

Opinions for the week of August 29 - September 2, 2016

Michael Wu v. USA No. 16-1660

Submitted August 26, 2016 — Decided August 29, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 14-cv-3925 — **Sharon Johnson Coleman**, *Judge*.
Before MANION, ROVNER, and HAMILTON, *Circuit Judges*.

PER CURIAM. Michael and Christine Wu contributed more than allowed to their individual retirement accounts in 2007, and as a result they faced taxes on those accounts for each year that the excess funds remained. The Wu's realized their mistake in early 2010, informed the IRS, and corrected the problem by withdrawing the excesses from their accounts. The Wu's paid the taxes for 2007 through 2009, and although they conceded liability for the first two years, they each sought a refund for tax year 2009 on the ground that they had avoided incurring taxes for that year by adjusting the IRA account balances before the April 2010 filing deadline for their 2009 tax return. The IRS rejected this contention, prompting the Wu's to file this action under 28 U.S.C. § 1346(a)(1) for a refund of the 2009 taxes. The district court sided with the government, and the Wu's appeal. We affirm the judgment.

Virgil Smith v. Ron Neal No. 16-1361

Submitted August 26, 2016 — Decided August 29, 2016

Case Type: Prisoner

Northern District of Indiana, South Bend Division. No. 3:15cv607 — **James T. Moody**, *Judge*.
Before DANIEL A. MANION, *Circuit Judge*;ILANA DIAMOND ROVNER, *Circuit Judge*;DAVID F.
HAMILTON, *Circuit Judge*.

ORDER

Virgil Smith, an Indiana prisoner, challenges the denial of his habeas corpus petition filed under 28 U.S.C. § 2254, alleging that his disciplinary proceeding for assaulting another inmate did not provide the process that he was due. We affirm.

USA v. William Fuller, III No. 16-1328

Argued July 7, 2016 — Decided August 29, 2016

Case Type: Criminal

Southern District of Illinois. No. 4:15-CR-40044-SMY — **Staci M. Yandle**, *Judge*.
Before DIANE P. WOOD, *Chief Judge*;WILLIAM J. BAUER, *Circuit Judge*;MICHAEL S. KANNE, *Circuit Judge*.

ORDER

While incarcerated in the Marion federal penitentiary, William Fuller attacked another inmate. He pleaded guilty to possession of a weapon by an inmate and assault with a dangerous weapon and was sentenced to 77 months' imprisonment, the bottom of his guidelines range. He now appeals his sentence, contending that the district court did not adequately consider his arguments in mitigation... Fuller's sentence is AFFIRMED.

USA v. William Thomas No. 15-2483

Argued May 24, 2016 — Decided August 29, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13 CR 832 — **Amy J. St. Eve**, *Judge*.
Before WOOD, *Chief Judge*,and EASTERBROOK and KANNE, *Circuit Judges*.

WOOD, *Chief Judge*. William Thomas pleaded guilty to all charges of a three-count indictment: being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1); possession of heroin with intent to distribute, 21 U.S.C. § 841(a)(1); and possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c). He reserved the right, however, to appeal the district court's refusal to suppress the gun and heroin that prompted his indictment... He has now done so. He relies principally on *Brady v. Maryland*, 373 U.S. 83 (1963), contending that the government violated his due process rights by refusing to turn over information about the confidential informant whose testimony formed the basis for the search warrant on which the police relied. Even if *Brady* applies to pretrial motions to suppress, Thomas cannot prevail. The warrant was supported by probable cause, and thus the information he seeks is not material. We therefore affirm the district court's judgment.

Charles Walker v. Kathy Griffin No. 15-2147

Argued May 24, 2016 — Decided August 29, 2016

Case Type: Prisoner

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-1476-JMS-TAB — **Jane Magnus-Stinson**, *Judge*.

