

Opinions for the week of August 22 - August 26, 2016

Rufus Nwatuwegwu v. Boehringer Ingelheim Pharmaceuticals Inc. No. 16-1171

Submitted May 3, 2016 — Decided August 22, 2016

Case Type: Civil

Southern District of Illinois. No. 3:15-px-1055 — **David R. Herndon**, *Judge*.

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

ORDER

This personal-injury suit under the diversity jurisdiction is one of thousands consolidated for pretrial proceedings as part of multidistrict litigation in the Southern District of Illinois. The plaintiffs, Rufus Nwatuwegwu and his wife, Sarah, claim that Mr. Nwatuwegwu suffered a stroke because he was using the drug Pradaxa, a prescription blood-thinner marketed by the defendant, Boehringer Ingelheim Pharmaceuticals. The Nwatuwegwus moved for leave to voluntarily dismiss the action without prejudice after failing to meet discovery deadlines, but the district court instead dismissed the action with prejudice, prompting this appeal... What seems clear is that the plaintiffs concealed the existence of records covered by the case-management order and, after being caught, have sought to blame Boehringer and belittled the missing records as lacking relevance. We cannot understand why, in the face of dismissal, counsel for the plaintiffs did not simply *call* the Nigerian hospital, or attempt to contact the treating physicians directly, or, indeed, undertake any step to secure the records aside from mailing a record-retention request halfway around the world and hoping for the best. Faced with this lack of diligent prosecution, the district court was within its discretion to dismiss the claim with prejudice. AFFIRMED.

Albert Hanna v. City of Chicago No. 15-3305

Argued May 19, 2016 — Decided August 22, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11 C 4885 — **Andrea R. Wood**, *Judge*.

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

WOOD, *Chief Judge*. In order to receive federal housing funds, the City of Chicago must certify that it is in compliance with a number of federal requirements related to reducing the city's racial segregation. Albert C. Hanna's suit against the City alleges that it violated the False Claims Act because its policies—in particular, "aldermanic privilege" and strategic zoning of relatively wealthy neighborhoods—have actually *increased* segregation, making its certifications false. But, as the district court properly recognized, Hanna has not alleged the circumstances of the purported fraud with sufficient particularity to satisfy Federal Rule of Procedure 9(b). We therefore affirm its judgment.

Michael Armstrong v. City of Belleville No. 15-1844

Submitted August 18, 2016 — Decided August 22, 2016

Case Type: Prisoner

Southern District of Illinois. No. 12-cv-01171-MJR-SCW — **Michael J. Reagan**, *Chief Judge*.

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

EASTERBROOK, *Circuit Judge*. Michael Armstrong contends in this suit under 42 U.S.C. §1983 that police officers in Belleville, Illinois, needlessly used a Taser against him when he was disoriented after being hit by a bus. We assume for the purpose of this appeal that Armstrong was knocked unconscious by the bus and unable to respond to commands issued by the police in the minutes after he regained consciousness. The defendants moved for summary judgment, contending that use of the Taser was reasonable under the circumstances as they appeared to the police, who did not have all the facts. Armstrong did not reply to the motion for summary judgment. The district court accepted defendants'

version of events and on May 1, 2014, entered judgment in their favor... Whether we look at this case through the lens of Appellate Rule 4(a)(6) or Civil Rule 60(b), Armstrong has taken too long after learning about defendants' motion for summary judgment and the resulting judgment. He is not entitled to a further opportunity to litigate. AFFIRMED

Jimmie Poe, Sr. v. Leann LaRiva No. 14-3513

Argued April 7, 2016 — Decided August 22, 2016

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division No. 2:14-cv-00324 — **William T. Lawrence**, *Judge*.
Before EASTERBROOK, KANNE, and SYKES, *Circuit Judges*.

KANNE, *Circuit Judge*. In 1996, a jury convicted Petitioner Jimmie Poe of several narcotics-related offenses, including engaging in a continuing criminal enterprise ("CCE"). On June 1, 1999, the Supreme Court decided *Richardson v. United States*, 526 U.S. 813 (1999), which rendered the CCE jury instructions used in Poe's trial erroneous. Poe petitioned, on July 16, 1999, for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, challenging his conviction under *Richardson*. Fourteen months later, the district court dismissed Poe's § 2241 petition without prejudice, because he should have filed under 28 U.S.C. § 2255. On June 18, 2001, Poe petitioned for a writ of habeas corpus, pursuant to § 2255, which was subsequently denied as time-barred. We affirmed the district court's denial of Poe's § 2255 petition in *Poe v. United States*, 468 F.3d 473 (7th Cir. 2006). On October 28, 2014, Poe filed a new § 2241 petition, challenging his conviction and sentence in light of *Alleyne v. United States*, 133 S. Ct. 2151 (2013). The district court denied his petition, again for not filing it under § 2255, and he appealed. We affirm.

