

Opinions for the week of September 6 - September 9, 2016

USA v. Andre Williams No. 16-1913

Submitted August 30, 2016 — Decided September 6, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 95 CR 242-6 — **Robert W. Gettleman**, *Judge*.
Before DIANE P. WOOD, *Chief Judge*; RICHARD A. POSNER, *Circuit Judge*; FRANK H.
EASTERBROOK, *Circuit Judge*.

Order

Andre Williams, who has 14 years left to serve in prison (his release is scheduled for 2030, if he earns and retains all good-time credits), asked the district court to revise some conditions that will apply to supervised release once his time in prison ends. The district court declined, deeming the application premature... If the district judge had proposed to defer decision until Williams was actually out of prison, then we would be inclined to think the decision a mistake. Williams is entitled to know, before he leaves prison, what terms and conditions govern his supervised release. We would be reluctant to allow a judge to deem premature a request in the final year or two of imprisonment. But treating a request 14 years in advance as premature, and requiring the prisoner to make all potential arguments at one time in the year or so before release, is a sound exercise of discretion. On that understanding, the judgment is affirmed.

Elouise Bradley v. Jennifer Sabree No. 16-1774

Submitted August 26, 2016 — Decided September 6, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 15-CV-1384-PP — **Pamela Pepper**, *Judge*.
Before MANION, ROVNER and HAMILTON, *Circuit Judges*.

PER CURIAM. Elouise Bradley appeals the dismissal of her civil-rights lawsuit alleging that employees of the Wisconsin Department of Children and Families and Lutheran Social Services played a role in the improper revocation of her license to operate a childcare center. We affirm.

USA v. Kevin Smith No. 15-3033

Argued May 24, 2016 — Decided September 6, 2016

Case Type: Criminal

Southern District of Illinois. No. 14-CR-30034 — **Michael J. Reagan**, *Chief Judge*.
Before ILANA DIAMOND ROVNER, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*; DAVID F.
HAMILTON, *Circuit Judge*.

ORDER

On February 20, 2015, Kevin Lamar Smith pled guilty to being a felon in possession of a weapon. He and the government disagreed as to whether he had three prior convictions that met the criteria for triggering an enhanced sentence under the Federal Armed Career Criminal Act. Under the Act, a court must impose a sentence of fifteen years on any defendant who is a felon in possession of a weapon, in violation of 18 U.S.C. § 922(g), and has three or more previous convictions for a “violent felony” or a “serious drug offense.” 18 U.S.C. § 924(e)(1). Smith contends that one of his prior convictions, for burglary under Missouri law, does not qualify as a violent felony under the Act. On June 23, 2016, the Supreme Court issued a decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), which clarified the manner in which a sentencing court determines whether a defendant’s prior conviction qualifies as a violent felony for purposes of the enhanced sentence. In light of *Mathis*, the government now concedes that it is unable to demonstrate that Smith’s conviction for second-degree Missouri Burglary qualifies as a predicate felony under the Act. We therefore VACATE Smith’s sentence and REMAND for re-sentencing.

Joni Zaya v. Kul Sood No. 15-1470

Argued October 26, 2015 — Decided September 6, 2016

Case Type: Civil

Central District of Illinois. No. 12-CV-1307 — **Jonathan E. Hawley**, *Judge*.