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

WOOD, *Chief Judge*. Charles Walker was convicted in an Indiana court of robbery, adjudicated a habitual offender pursuant to Indiana Code § 35-50-2-8, and sentenced to 40 years in prison. Twenty of those years were attributable to his habitual-offender status. The version of the habitual-offender statute Indiana had in place at the time applied if a defendant had been convicted of two prior unrelated felonies, in a specific sequence: the second felony had to have been committed after the commission of and sentencing for the first, and the present crime had to have been committed after the commission and sentencing of the second earlier offense. At Walker's trial, the state provided evidence of three prior felonies, but it failed to offer evidence of the date when one of the crimes was committed. The only claim Walker presses before us is ineffective assistance of appellate counsel. He contends that his lawyer on direct appeal should have challenged the sufficiency of the evidence for the habitual-offender conviction, given the missing date. Even assuming that counsel's performance fell below the constitutional minimum, we conclude that Walker's petition for a writ of habeas corpus was properly dismissed. The state appellate court's conclusion that Walker's Sixth Amendment right to counsel was not infringed meets the generous standards that apply under 28 U.S.C. § 2254, and so we affirm.

USA v. Tony Hurlburt No. 14-3611 & **USA v. Joshua Gillespie** No. 15-1686

Argued December 2, 2015 — Decided August 29, 2016

Western District of Wisconsin. No. 14-cr-62-jdp — **James D. Peterson**, *Judge*. Western District of Wisconsin. No. 14-cr-106-wmc — **William C. Conley**, *Chief Judge*.

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

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

SYKES, *Circuit Judge*. Tony Hurlburt and Joshua Gillespie pleaded guilty in separate cases to unlawfully possessing a firearm as a felon... Their appeals raise the same legal issue, so we've consolidated them for decision. To calculate the Sentencing Guidelines range in each case, the district court began with U.S.S.G. § 2K2.1(a), which assigns progressively higher offense levels if the defendant has one or more prior convictions for a "crime of violence." The term "crime of violence" is defined in the career-offender guideline and includes "any offense ... that ... is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 4B1.2(a)(2) (2014) (emphasis added). The highlighted text is known as the "residual clause." The residual clause in § 4B1.2(a)(2) mirrors the residual clause in the Armed Career Criminal Act

("ACCA"), which steeply increases the minimum and maximum penalties for § 922(g) violations... One year ago the Supreme Court invalidated the ACCA's residual clause as unconstitutionally vague. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). The question here is whether *Johnson's* holding applies to the parallel residual clause in the career offender guideline. An emerging consensus of the circuits holds that it does... In this circuit, however, vagueness challenges to the Sentencing Guidelines are categorically foreclosed. Circuit precedent—namely, *United States v. Tichenor*, 683 F.3d 358, 364–65 (7th Cir. 2012)—holds that the Guidelines are not susceptible to challenge on vagueness grounds. But *Tichenor* was decided before *Johnson* and *Peugh v. United States*, 133 S. Ct. 2072 (2013), which have fatally undermined its reasoning. Accordingly, we now overrule *Tichenor*. Applying *Johnson*, we join the increasing majority of our sister circuits in holding that the residual clause in § 4B1.2(a)(2) is unconstitutionally vague.

USA v. Darryl Rollins No. 13-1731

Argued December 2, 2015 — Decided August 29, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 10-CR-186 — Rudolph T. Randa, Judge.

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

SYKES, *Circuit Judge*. Darryl Rollins pleaded guilty to selling crack cocaine and was sentenced to 84 months in prison. This is our second time hearing his appeal. He challenges the calculation of his Sentencing Guidelines range... The district judge classified Rollins as a career offender based in part on a prior conviction for possession of a sawed-off shotgun, a crime that qualifies (if at all) only under the residual clause of this definition... In the meantime, the government changed its position on two key questions lurking in the background: (1) Does the Supreme Court's holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015), apply to the residual clause in the career-offender guideline; and (2) should *United States v. Tichenor*, 683 F.3d 358 (7th Cir. 2012), be overruled? *Johnson* invalidated the ACCA's residual clause as unconstitutionally vague. 135 S. Ct. at 2563. Although *Johnson* logically applies to the mirror-image residual clause in § 4B1.2(a)(2), our decision in *Tichenor* categorically forecloses vagueness challenges to the Guidelines. 683 F.3d at 364–65. The government previously invoked *Tichenor*, and Rollins did not ask the court to revisit and overrule it. After the panel issued its opinion, however, the government reversed course and now argues that *Tichenor* should be overruled and that *Johnson's* constitutional holding applies to the residual clause in § 4B1.2(a)(2). In light of the government's concession, the panel vacated its opinion and granted rehearing. In a separate decision also issued today, the en banc court overrules *Tichenor* and holds that under *Johnson*, the residual clause in the career-offender guideline is unconstitutionally vague. *United States v. Hurlburt*, Nos. 14-3611 & 15-1686 (7th Cir. Aug. 29, 2016). That decision undermines *Raupp's* rationale and is decisive here... we VACATE Rollins's sentence and REMAND for resentencing.

