship with Brandon Lomax. As such, he claims that the district court erred by refusing to instruct the jury about the buyer-seller relationship. We agree and remand Anthony Lomax's case for a new trial to include the buyer-seller jury instruction. Brandon Lomax argues that he was entitled to a jury determination on whether he had two prior drug convictions, and the district court's finding that he had two prior drug convictions, which enhanced his mandatory minimum sentence to life imprisonment, violated the Constitution. We disagree and affirm his sentence. Demond Glover also challenges his sentence stating that his case should be remanded for resentencing because he was erroneously classified as a career offender in light of *Johnson v. United States*, 135 S. Ct. 569 (2015). Because we find that the error was harmless, we affirm his sentence.

**USA v. Vernado Malone** No. 15-2400

Argued February 18, 2016 — Decided March 9, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 3:13-CR-104 — **Jon E. DeGuilio**, *Judge*.

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

KANNE, *Circuit Judge*. Appellant Vernado Malone pled guilty to mail fraud and aggravated identity theft pursuant to a written plea agreement. In the factual basis of his plea agreement, he admitted that he "committed numerous instances of access device fraud" and "misused the means of identification of employees of several companies," specifically identifying three companies and one individual he defrauded. At sentencing, the government presented evidence that there were twenty-eight victims of Malone's scheme. Despite having waived his right to appeal, Malone argues that the government materially breached the plea agreement by presenting evidence of twenty-eight victims when only four

were referred to by name in the agreement. Because the plea agreement made clear that the named victims were either an “example” or just “[o]ne of” the companies he defrauded, the government did not commit a material breach by introducing evidence that there were more victims than those specifically named. Accordingly, we enforce the appellate waiver and dismiss this appeal.

**William Bridge v. New Holland Logansport, Inc.** No. 15-1935

Argued November 9, 2015 — Decided March 9, 2016

Case Type: Civil

Northern District of Indiana, South Bend Division. No. 3:12 CV 360 — **James T. Moody**, *Judge*.  
Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and SHAH, *District Judge*.

SHAH, *District Judge*. William Bridge was fired from his job at New Holland Logansport in March 2011, when he was 61 years old. Bridge sued Logansport under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which prohibits employers from discharging individuals because of their age, *id.* § 623(a)(1). The statute defines “employer” as someone who has twenty or more employees for each working day, in each of twenty or more calendar weeks, in the calendar year of (or in the year preceding) the discriminatory act. *Id.* § 630(b). After concluding that New Holland Logansport did not have twenty or more employees, the district court granted Logansport’s motion for summary judgment. We affirm.

**USA v. Rondell Freeman** No. 15-1170

Argued November 12, 2015 — Decided March 9, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 07-cr-00843 — **Joan H. Lefkow**, *Judge*.  
Before BAUER, FLAUM, and MANION, *Circuit Judges*.

MANION, *Circuit Judge*. In 2009, Rondell Freeman and several codefendants were convicted on various counts stemming from their participation in a Chicago drug conspiracy. After learning that the government had knowingly used false testimony at trial, the district court vacated the defendants’ convictions on the conspiracy charged in Count 1 of the indictment. The government appealed, and we affirmed in *United States v. Freeman*, 650 F.3d 673 (7th Cir. 2011). But the district court also left intact the defendants’ convictions on a number of other counts that incorporated the conspiracy charged in Count 1 as a necessary element. The result was an anomaly: with the conspiracy count dismissed, how could the convictions dependent on the conspiracy’s existence remain standing? We recently answered that question for two of Freeman’s codefendants in *United States v. Wilbourn*, 799 F.3d 900 (7th Cir. 2015), where we held that the dismissal of the conspiracy count did not, by itself, necessitate dismissing the remaining counts encompassing the conspiracy. Like his codefendants before him, Freeman argues on appeal that the district court should have vacated his conspiracy-based convictions in light of its dismissal of the conspiracy charge. He also challenges his sentence. For the reasons that follow, we affirm.

**Marlon Thomas v. WGN News** No. 16-1025

Submitted March 10, 2016 — Decided March 10, 2016

Case Type: Civil

Northern District of Illinois. 15 C 10812 — **Amy J. St. Eve**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*.

**ORDER**

Marlon Thomas sued WGN News, using a form complaint for violations of constitutional rights under 42 U.S.C. §§ 1983, 1985, and 1986. He alleged vaguely that on October 23, 1986, WGN used his likeness to attract viewers and to advertise its business and sought \$7 million in damages. The district court

screened the complaint, see 28 U.S.C. § 1915(e)(2)(B), and dismissed it for lack of subject matter jurisdiction. Because both Thomas and WGN News are citizens of Illinois, there was no diversity jurisdiction, see 28 U.S.C. § 1332, and his complaint reveals no possible non-frivolous federal question, see 18 U.S.C. § 1331. On appeal Thomas generally disputes the dismissal of his complaint. His claim, however, appears to be grounded in tort, involving a right to publicity or possibly libel, and such claims arise under state law and must be brought in state court... AFFIRMED.