Jerry D. Ferguson v. West Central FS, Inc. No. 15-3093

Argued February 24, 2016 — Decided August 23, 2016

Case Type: Bankruptcy from District Court

Central District of Illinois. No. 14-1071 — **James E. Shadid**, *Chief Judge*.
Before EASTERBROOK, ROVNER, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Jerry and Julie Ferguson proposed a plan to repay the debts on their family farm under Chapter 12 of the Bankruptcy Code. This appeal concerns two of those debts: (a) a loan of \$300,000 from First Community Bank, secured by a mortgage on the farm plus a lien on the Fergusons' farming equipment and crops, and (b) a loan of \$176,000 from West Central FS, secured by a junior lien on the equipment and crops. The bankruptcy judge approved a sale of the equipment and crops, which yielded \$238,000. The Bank, as the senior creditor, demanded those proceeds. But West Central offered an idea that would protect its own security interest: require the Bank to recoup its loan via the mortgage, which would allow West Central to be repaid from the sale of equipment and crops. Both secured creditors would be made whole. This remedy is called marshaling. It is not mentioned in the Bankruptcy Code, but the Supreme Court has said that bankruptcy courts should apply the doctrine according to state law. *Meyer v. United States*, 375 U.S. 233 (1963); see also *Butner v. United States*, 440 U.S. 48 (1979)... Every litigant tells us that *Bullard* is inapplicable because it involved a filing under Chapter 13. But *Bullard* interprets §158, which sets out the rules of appellate jurisdiction for bankruptcy cases—all bankruptcy cases. The parties offer no argument that §158 bears a distinct meaning for each chapter of the Bankruptcy Code. *Bullard* interprets §158, which applies to this appeal no less than to a Chapter 13 proceeding. This appeal is dismissed for want of jurisdiction.

USA v. Joshua N. Bowser No. 15-2258

Argued January 19, 2016 — Decided August 23, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:12-cr-00102-TWP-DML — **Tanya Walton Pratt**, *Judge*.

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

ROVNER, *Circuit Judge*. This appeal involves the government's efforts to seize personal property bearing the insignia of the Outlaws Motorcycle Club (the "Outlaws"), and the effort of a representative of the Outlaws to intervene to prevent those forfeitures. The forfeiture actions stemmed from criminal cases brought against a number of Outlaws members, including all members of the Indianapolis chapter of the Outlaws. As we summarized in *United States v.*

Knoll, 785 F.3d 1151, 1152-53 (7th Cir. 2015), "[t]his case began with a forty-nine count indictment that charged fifty-one individuals (all members of the

Outlaws) with racketeering, mail and wire fraud, money laundering, drug trafficking, extortion, running an illegal gambling business, witness tampering and firearms offenses, among other things." Included in that indictment, was a count charging nineteen members of the Outlaws with violations of the Racketeer Influenced and Corrupt Organizations statute (RICO), based on allegations that the Outlaws was an enterprise and its members participated in that enterprise through the commission of various crimes. The indictment included a notice of the government's intent to forfeit any and all property affording the RICO defendants with a source of influence over the enterprise and all property obtained, directly or indirectly, from racketeering activity... The decision of the district court is AFFIRMED.

Robert Hillmann v. City of Chicago Nos. 14-3438 & 14-3494

Argued September 17, 2015 — Decided August 23, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 04 C 6671 — **Rubén Castillo**, *Chief Judge*.

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

SYKES, *Circuit Judge*. For nearly three decades, Robert Hillmann worked for the City of Chicago in its Department of Streets and Sanitation. In July 2002 the City eliminated his position in a citywide reduction in force ("RIF"). Two years later he sued the City alleging that he was targeted for inclusion in the RIF because he asserted his rights under the Illinois Workers' Compensation Act ("IWCA"), 820 ILL. COMP. STAT. 305/1 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.* This long-running case twice proceeded to trial. In the first trial, a jury found for the City on the IWCA retaliatory-discharge claim. For reasons not entirely clear to us, the ADA claim was tried to the court at the same time. But the judge died before issuing a decision, and a successor judge ordered a new trial on both claims based on an evidentiary error. The second trial yielded a split result. The jury found in Hillmann's favor on the IWCA claim and returned a seven-figure damages verdict. The judge found for the City on the ADA claim... To sum up, Hillmann lacked evidence to prove the element of causation on *either* claim, so the City was entitled to judgment as a matter of law on both. Accordingly, we REVERSE in part and REMAND with instructions to enter judgment for the City on the IWCA retaliatory-discharge claim. In all other respects, the judgment is AFFIRMED.