Brenda Leonard v. Julian Castro No. 16-1552

Submitted August 26, 2016 — Decided August 30, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 10478 — **John Z. Lee**, *Judge*.

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

ORDER

This case presents Brenda Leonard's second challenge to the decision of her former employer, the United States Department of Housing and Urban Development, to fire her. She accuses HUD of discriminating against her on the basis of race, age, and prior protected activity when, between 2007 and 2010, it reprimanded her, gave her negative performance reviews, and eventually fired her in 2010. The district court entered summary judgment against her on the ground that Leonard cannot relitigate in this

case the same claims she already litigated in an earlier case. We agree with that analysis and affirm the district court's judgment.

Ronald Grason v. Sylvia Burwell No. 16-1462

Submitted August 26, 2016 — Decided August 30, 2016

Case Type: Civil

Central District of Illinois. No. 14-2267 — **Harold A. Baker**, *Judge*.

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

ORDER

Ronald Grason, a former participating physician in the Medicare program, sued the Secretary of the Department of Health and Human Services after one of its divisions, the Centers for Medicare and Medicaid Services (CMS), charged him with filing fraudulent reimbursement requests and revoked his billing privileges. An administrative law judge rejected Grason's challenge to the revocation, and the district court concluded that the ALJ's decision was supported by substantial evidence. We affirm.

Dawain Bell v. City of Chicago No. 15-2833

Argued February 11, 2016 — Decided August 30, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 7382 — **Gary Feinerman**, *Judge*.

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

KANNE, *Circuit Judge*.In September 2012, Chicago Police Department officers arrested Plaintiff Dawain Bell for possession of a controlled substance. At the time, Bell was driving Plaintiff Alice Spinks's vehicle. Chicago Police impounded the vehicle after Bell's arrest pursuant to Chicago Municipal Code § 7-24-225, which permits police to impound a vehicle when officers have probable cause to believe it contained a controlled substance or was used in an illegal drug transaction... Spinks and Bell ("Plaintiffs") filed this lawsuit against Defendant City of Chicago ("City") in Cook County Circuit Court in 2014, alleging, amongst other theories, that the City's impoundment-related ordinances violated Illinois law and were facially invalid under the Fourth Amendment to the U.S. Constitution. The City removed the action to federal court pursuant to 28 U.S.C. § 1441 based on Plaintiffs' allegations that the impoundment ordinance violated the Fourth Amendment... the judgment of the district court is AFFIRMED.

Rebirth Christian Academy Daycare v. Melanie Brizzi No. 15-2220

Argued January 5, 2016 — Decided August 30, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 12-cv-01067-SEB-DKL — **Sarah Evans Barker**, *Judge*.

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

ROVNER, *Circuit Judge*.Rebirth Christian Academy Daycare, an Indiana non-profit corporation, ran a child care ministry—a "child care operated by a church or religious ministry that is a religious organization exempt from federal income taxation."... A state agency revoked Rebirth's registration after an inspector concluded that the organization had violated several statutory and regulatory provisions governing registered child care ministries. Rebirth sued state officials for damages and injunctive relief under 42 U.S.C. § 1983, claiming that they had violated the due-process clause of the Fourteenth Amendment by revoking its registration without providing it with an opportunity to be heard. The district court dismissed Rebirth's individual-capacity claims, concluding that qualified immunity protected the defendants from liability for civil damages because they had not violated clearly established law. After the parties

developed an evidentiary record on the official-capacity claims, Rebirth ultimately prevailed on its claims for injunctive relief. It now challenges the district court's dismissal of its claims for damages against the defendants sued in their individual capacities. We conclude that, based on the allegations in the complaint, the defendants were not entitled to qualified immunity because they violated clearly established law: the complaint adequately alleges that they deprived Rebirth of a property interest without first providing an opportunity for some type of hearing. Accordingly, we reinstate Rebirth's individual-capacity claims and remand for further proceedings.