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

SYKES, *Circuit Judge*. Joni Zaya broke his wrist while he was an inmate at the Henry Hill Correctional Center in Galesburg, Illinois. The prison physician, Dr. Kul B. Sood, sent Zaya to an off-site orthopedic surgeon who took x-rays, fitted Zaya with a cast, and sent him back to the prison with instructions that he return in three weeks for a follow-up exam and additional x-rays. Dr. Sood didn't follow those instructions. Instead he waited nearly seven weeks to send Zaya back to the orthopedic surgeon. By that time Zaya's wrist had healed at an improper angle, and two surgeries were required to repair the defect. Zaya then filed this action under 42 U.S.C. § 1983 claiming that Dr. Sood was deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. The district court granted Dr. Sood's motion for summary judgment, holding that the doctor's decision to delay Zaya's return to the orthopedic surgeon constituted a mere difference of opinion between two medical professionals. Zaya now appeals. It is well established that a difference of opinion between two doctors is insufficient to survive summary judgment on a deliberate-indifference claim. But when a plaintiff provides evidence from which a reasonable jury could infer that the defendant doctor disregarded rather than disagreed with the course of treatment recommended by another doctor, summary judgment is unwarranted. Because Zaya has provided such evidence, we reverse and remand for further proceedings.

Marylee Arrigo v. Link Stop, Inc. Nos. 13-3838 & 14-3298

Argued May 26, 2015 — Decided September 6, 2016

Case Type: Civil

Western District of Wisconsin. Nos. 13 CV 00437 and 12 CV 00700 — **Barbara B. Crabb**, *Judge*.

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

WILLIAMS, *Circuit Judge*. Marylee Arrigo maintained in this lawsuit that she was fired from her job for taking or requesting leave under the Family and Medical Leave Act. The jury did not agree, and she appeals. Arrigo contends that her supervisor's notes from a meeting he requested before she returned from medical leave were wrongly excluded from trial. We conclude that the district court did not abuse its discretion when it found the notes not relevant to the issues at trial, as Arrigo's only claim at trial was under the FMLA and the notes do not suggest displeasure with Arrigo's use of leave. She also argues that the district court erred when it denied her motion for leave to amend to add claims under Title VII and the Americans with Disabilities Act, but she has not shown good cause for filing the motion after the deadline. Finally, Arrigo maintains that the district court should not have dismissed a second lawsuit that she filed which alleged the same Title VII and ADA claims for which she unsuccessfully sought leave to amend in the first suit. Allowing the second lawsuit to proceed would undercut our decision to uphold the denial of leave to amend to add these very claims. Therefore, we affirm the judgment of the district court.

Michael Gamboa v. Jeffrey Krueger No. 15-3608

September 7, 2016

Case Type: Prisoner

On Petition for Rehearing and Rehearing En Banc

Central District of Illinois. No. 1:14-cv-01373-JES — **James E. Shadid**, *Chief Judge*.

Before DIANE P. WOOD, *Chief Judge*; MICHAEL S. KANNE, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*.

ORDER

We grant Michael Gamboa's petition for rehearing to the extent that we vacate our order of February 25, 2016, and replace it with this order. No judge in active service has called for a vote on Gamboa's request for rehearing en banc; that request is denied... The judgment of the district court is **AFFIRMED**.

Erick Marquez v. Weinstein, Pinson & Riley, P.S No. 15-3273

Argued May 19, 2016 — Decided September 7, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:14-cv-00739 — **John J. Tharp, Jr.**, *Judge*.
Before WOOD, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Plaintiffs-appellants Erick Marquez, Iraida Garriga, and Doris Russel brought an action, individually and on behalf of a class, against defendants-appellees Evan L. Moscov, his law firm Weinstein, Pinson & Riley, P.S. ("Weinstein"), and debt collection agency NCO Financial Systems, Inc. (NCO), alleging violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 et seq., arising out of the defendants' attempt to collect on student loan debts allegedly owed by the plaintiffs. The gravamen of the complaint was that the defendants included a misleading and deceptive statement in a paragraph of the debt-collection complaint they filed against the plaintiffs in state court. The district court granted the initial motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and after the plaintiffs filed their second amended complaint, granted a subsequent motion to dismiss as well, this time with prejudice. The plaintiffs now appeal that dismissal... The decision of the district court is REVERSED and the case REMANDED for further proceedings consistent with this opinion.