USA v. Alfredo Vasquez-Hernandez No. 14-3622

Argued January 11, 2016 — Decided August 25, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 09 CR 383 — **Rubén Castillo**, *Chief Judge*.

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

WILLIAMS, *Circuit Judge*, dissenting.

EASTERBROOK, *Circuit Judge*. Alfredo Vasquez-Hernandez pleaded guilty to a drug conspiracy. 21 U.S.C. §846. He admitted transporting 200 kilograms of cocaine, worth some \$5 million, on behalf of the notorious Sinaloa Cartel, and to receiving a further 76 kilograms to be sold on consignment for about \$2

million. The district court calculated a Guidelines range of 188 to 235 months' imprisonment and sentenced Vasquez-Hernandez to 264 months, about 2½ years more than the high end of the range. Although Vasquez-Hernandez conceded being an agent of others, the district judge concluded that he also had a supervisory role—that, indeed, anyone entrusted with \$7 million of someone else's cocaine must have high status in the organization. Vasquez-Hernandez contends on appeal that these were one-off transactions, that he supervised no one, that the range therefore should have been 135 to 168 months, and that his sentence should be within that range. The principal appellate contest revolves around the three offense levels that the district judge added under U.S.S.G. §3B1.1(b), which applies when the defendant was “a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive”. The district court found that the Sinaloa Cartel is substantially larger than five participants, and that Vasquez-Hernandez had criminal contact with at least that many persons. If an organization has five members (or is otherwise extensive), supervising any one of them supports the enhancement. See *United States v. Figueroa*, 682 F.3d 694, 696–97 (7th Cir. 2012). The judge's findings are not clearly erroneous... We have urged district judges to let us know whether they would have imposed the same sentence even if they had also ruled differently on one of the many subsidiary issues that the Guidelines pose. See, e.g., *United States v. Hawkins*, 777 F.3d 880, 885 (7th Cir. 2015); *United States v. Lopez*, 634 F.3d 948, 953–54 (7th Cir. 2011); *United States v. Sanner*, 565 F.3d 400, 405–06 (7th Cir. 2009). The district judge's statements at sentencing strongly imply that three levels one way or the other (either for supervision or acceptance of responsibility) just did not affect the sentence. He said several times that 25 years (less credit for time Vasquez-Hernandez had spent in Mexican confinement) was the only sensible sentence. But the judge did not say expressly that he would have held to this view had the Guidelines range been as low as 135 to 168 months, as Vasquez-Hernandez contends it should have been. It would help both litigants and the court of appeals for judges to say when every last level matters, and when it does not. AFFIRMED

Tyrone Petties v. Imhotep Carter No. 14-2674

Argued April 28, 2015 — Reargued En Banc December 1, 2015 — Decided August 23, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 12 C 9353 — **George M. Marovich**, *Judge*.

Before WOOD, *Chief Judge*, and POSNER, FLAUM, EASTERBROOK, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*, joined by FLAUM and KANNE, *Circuit Judges*, dissenting.

WILLIAMS, *Circuit Judge*. Tyrone Petties suffered a debilitating rupture in his Achilles tendon, which caused him extreme pain and impeded his mobility over the course of three years. He brought a lawsuit under 42 U.S.C. § 1983 against his doctors at Stateville Correctional Facility, alleging they failed to alleviate his suffering and to enable his recovery from the injury. We heard this case *en banc* to clarify when a doctor's rationale for his treatment decisions supports a triable issue as to whether that doctor acted with deliberate indifference under the Eighth Amendment. We conclude that even if a doctor denies knowing that he was exposing a plaintiff to a substantial risk of serious harm, evidence from which a reasonable jury could infer a doctor knew he was providing deficient treatment is sufficient to survive summary judgment. Because we find that Petties has produced sufficient evidence for a jury to conclude that the doctors knew the care they were providing was insufficient, we reverse the district court's grant of summary judgment to the defendants.

Ruthelle Frank v. Scott Walker Nos. 16-3003 & 16-3052

One Wisconsin Institute, Inc. v. Mark Thomsen Nos. 16-3083 & 16-3091

August 26, 2016

Case Type: Civil

On Petitions for Initial Hearing En Banc

Before WOOD, *Chief Judge*, and POSNER, FLAUM, EASTERBROOK, KANNE, ROVNER, SYKES, and HAMILTON, *Circuit Judges*.