**Vincent Rose v. Board of Election Commissioner** No. 15-1931

Argued January 20, 2016 — Decided March 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-00382 — **Amy J. St. Eve**, *Judge*.  
Before WOOD, *Chief Judge*, and MANION and ROVNER, *Circuit Judges*.

MANION, *Circuit Judge*. Vincent Rose sued the state of Illinois and the Chicago Board of Election Commissioners after the Board refused to put Rose's name on the ballot for a local government election in 2015. The district court dismissed Rose's amended complaint because an Illinois state court had already adjudicated an identical cause of action brought by Rose against the same defendants. Rose now appeals the district court's dismissal of his federal action. We affirm.

**Robert Formella v. Megan J. Brennan** No. 15-1402

Argued January 22, 2016 — Decided March 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 3032 — **Virginia M. Kendall**, *Judge*.  
Before BAUER, FLAUM, and HAMILTON, *Circuit Judges*.

BAUER, *Circuit Judge*. Plaintiff-appellant, Robert Formella ("Formella"), appeals the district court's grant of summary judgment in favor of defendant-appellee, the Postmaster General of the United States Post Office ("USPS"). Formella sued USPS for employment discrimination based on race and age, in violation of Title VII of the Civil Rights Act of 1963, 42 U.S.C. §§ 2000e-2 and 2000e-3 ("Title VII"), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621, *et seq.* ("ADEA"), respectively, and retaliation in violation of Title VII. For the following reasons, we affirm the district court's decision.

**USA v. Charles Estell** No. 14-1655

Submitted February 11, 2016 — Decided March 10, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 416 — **Gary Feinerman**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

**ORDER**

Charles Estell was charged with armed bank robbery, 18 U.S.C. § 2113(a), (d), and brandishing a firearm during and in relation to that crime, *id.* § 924(c)(1)(A)(ii). He testified at trial that he was forced to rob the bank by men who threatened to harm his fiancée and infant son. The jury disbelieved this defense, and the district court sentenced him to a total of 390 months' imprisonment. Estell has filed a notice of appeal, but his newly appointed lawyer asserts that the appeal is frivolous and seeks to withdraw. See *Anders v. California*, 386 U.S. 738, 744 (1967). Estell opposes counsel's motion. See CIR. R. 51(b). Counsel's brief in support of her motion explains the nature of the case and addresses issues that an appeal of this kind might be expected to involve. Because the analysis in the brief appears to be thorough, we limit our review to the subjects counsel discusses plus the additional contentions in Estell's response. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014)... Finally, although counsel did identify a meritorious

challenge to the conditions of Estell's supervised release, he directed her to not pursue that challenge. See *United States v. Bryant*, 754 F.3d 443, 447 (7th Cir. 2014). Counsel's motion to withdraw is GRANTED, and the appeal is DISMISSED.

**Benedict Nichols v. State of Wisconsin** No. 15-3172

Submitted March 10, 2016 — Decided March 11, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 15-C-1118 — **C.N. Clevert, Jr.**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*.

**ORDER**

Benedict Nichols appeals from the dismissal of his complaint against the State of Wisconsin alleging a "Workman's Comp. problem." Nichols alleges that he injured a muscle in 1999 while shoveling snow to clear the entrance to a sheet metal factory where he worked. He was fired from that job shortly after. It is unclear from the complaint whether he ever filed a worker's compensation claim. Nichols asserts that his boss "lied in court" and accuses the State of Wisconsin of obstructing justice and "not arresting the guilty party." The district court dismissed the complaint at screening for failure to state a claim. See 28 U.S.C. § 1915(e)(2)(B). The court explained that the complaint fails to allege any basis for federal jurisdiction of a state-law worker's compensation claim. The court added that any claim against the State of Wisconsin was barred by the Eleventh Amendment and expressed doubt about the timeliness of any claim based on events that occurred more than 15 years ago... DISMISSED.

**Miykael Muhammad v. City of Chicago** No. 15-2119

Submitted March 10, 2016 — Decided March 11, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:13-cv-02916 — **John Robert Blakey**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*.

**ORDER**

Miykael Muhammad sued the City of Chicago and others for allegedly violating his civil rights during a traffic stop when a police officer forced him to take a field sobriety test. See 42 U.S.C. § 1983. During discovery Muhammad failed repeatedly to answer fully the defendants' interrogatories, even after the district court ordered him twice to do so. To sanction his obstinacy, the district court dismissed his suit with prejudice under Federal Rule of Civil Procedure 37(b)(2)(A). Because we conclude that the sanction was not an abuse of discretion, we affirm.