USA v. Roy Shannon, Jr. No. 15-2667

Argued May 31, 2016 — Decided September 7, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 1:14-cr-00074 — **Matthew F. Kennelly**, *Judge*.
Before EASTERBROOK and WILLIAMS, *Circuit Judges* and YANDLE, *District Judge*.

YANDLE, *District Judge*. Following a bench trial, Roy Shannon, Jr. was found guilty of one count of conspiracy to commit wire fraud, two counts of identity theft, and two counts of aggravated identity theft. Shannon was sentenced to 14 months on Counts 1, 2 and 3, to run concurrently with each other, and 24 months on Counts 4 and 5, to run concurrently with each other, but consecutively as to Counts 1–3. Shannon's total prison sentence amounted to 38 months of incarceration followed by a 3 year term of supervised release. On appeal, Shannon challenges his conviction and sentence, arguing first that the Government's evidence was heavily dependent of the uncorroborated testimony of Marcus Taylor, a cooperating witness with "powerful motivation to falsify." As such, Shannon contends that the evidence was insufficient to establish beyond a reasonable doubt that he is guilty of the charged offenses. Secondly, Shannon challenges the district court's application of a 2-level Sentencing Guidelines enhancement for the organizer or leader of a criminal enterprise. We reject both challenges and affirm his conviction and sentence.

USA v. Franklin Brown No. 16-1216

Argued August 9, 2016 — Decided September 8, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 09 CR 671 — **James B. Zagel**, *Judge*.
Before BAUER, POSNER, and SYKES, *Circuit Judges*.
POSNER, *Circuit Judge*, dissenting.

BAUER, *Circuit Judge*. Franklin Brown seeks to reduce his 292-month drug-distribution sentence based on the retroactive application of Amendment 782 to the federal sentencing guidelines. See 18 U.S.C. §

3582(c). The district court denied the motion, determining that Brown's offense level was unaffected by the amendment. We affirm.

Jessie Rivera v. Ravi Gupta No. 15-3462

Submitted August 18, 2016 — Decided September 8, 2016

Case Type: Prisoner

Western District of Wisconsin. No. 13 C 56 — **William M. Conley**, *Chief Judge*.

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

POSNER, *Circuit Judge*. Jessie Rivera, a federal inmate, suffers from numbness and pain as a result of second-degree burns on his left leg, foot, and ankle. His suit accuses a physician named Ravi Gupta, and a prison health services administrator named Cesar Lopez, of deliberate indifference to his need for substantial medical treatment, thereby violating his Eighth Amendment rights. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976). The district court entered summary judgment for the defendants, precipitating this appeal. (Rivera had also brought a claim under the Federal Torts Claims Act, but the district court rightly dismissed it on the authority of *United States v. Demko*, 385 U.S. 149 (1996), which holds that the Inmate Accident Compensation Act, 18 U.S.C. § 4126(c)(4), precludes FTCA claims for prisoners injured while working.)... A final point: although Rivera does not argue on appeal that the district judge abused its discretion in denying his motion for counsel, the judge's unquestionably correct remark that "counsel could have assisted Rivera in responding to defendants' motion for summary judgment in several respects, perhaps most critically in possibly securing expert testimony," persuades us that on remand the judge should recruit counsel for Rivera. Cf. *Pruitt v. Mote*, 503 F.3d 647, 655–56 (7th Cir. 2007) (en banc). The judgment in favor of Dr. Gupta is reversed, the judgment in favor of Mr. Lopez affirmed, and the case remanded to the district court for further proceedings, consistent with this opinion, concerning the plaintiff's claim against Gupta.

Jeremy Meyers v. Oneida Tribe of Indians of Wisconsin No. 15-3127

Argued February 19, 2016 — Decided September 8, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 1:15-cv-00445-WCG — **William C. Griesbach**, *Chief Judge*.

Before MANION and ROVNER, *Circuit Judges*, and BLAKEY, *District Judge*.