PER CURIAM. Before us are two sets of appeals and cross-appeals, each of which concerns Wisconsin's law requiring voters to have qualifying photo identification. In each matter, one originating in the Eastern District of Wisconsin and the other in the Western District of Wisconsin, the plaintiffs have petitioned for initial review en banc. We have consolidated their petitions for the purposes of this order. The plaintiffs argue that only initial en banc treatment will permit a decision in time for the court's conclusions to be put into effect for the election upcoming in November 2016. It is questionable whether action on that schedule is feasible, given that Wisconsin will start printing absentee ballots at the end of this month. We will assume for the sake of argument, however, that this obstacle alone is not enough to deny the petitions. There is a more important concern, however, which has to do with the regularity of the judicial process. Whether this court should try to resolve the parties' disputes on such a short schedule depends in part on whether qualified electors will be unable to vote under Wisconsin's current procedures... the petitions for initial hearing en banc are DENIED.

USA v. Djuane L. McPhaul No. 16-1162

Argued May 31, 2016 — Decided August 26, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:14-cr-00203 — **Tanya Walton Pratt**, *Judge*.
Before EASTERBROOK and WILLIAMS, *Circuit Judges*, and YANDLE, *District Judge*.

WILLIAMS, *Circuit Judge*. Djuane McPhaul already had a violent felony conviction on his record when he was caught driving with a loaded gun in the car, while wearing body armor. He was charged with being a felon in possession of a gun, and with being a violent felon in possession of body armor. A jury convicted him on the body armor charge but acquitted him on the gun charge. On appeal, he argues that the body armor should have been suppressed because it was discovered through an unconstitutional search. We disagree. The pat-down that revealed the body armor was lawful because officers had probable cause to stop McPhaul—for minor traffic violations, driving on a suspended license, and using a car to flee officers. McPhaul also challenges two Sentencing Guidelines enhancements, one for using the body armor “in connection with another felony offense,” and another for attempting to obstruct justice. We reject these challenges too. McPhaul used a car to flee officers, which is a felony, and he wore the body armor while doing so. And when he was in pre-trial custody, he attempted to obstruct justice through several letters he wrote to his cousin. So we affirm his conviction and sentence.

Roy Ward v. Ron Neal No. 16-1001

Argued August 18, 2016 — Decided August 26, 2016

Case Type: Prisoner

Southern District of Indiana, Evansville Division. No. 3:12-cv-00192-RLY-WGH — **Richard L. Young**,
Chief Judge.
Before WOOD, *Chief Judge*, and EASTERBROOK and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. Roy L. Ward is under a sentence of death for the brutal murder of Stacy Payne, just 15 years old at the time of the crime. He pleaded guilty to the charge at his second trial; a jury recommended death; and the trial court sentenced him accordingly. His conviction and sentence have passed muster through all the appropriate stages of review in the state courts, and the district court found no reason to disturb their conclusions when Ward sought a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His primary ground for relief, and the only theory he pursues on appeal, is that his trial counsel rendered constitutionally ineffective assistance when they portrayed him as a dangerous, incurable “psychopath” to the jury, and that this failing is enough to undermine confidence in the sentence. We conclude, however, that the Indiana Supreme Court's decision that Ward suffered no prejudice from counsel's shortcomings was reasonable. This is enough to require us to affirm the district court's judgment denying the petition for a writ of habeas corpus.

USA v. Mato Montelongo No. 15-3777

Submitted August 26, 2016 — Decided August 26, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 12-CR-175 — **William C. Griesbach**, *Chief Judge*.

Before DANIEL A. MANION, *Circuit Judge*;ILANA DIAMOND ROVNER, *Circuit Judge*;DAVID F. HAMILTON, *Circuit Judge*.

ORDER

Mato Montelongo pleaded guilty in 2014 to using counterfeit credit and debit cards, see 18 U.S.C. § 1029(a), and was sentenced to 16 months' imprisonment and 3 years' supervised release. Three months after he was released from prison and began serving the term of supervision, the government sought revocation, see 18 U.S.C. § 3583(e), (g), alleging that Montelongo had absconded to Colorado after twice testing positive for marijuana. At a hearing on the government's motion... Montelongo admitted that he had violated conditions of release prohibiting illegal drug use, mandating drug testing and counseling, and requiring that he follow his probation officer's instructions. The district court revoked his supervised release and imposed a prison term of 12 months and 1 day. Montelongo filed a notice of appeal, but his appointed attorney asserts that the appeal is frivolous and seeks to withdraw... Counsel's motion to withdraw is GRANTED, and the appeal is DISMISSED.