**Official Committee of Unsecure v. T.D. Investments I, LLP** No. 15-2093

Argued December 4, 2015 — Decided March 11, 2016

Case Type: Bankruptcy from Bankruptcy Court

Eastern District of Wisconsin. No. 13-02709-SVK — **Susan V. Kelley**, *Bankruptcy Judge*.

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

POSNER, *Circuit Judge*. In 2012 a company named Great Lakes Quick Lube LP (Great Lakes for short), which owned a series of stores throughout the Midwest that provided oil changes and other automotive maintenance services, filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The committee appointed to represent the unsecured creditors filed an adversary action (in effect a separate suit within the overall bankruptcy proceeding) against T.D. Investments I, LLP, which had leased two oil-change stores to Great Lakes. Great Lakes had negotiated the termination of the leases 52 days before it

declared bankruptcy, and the creditors' committee contends that the termination was either a preferential or a fraudulent transfer of the leases to T.D. and that whichever it was the value of the leases belongs to the bankrupt estate and should therefore be available to the bankrupt's creditors. T.D. denies that the terminations were transfers, let alone preferential or fraudulent, and the bankruptcy judge agreed but at the request of the creditors' committee asked us to accept a direct appeal from her ruling. See 28 U.S.C. § 158(d)(2)(A). We have accepted the appeal... The judgment of the bankruptcy court is reversed and the case remanded to that court to determine the value of Great Lakes' transfer to T.D. and whether T.D. has any defenses to the creditors' claims. Other issues are raised by the parties but do not warrant discussion. REVERSED, AND REMANDED WITH DIRECTIONS.

**USA v. Derrick Smith** No. 15-2005

Argued February 26, 2016 — Decided March 11, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 175 — **Sharon Johnson Coleman**, *Judge*.  
Before POSNER, FLAUM, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. In March 2011 Derrick Smith was appointed to the Illinois House of Representatives to complete an unfinished term. He wanted to be elected in his own right, which meant that he had to campaign in his party's primary, set for March 2012. One of his campaign assistants, known to Smith as "Pete," alerted the FBI that Smith might be corrupt. Pete (whose last name has been kept confidential) began recording some of his conversations with Smith. At the FBI's suggestion, Pete told Smith that a woman who lived in his district would provide \$7,000 (money that would help Smith pay his campaign staff) if Smith wrote a letter supporting her application for a grant from the state's Capital Development Board for the construction of a daycare center. This was a sting; there was no such woman, and the money would come from the FBI. Letters of recommendation from one public official to another are common and lawful—unless paid for. The exchange of an official act for money violates federal law, no matter how the recipient uses the cash. See, e.g., *Evans v. United States*, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257 (1991); *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015). Smith wrote the letter, and Pete handed over \$7,000. Smith immediately used some of the money to pay his campaign staff; a search of his home turned up the rest... It would not be helpful to run through all of the other exchanges. They are similar to these. Smith has not been convicted on the basis of hearsay, or of out-of-court testimonial statements. Smith's own words and deeds convicted him.

AFFIRMED

**Da Vonte Love v. Kevin Nyklewicz** No. 15-1913

Submitted March 10, 2016 — Decided March 11, 2016

Case Type: Prisoner

Eastern District of Wisconsin. No. 11-C-882 — **Charles N. Clevert, Jr.**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*.

**ORDER**

DaVonte Love, a Wisconsin inmate who is blind in one eye, challenges the grant of summary judgment against him in this action under 42 U.S.C. § 1983, asserting that his Eighth Amendment rights were violated when he was prevented from attending medical appointments outside the jail. We affirm.

**USA v. Pedro Garza** No. 15-1886

Submitted March 10, 2016 — Decided March 11, 2016

Case Type: Criminal

Northern District of Indiana, Fort Wayne Division No. 1:12CR88-001 — **Theresa L. Springmann**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*.

## ORDER

In late 2012, police in Fort Wayne, Indiana, conducted a series of controlled buys from Pedro Garza, and he was arrested after attempting to sell to an undercover detective almost \$40,000 worth of cocaine. Garza was charged with five counts of distributing controlled substances, 21 U.S.C. § 841(a)(1)(A), and, in exchange for the government's agreement to dismiss four of those counts, Garza agreed to plead guilty to the remaining count and waive his right to appeal. Under the appeal waiver, Garza consented to "expressly waive [his] right to appeal or to contest [his] conviction and all components of [his] sentence." A magistrate judge conducted a plea colloquy and recommended that the district court accept Garza's guilty plea. See 28 U.S.C. § 636(b)(1); *United States v. Harden*, 758 F.3d 886, 891 (7th Cir. 2014). The district court adopted that recommendation and sentenced Garza to 188 months' imprisonment—the low end of the guidelines range... Accordingly we **GRANT** counsel's motion to withdraw and **DISMISS** the appeal.

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](#).