USA v. Patrick McGuire No. 15-2071

Argued May 24, 2016 — Decided August 30, 2016

Case Type: Criminal

Southern District of Illinois. No. 14-CR-30148-NJR-1 — **Nancy J. Rosenstengel**, *Judge*.

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

HAMILTON, *Circuit Judge*, concurring.

SYKES, *Circuit Judge*. Patrick McGuire pleaded guilty to a single count of interfering with commerce by threat or violence. At sentencing the district court classified McGuire as a career offender under § 4B1.1(a) of the Sentencing Guidelines, which increases the offense level if the defendant has two prior felony convictions for a "crime of violence."... McGuire appeals, arguing that in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), the residual clause in the career-offender guideline is unconstitutionally vague. The government agrees and confesses error. In a recent decision circulated to the full court under Circuit Rule 40(e), we also agreed and invalidated § 4B1.2(a)(2)'s residual clause as unconstitutionally vague. *United States v. Hurlburt*, No. 14-3611 (7th Cir. Aug. 29, 2016) (en banc). Applying *Hurlburt* there, McGuire was wrongly classified as a career offender. As in most cases involving miscalculation of a defendant's Guidelines range, that error warrants full resentencing.

USA v. Joshua Waldman No. 15-1756

Argued February 16, 2016 — Decided August 30, 2016

Case Type: Criminal

Southern District of Indiana, Terre Haute Division. No. 2:13-cr-00039 — **Jane E. Magnus-Stinson**, *Judge*.

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

WILLIAMS, *Circuit Judge*. Inmate Joshua Waldman was convicted of forcibly assaulting a correctional officer after headbutting him during an argument about a pat-down search. He advanced a self-defense argument at trial, but was unsuccessful. On appeal, he argues that the district court erred in holding that there needed to be an imminent threat of death or serious bodily harm before he could justifiably use force in self-defense. We agree. Requiring that an inmate fear serious bodily harm or death before using force to protect himself is inconsistent with both the Eighth Amendment and common law principles justifying the use of self-defense. But we find no clear error in the district court's finding that Waldman had a legal alternative to force in complying with the pat-down. So we affirm Waldman's conviction because he failed to prove at least one of the required components of his defense.

Charmaine Hamer v. Neighborhood Housing Services No. 15-3764

Argued June 2, 2016 — Decided August 31, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:12-cv-10150 — **Rubén Castillo**, *Chief Judge*.

Before POSNER and SYKES, *Circuit Judges*, and YANDLE, *District Judge*.

YANDLE, *District Judge*. Charmaine Hamer, a former Intake Specialist for the Housing Services of Chicago (“NHS”) and Fannie Mae’s Mortgage Help Center... filed suit against her former employers, alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et. seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended. The district court granted summary judgment in favor of NHS and Fannie Mae on September 14, 2015... Hamer’s counsel filed a “Motion to Withdraw and to Extend Deadline for Filing Notice of Appeal” in which she requested an extension to December 14, 2015 for Hamer to file her Notice of Appeal. The district court granted the motion and extended the deadline to December 14, 2015. Hamer filed her Notice of Appeal with this Court on December 11, 2015; within the timeframe permitted by the district court’s Order, but exceeding the extension allowable under Fed. R. App. P. 4(a)(5)(C)... On December 31, 2015, we, sua sponte, entered an Order instructing the Appellees to file a brief addressing the timeliness of this appeal. They did so, arguing that Hamer’s Notice of Appeal is untimely under Rule 4(a)(5)(C) and, therefore, that this Court lacks jurisdiction over her appeal. Hamer asserts that the district court extended the time to file her Notice of Appeal pursuant 28 U.S.C. § 2107(c), which states in relevant part: “[T]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause.” She contends that Rule 4(a)(5)(C) does not apply since the district court did not consider it when granting the extension. Hamer further argues that the Appellees waived their timeliness challenge by not initially raising it... Had the Appellees never challenged the timeliness of Hamer’s Notice, they could not waive what this Court is bound by statute to uphold. Accordingly, because we have no jurisdiction to consider Hamer’s appeal on the merits, it is dismissed.