Eber Salgado-Gutierrez v. Loretta Lynch No. 16-1534

Argued August 9, 2016 — Decided August 24, 2016

Case Type: Agency

Board of Immigration Appeals. No. A205-154-421

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

POSNER, *Circuit Judge, concurring*.

SYKES, *Circuit Judge*. Eber Salgado Gutierrez, a 40-year-old citizen of Mexico, was ordered removed from the United States for being unlawfully present in the country and for having been convicted of a drug crime. He petitions for review of an order of the Board of Immigration Appeals upholding the immigration judge's denial of withholding of removal (based on social-group membership) and relief under the Convention Against Torture. We have jurisdiction to review only two of his arguments: (1) his claim that the agency improperly rejected his proposed social group, and (2) his claim that the agency misapplied the legal standard under the CAT. Because these arguments are without merit, we dismiss in part and deny in part Salgado's petition for review.

Black Earth Meat Market, LLC v. Village of Black Earth No. 15-3818

Argued June 1, 2016 — Decided August 24, 2016

Case Type: Civil

Western District of Wisconsin. No. 3:14-cv-00674-bbc — **Barbara B. Crabb**, *Judge*.

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

WOOD, *Chief Judge*. Roughly 90 miles west of Milwaukee lies the small town of Black Earth, Wisconsin. For years, a butcher shop operated on the plot located at 1345 Mills Street. While the property is not zoned for slaughtering livestock, the activity had long been permitted as a legal nonconforming use. In 2001, Black Earth Meats (BEM) purchased the property. Sometime after 2009, the volume and frequency of slaughter increased. By 2011, neighbors were complaining about increased traffic, delivery trucks blocking the road, live-stock noise, foul odors, improper storage of animal parts, and the presence of offal, blood, and animal waste in the streets. Steers escaped from the facility on three occasions; each time, a posse had to hunt the fugitive bovine through the streets of Black Earth and, ultimately, shoot it dead. In

2013, the Village trustees decided to do something about the renegade slaughterhouse. It increased enforcement of Village regulations, ordered BEM to propose an acceptable plan for relocating its slaughter activities, held several public meetings, and in July 2014, threatened litigation. As a result of the Village's threat of litigation, the U.S. Department of Agriculture (USDA) refused to guarantee a loan to BEM from the Bank of New Glarus. Shortly afterwards, BEM lost its financing, closed, and then sued the Village and the members of its Board. The district court granted summary judgment to the defendants. BEM appeals, and we affirm.

Darryl J. Sutton v. Randy Pfister No. 15-2888

Argued May 26, 2016 — Decided August 24, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 09 C 8035 — **Sharon Johnson Coleman**, *Judge*.
Before WOOD, *Chief Judge*, and MANION and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. Daryl Sutton is serving a sentence in an Illinois prison for aggravated criminal sexual assault. He contends, in this *habeas corpus* proceeding under 28 U.S.C. § 2254, that the evidence connecting him with that crime was obtained by the state through a conceded violation of the Fourth Amendment in a different case—specifically, a court order unsupported by probable cause, requiring him to furnish a blood sample for DNA testing. The district court ruled that the writ should issue, but we conclude that it erred in doing so, because the blood (and thus the DNA) would inevitably have been produced under a state law that provided legal authority for collecting the sample. We therefore reverse.

Daniyar Santashbekov v. Loretta Lynch No. 15-2359

Argued April 6, 2016 — Decided August 24, 2016

Case Type: Agency

Board of Immigration Appeals No. A205-800-334

Before FLAUM, RIPPLE, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Daniyar Santashbekov petitions for review of an order of the Board of Immigration Appeals denying his application for asylum. The immigration judge found that Santashbekov's claims of political persecution were not credible, and the Board affirmed. We deny Santashbekov's petition because substantial evidence supports the judge's and Board's credibility findings.

Scott Weldon v. USA No. 15-1994

Argued August 9, 2016 — Decided August 24, 2016

Case Type: Prisoner

Southern District of Illinois. No. 3:14-cv-00691-DRH — **David R. Herndon**, *Judge*.