ROVNER, *Circuit Judge*. In response to the burgeoning problem of identity theft, when Congress enacted the Fair and Accurate Credit Transaction Act (FACTA) in 2003, it included within the Act a provision to reduce the amount of potentially misappropriable information produced in credit and debit card receipts. The Act prohibits merchants from printing on the receipt the credit card expiration date and more than the last five digits of the credit or debit card number. The plaintiff in this case, Jeremy Meyers, used his credit card to make purchases at two stores owned by the defendant, the Oneida Tribe of Indians of Wisconsin, and received an electronically-printed receipt at each store that included more than the last five digits of his credit card as well as the card's expiration date. Meyers brought a putative class action in the eastern District of Wisconsin for violations of FACTA, but the district court determined that the defendant, an Indian Tribe, was immune from suit under the Act. Meyers appeals and we affirm.

USA v. Ryan Pouliot, Justin Edwards Nos. 15-2373, 15-2374 & 15-2552

Argued December 10, 2015— Decided September 8, 2016

Case Type: Criminal

Western District of Wisconsin. Nos. 13-cr-56 & 14-cr-102 — **Barbara B. Crabb**, *Judge*.

Western District of Wisconsin. No. 14-cr-104 — **James D. Peterson**, *Judge*.

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

SYKES, *Circuit Judge*. In separate cases Justin Edwards and Ryan Pouliot pleaded guilty to firearms offenses that carry an enhanced base offense level under the Sentencing Guidelines if the defendant has a prior conviction for a “crime of violence.” See U.S.S.G. § 2K2.1(a). At the time they were sentenced, the version of the Guidelines then in effect defined “crime of violence” to include “any offense under federal or state law ... that ... is burglary of a dwelling.” *Id.* § 4B1.2(a)(2).¹ Both defendants have prior Wisconsin convictions for burglary; the district judge in each case counted the convictions as crime-of-violence predicates and applied the higher offense level. The defendants challenge the enhancement, arguing that a conviction under Wisconsin’s burglary statute cannot serve as a predicate offense under § 2K2.1(a). Because their appeals raise the same issue, we’ve consolidated them for decision. To determine whether a prior conviction counts as a crime of violence requires a categorical approach that focuses on the statutory definition of the crime of conviction. If state law defines the offense more broadly than the Guidelines, the prior conviction doesn’t qualify as a crime of violence, even if the defendant’s *conduct* satisfies all of the elements of the Guidelines offense. In a narrow set of circumstances, the sentencing court may go one step beyond the statute itself. When a single statute creates multiple offenses, the court may consult a limited universe of documents to determine which offense the defendant was convicted of committing. This inquiry is called the “modified categorical approach,” but it only applies to “divisible” statutes. The Supreme Court recently clarified that a statute is considered divisible only if it creates multiple offenses by setting forth alternative *elements*. See *United States v. Mathis*, 136 S. Ct. 2243 (2016). Wisconsin defines burglary more broadly than the Guidelines: The relevant statute prohibits burglary of a “building or dwelling.” WIS. STAT. § 943.10(1m)(a). The judges in both cases consulted the state charging documents to determine whether Edwards and Pouliot were convicted of burglary of a dwelling as required by § 4B1.2(a)(2). The documents revealed that both were charged with burgling a dwelling, so the judges applied a higher offense level under § 2K2.1(a). After *Mathis*, however, it’s clear that this recourse to state-court charging documents was improper. The relevant subsection of Wisconsin’s burglary statute sets forth alternative *means* of satisfying the location element of the state’s burglary offense. Accordingly, we vacate the sentences and remand for resentencing.

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

Argued October 26, 2015 — Decided September 9, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division No. 13 CR 572 — **Elaine E. Bucklo**, *Judge*.