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

POSNER, *Circuit Judge*. The defendant pleaded guilty to having distributed an illegal drug, resulting in a death. See 21 U.S.C. §§ 841(a)(1), (b)(1)(C). Because he agreed to cooperate with the government in the prosecution of another person who had contributed to the death, he received a prison sentence of only eight years. Three years later he filed a motion to vacate his conviction and sentence on the principal ground (and the only we need discuss) that his lawyer had rendered ineffective assistance by persuading him to plead guilty because (according to the lawyer), the defendant had no possible defense. The district judge denied the motion, precipitating this appeal... It's true that to be entitled to a new trial Weldon has to establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), an insistence that might have persuaded the government to negotiate a settlement with him that would (without the uncertainty of

a trial) have reduced his punishment significantly. See *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012); *Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014). Weldon is entitled to an evidentiary hearing to determine that probability. The judgment of the district court is therefore vacated and the case remanded for further proceedings consistent with this opinion. (The government has filed a motion to supplement the record on appeal, but we deny the motion; it is better for the district court to have the full record before it on remand.) VACATED AND REMANDED

USA v. John Henricks, III No. 15-1865

Argued February 19, 2016 — Decided August 24, 2016

Case Type: Criminal

Western District of Wisconsin. No. 13-CR-83 — **Barbara B. Crabb**, *Judge*.

Before DANIEL A. MANION, *Circuit Judge*; ILANA D. ROVNER, *Circuit Judge*; JOHN ROBERT BLAKEY, *District Judge*.

ORDER

John Henricks, III pleaded guilty to one count of mail fraud. The district court sentenced him to 121 months' imprisonment and ordered him to pay \$1.3 million in restitution to his victims. After willfully failing to pay the restitution, the district court resentenced him under 18 U.S.C. § 3614 to 151 months' imprisonment. Henricks appeals his resentencing, but because the district court did not clearly err either in finding that Henricks's failure to pay restitution was willful or in resentencing Henricks while he was in custody, we affirm.

Raymond King v. Randy Pfister No. 14-3389

Argued January 5, 2016 — Decided August 24, 2016

Case Type: Prisoner

Central District of Illinois. No. 1:11-cv-01155 — **Sara Darrow**, *Judge*.

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

KANNE, *Circuit Judge*. In 2004, Petitioner Raymond King was convicted by a jury of first-degree murder. He was sentenced by the state trial court to life imprisonment. The trial court judge that presided over King's trial and sentencing had represented King over fifteen years prior as an assistant public defender. King appealed his conviction and sentence, which were affirmed on direct appeal and denied review by the Illinois Supreme Court. King then filed for post-conviction relief, which was dismissed by the trial court, affirmed on appeal, and denied review by the Illinois Supreme Court. Subsequently, King petitioned for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in federal district court, which was denied. On appeal, King argues that his trial and appellate counsel were ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), because they did not seek substitution of the trial court judge. In doing so, he challenges the Illinois Appellate Court's decision in *People v. King*, No. 03-08-0875, slip op. (Ill. App. Ct. June 21, 2010), which was the last state court to address his claims on the merits. We affirm.

Maria Arias v. Loretta E. Lynch No. 14-2839

Argued October 30, 2015 — Decided August 24, 2016

Case Type: Agency

Board of Immigration Appeals. No. A087 774 871

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

POSNER, *Circuit Judge*, concurring.

HAMILTON, *Circuit Judge*. Petitioner Maria Eudofilia Arias came to this country without authorization in 2000. She has raised three children here. Her longtime employer calls her an “excellent employee.” She now faces removal from the United States after the Board of Immigration Appeals characterized her sole criminal conviction—falsely using a social security number to work—as a “crime involving moral turpitude.” This characterization bars Arias from seeking discretionary cancellation of removal under 8 U.S.C. § 1229b(b)(1). Arias has petitioned for review of the removal order. We grant the petition and remand the case to the Board for further proceedings. Arias was convicted under a statute making it a federal crime to misrepresent a social security number to be one’s own “for *any* ... purpose.” 42 U.S.C. § 408(a)(7)(B) (emphasis added). Many violations of that statute would amount to crimes involving moral turpitude. For both legal and pragmatic reasons, though, we doubt that every violation of the statute necessarily qualifies as a crime involving moral turpitude.

Lisa Allen v. Greatbanc Trust Company No. 15-3569

Argued April 12, 2016 — Decided August 25, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 C 3053 — **James B. Zagel**, *Judge*.
Before WOOD, *Chief Judge*, and FLAUM and WILLIAMS, *Circuit Judges*.

WOOD, *Chief Judge*. GreatBanc is the fiduciary for an employee stock ownership plan (“the Plan”) for employees of Personal-Touch, a home-health-care company. In that role, it facilitated a transaction in which the Plan purchased a number of shares in the company with a loan from the company itself. Unfortunately, the shares turned out the worth much less than the Plan paid, leaving the Plan with no valuable assets and heavily indebted to the company’s principal shareholders. The Plan’s participants, all employees of Personal Touch, wound up being on the hook for interest payments on the loan. Employees Lisa Allen and Misty Dalton brought this action under section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, raising two theories of recovery: first, that GreatBanc engaged in transactions that section 406 of ERISA prohibits, see 29 U.S.C. § 1106; and second, that GreatBanc breached its fiduciary duty under ERISA section 404, 29 U.S.C. § 1104, by failing to secure an appropriate valuation of the Personal-Touch stock. The district court initially dismissed the complaint without prejudice, but it later converted the judgment to one with prejudice after plaintiffs opted not to amend their complaint. Because the plaintiffs plausibly alleged both a prohibited transaction and a breach of fiduciary duty, we reverse the judgment of the district court and remand for further proceedings.

S.C. Johnson & Son, Inc. v. Nutraceutical Corporation No. 15-3337

Argued April 12, 2016 — Decided August 25, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 11-C-861 — **Rudolph T. Randa**, *Judge*.
Before WOOD, *Chief Judge*, and FLAUM and WILLIAMS, *Circuit Judges*.

WOOD, *Chief Judge*. This case is the story of two roads, which, unlike those in the Robert Frost poem, converged in a lawsuit. See ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL 9 (1916). Almost thirty-five years ago, Sandy Maine came out of the backwoods and entered the business of natural insect repellants. She marketed and distributed her products under the mark “BUG OFF” through a company called Sunfeather. Although her products were commercially successful, she never registered the mark. This became a problem in 1998, when Melvin Chervitz registered it. It became a much bigger problem in 2011, when S.C. Johnson & Son, Inc., which had acquired the Chervitz registration, sued Nutraceutical (Sunfeather’s successor-in-interest) for trademark infringement. Nutraceutical defended on the ground of prior and continuous use. From the time the pleadings were filed through the trial, the parties all agreed that the period in dispute was before 1998. But the earth underneath Nutraceutical

shifted after the district court requested post-trial briefing in lieu of closing argument. For the first time, S.C. Johnson argued that Nutraceutical had failed to prove continuous use of the mark *after 2012*. The district court was persuaded that this was true and ruled in S.C. Johnson's favor, granting a permanent injunction against Nutraceutical's use of the mark and ordering it to destroy all unauthorized products. Nutraceutical appeals, arguing that the district court erred in declining to find S.C. Johnson's winning argument estopped or waived. Meanwhile, S.C. Johnson contends that the district court clearly erred in finding that Nutraceutical established continuity of use before 2012; the alleged lack of continuity, it says, provides an alternate ground for the injunction... The district court abused its discretion when it entertained S.C. Johnson's post-trial argument that Nutraceutical failed to prove continuous use of the BUG OFF mark *after 2012*. Because the district court did not clearly err in finding that Nutraceutical maintained continuous use *prior* to 2012, S.C. Johnson's judgment cannot be saved. We therefore REVERSE and order that the injunction against Nutraceutical be VACATED forthwith.

Jose Cisneros v. Loretta Lynch No. 15-3238

Argued May 26, 2016 — Decided August 25, 2016

Case Type: Agency

Board of Immigration Appeals No. A073-393-696

Before WOOD, *Chief Judge*, and MANION and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. José Antonio Cisneros, who had been a lawful permanent resident of the United States since 1996, had the bad judgment to commit unarmed robbery in 2012. This is an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii), and so one result of his conviction was the loss of his legal permanent resident status. His conviction also made him inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I)— that is, unable to adjust his status back to that of a lawful permanent resident— because robbery is a crime of moral turpitude. In order to regain eligibility for relief from removal through adjustment of status, Cisneros needed to deal with the problem of his inadmissibility. He therefore applied for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)(1)(B), which gives the Attorney General the discretionary power to waive inadmissibility based on several grounds, including a crime of moral turpitude, if the person is a spouse, parent, or child of a U.S. citizen who would suffer “extreme hardship” if removed. The Attorney General has promulgated regulations implementing this authority. The regulations state that with respect to inadmissibility based on “violent or dangerous crimes,” she “in general, will not favorably exercise discretion under section 212(h)(2) of the Act ... to consent to an application or reapplication for a visa, or admission to the United States, or adjustment of status, with respect to immigrant aliens who are inadmissible under section 212(a)(2) of the Act in cases involving violent or dangerous crimes, except in extraordinary circumstances.” 8 C.F.R. § 1212.7(d). The regulation identifies, as one example of such extraordinary circumstances, “cases in which an alien clearly demonstrates that the denial of the application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship.” *Id.* An immigration judge granted Cisneros's application for a waiver and adjustment of status, finding that his U.S.-citizen family would suffer “exceptional and extremely unusual hardship” as a result of his removal. The Department of Homeland Security appealed, and the Board of Immigration Appeals (“the Board”) overturned that decision and revoked the waiver. Cisneros now petitions for review from the Board's decision. Our authority, however, extends only to legal or constitutional issues, not discretionary determinations. Finding no cognizable error, we deny the petition for review.