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

KANNE, *Circuit Judge*. Defendant Gregory Turner was convicted of willfully conspiring, with Prince Asiel Ben Israel, to provide services for Zimbabwean Special Designated Nationals (“SDNs”), a group of government officials and related individuals deemed to be blocking the democratic processes or institutions of Zimbabwe. On appeal, Turner raises several challenges against his pre-trial and trial proceedings. First, he argues that the district court erred in admitting into evidence a document detailing his agreement to provide services for the Zimbabwean SDNs, called the “Consulting Agreement.” Second, he contends that the district court erred in its instructions to the jury. Third, Turner argues that the district court erred in its interactions with the jury after deliberations had begun. We affirm.

USA v. Cedric Morris No. 15-2402

Argued February 18, 2016 — Decided September 9, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 13-CR-250 — **Rudolph T. Randa**, *Judge*.

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

SYKES, *Circuit Judge*. In 2015 Cedric Morris pleaded guilty to two counts of distributing heroin. The plea agreement called for the government to make several specific sentencing recommendations: what

quantity of drugs should count as relevant conduct, what Morris's base offense level should be, and whether Morris was entitled to an acceptance-of-responsibility reduction. The agreement also required the government "to recommend a sentence within the sentencing guidelines range as determined by the [district court]." At sentencing the judge determined that Morris's Guidelines range was 70–87 months. In making that determination, the judge applied a two-level enhancement for possession of a dangerous weapon in connection with a drug offense. See U.S.S.G. § 2D1.1(b)(1). Morris objected, and although the plea agreement made no mention of a dangerous-weapon enhancement, the government responded that the enhancement was appropriate because federal agents had recovered a handgun from Morris's residence. The government furthermore recommended a sentence at the high end of the Guidelines range calculated by the judge. The judge imposed an 87-month sentence. Morris now appeals, arguing that the government breached the terms of the plea agreement and that the two-level enhancement for possession of a dangerous weapon was unwarranted. There was no breach. The plea agreement expressly states that the parties remained free to make sentencing recommendations not mentioned in the agreement, which is what the government did when it supported an enhancement for possession of a dangerous weapon. The government also clearly satisfied its obligation to recommend a sentence within the Guidelines range calculated by the district judge. Finally, the handgun that was found in Morris's residence easily justifies application of the dangerous-weapon enhancement. Accordingly, we affirm Morris's sentence.

Shmael Turkhan v. Loretta E. Lynch Nos. 14-3456 & 15-1378

Argued April 5, 2016 — Decided September 9, 2016

Case Type: Agency

Board of Immigration Appeals No. A035-422-486.

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

WOOD, *Chief Judge*. Bureaucracy's "specific nature," Max Weber said, "develops the more perfectly the more [it] is 'dehumanized,' the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational and emotional elements which escape calculation." Max Weber, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 215–16 (H.H. Gerth & C. Wright Mills eds. & trans., 1991). By this standard, the government's treatment of this case has achieved perfection. In 1979, Shmael Isaac Turkhan, an Assyrian Christian and citizen of Iraq, immigrated to the United States as a lawful permanent resident. He was convicted of conspiracy to distribute cocaine in 1990 but has had no trouble with the law since then. Twenty-six years later, the Department of Homeland Security, Javert-like, is still trying to deport him to Iraq. The Board of Immigration Appeals affirmed the immigration judge's decision to defer his removal under the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), implemented at 8 C.F.R. §§ 208.16, 208.17. It refused, however, to reopen the immigration judge's order for Turkhan's removal. This means that he can be removed whenever the conditions for CAT deferral abate. Turkhan argues that the Board and the immigration judge erred in declining to reopen the decision requiring his removal for two reasons: first, he says, it was wrong for the Board to read its own order as a limited remand for consideration of relief under the CAT rather than as a reopening of the entire proceeding under section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c) (1994); and second, the Board should have found that Turkhan's constitutional right to procedural due process was violated at his original section 212(c) hearing. While we are mystified by the government's decision to contest this matter, the decision is not ours to make, and we must therefore deny Turkhan's petition for review.

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](#).