USA v. Anthony Johnson No. 15-3105

Submitted August 26, 2016 — Decided August 26, 2016

Case Type: Criminal

Southern District of Illinois. No. 3:15-CR-30061-DRH-1 — **David R. Herndon**, *Judge*.

Before DANIEL A. MANION, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

Anthony Johnson was caught with heroin at the Federal Correctional Institution in Greenville, Illinois, while serving a seven-year prison sentence for possessing a firearm after a felony conviction. Johnson had been meeting with a visitor when a guard saw him swallow a small object, and three days later prison staff found in his feces a balloon containing 1.1 grams of heroin. Johnson pleaded guilty to possessing contraband while incarcerated, see 18 U.S.C. § 1791(a)(2), (b)(1), and the district court sentenced him to a consecutive, 28-month term of imprisonment. The court also imposed a three-year term of supervised release, a \$100 fine, and a \$100 special assessment. Johnson 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). Counsel has submitted a brief that explains the nature of the case and addresses potential issues that an appeal of this kind might be expected to involve. We invited Johnson to comment on counsel's motion, but he has not done so. See CIR. R. 51(b). Because the analysis in the brief appears to be thorough, we focus our review on the subjects counsel discusses. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014); *United States v. Wagner*, 103 F.3d 551, 553 (7th Cir. 1996)... Thus, we GRANT counsel's motion to withdraw and DISMISS the appeal.

USA v. Samuel Gutierrez, Felipe Zamora Nos. 15-2193, 15-2762

Submitted August 18, 2016 — Decided August 26, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. Nos. 08 CR 746-10, -18 — **Charles R. Norgle**, *Judge*.
Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. In 2009 the defendants, Zamora and Guierrez, high-ranking members of the Latin Kings street gang, were charged with a variety of federal crimes. Zamora pleaded guilty to participating in both a racketeering conspiracy and a conspiracy to extort money from "miqueros," who specialize in providing identification documents to unauthorized aliens. Gutierrez pleaded guilty to participating in the racketeering conspiracy and to possessing an illegal drug with intent to distribute it. At sentencing the district judge credited Zamora with acceptance of responsibility, but in sentencing him to 240 months in prison failed to indicate what Zamora's guidelines range was. The court imposed a 3-year term of supervised release with all the standard conditions of supervised release plus two special conditions, one requiring Zamora to participate in an approved job-skill training program and the other requiring him to perform at least 20 hours of community service weekly if he was unemployed... Given that both defendants were entitled to a full resentencing after their successful first appeals, 18 U.S.C. § 3742(g), and instead received cursory treatment by the judge, and that the government does not contest Gutierrez's request that a different judge conduct his sentencing hearing on remand, we order that Gutierrez's third sentencing hearing be conducted before a different judge. See 7th Cir. R. 36. The defendants' sentences are vacated and both cases are remanded for resentencing.

Chris Lane v. Riverview Hospital No. 15-1118

Argued June 10, 2015 — Decided August 26, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-01113-TWP-TAB — **Tanya Walton Pratt**, *Judge*.

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

HAMILTON, *Circuit Judge*. Plaintiff Chris Lane sued Riverview Hospital, his former employer, for race discrimination in terminating his employment as a security guard at the hospital. The district court granted summary judgment for the defendant. We affirm.

LeRoy Anderson v. Matthew Morrison No. 14-3781

Submitted May 6, 2016* — Decided August 26, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 13 CV 8622 — **Manish S. Shah**, *Judge*.

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

WILLIAMS, *Circuit Judge*. Leroy Anderson, an Illinois prisoner, alleges that he fell and was knocked unconscious after guards at Stateville Correctional Center ordered him to walk handcuffed down stairs covered with milk and garbage. In his complaint under 42 U.S.C. § 1983, Anderson claims that the guards violated the Eighth Amendment by subjecting him to this hazard. The district court granted the defendants' motion to dismiss, ruling that slippery stairs do not pose a sufficiently serious risk of harm to state a claim under the Eighth Amendment. Because Anderson faced not only stairs slicked with milk, but also scattered trash and guards who required him to negotiate his descent while unaided and cuffed behind his back, the risk of serious harm was substantial. Therefore, we vacate and remand.

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](#).