Ivan Cadavedo v. Loretta Lynch No. 15-1914

Argued May 24, 2016 — Decided August 31, 2016

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A089 506 066
Before ROVNER, SYKES, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Ivan Mendoza Cadavedo, a native of the Philippines, petitions for review of a Board of Immigration Appeals decision that affirmed an immigration judge’s denial of his request for a continuance. At a 2014 hearing, an immigration judge denied Cadavedo’s request for a continuance to allow him to challenge a 2009 finding by United States Citizenship and Immigration Services (“USCIS”) that he had engaged in marriage fraud. That USCIS finding bars him from obtaining adjustment of his status to become a lawful permanent resident. We hold that there was no abuse of discretion in denying Cadavedo’s request for a continuance. Cadavedo made his request during the hearing he sought to have continued, and his entitlement to the belated relief he wanted to seek from USCIS is speculative at best.

Francisco Carrion v. Kim Butler No. 14-3241

Argued February 11, 2016 — Decided August 31, 2016

Case Type: Prisoner

Southern District of Illinois. No. 3:13-cv-00778-CJP — **David R. Herndon**, *Judge*.
Before RIPPLE, KANNE, and WILLIAMS, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Francisco Carrion was convicted of residential burglary and of first-degree murder following a bench trial in the Circuit Court of Cook County, Illinois. The state courts affirmed his conviction on direct appeal and on state postconviction review. Mr. Carrion then filed a habeas petition in federal court under 28 U.S.C. § 2254, in which he raised multiple claims for relief. The district court denied his petition, concluding that although the petition probably was timely filed, most of the claims were procedurally defaulted and the remaining claims were meritless; the court further declined to grant a certificate of appealability (“COA”). Mr. Carrion then appealed to this court, and we granted a COA instructing the parties to address three questions: whether there was sufficient evidence to support his convictions, whether Mr. Carrion’s confession was voluntary, and whether appellate counsel had been

ineffective in failing to challenge the voluntariness of his confession. After briefing and oral argument, we conclude that, whether we apply the deferential review of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254(d), or de novo review, Mr. Carrion is not entitled to relief on any of these claims. There is no question that the State of Illinois met its burden of proving each of the charges beyond a reasonable doubt. We further perceive no due process violation in the reception into evidence of Mr. Carrion’s statement, even though it was translated by an investigating officer. Any ambiguities in the statement were examined thoroughly at trial and the state trial court was entitled to admit and rely upon the statement. Accordingly, for the reasons set out more fully in this opinion, we affirm the district court’s denial of Mr. Carrion’s habeas petition.

Gordon Parker v. Christopher Duckworth No. 16-1648

Submitted August 26, 2016 — Decided September 1, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:14-cv-01854-SEB-DKL — **Sarah Evans Barker, Judge.**

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

ORDER

Gordon Parker sued two Indianapolis police officers under 42 U.S.C. § 1983 after he was arrested and charged with racketeering and drug crimes but the State then dismissed the charges. Parker alleged that the officers had deceived the prosecutor by falsifying an affidavit for probable cause implicating him in a drug deal. The district court granted summary judgment for the officers, finding that the affidavit established probable cause and that the accuracy of its content is undisputed. We affirm.

Pine Top Receivables of Illinois v. Transfercom, Ltd. No. 16-1073

Argued May 31, 2016 — Decided September 1, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-08908 — **Amy J. St. Eve, Judge.**

Before EASTERBROOK and WILLIAMS, *Circuit Judges* and YANDLE, *District Judge*.

YANDLE, *District Judge*. Pine Top Receivables of Illinois, LLC’s (“PTRIL”) sued Transfercom Limited (“Transfercom”) in state court. Transfercom removed the case on diversity grounds. On PTRIL’s motion, the district court remanded the matter based on its determination that, due to the service of suit clause in reinsurance treaties between the parties, Transfercom waived the right of removal... we AFFIRM.

Eric Alvarado v. Carolyn W. Colvin No. 15-2925

Argued April 1, 2016 — Decided September 1, 2016

Case Type: Civil

Central District of Illinois. No. 1:14-cv-01090 — **James E. Shadid, Judge.**

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

WILLIAMS, *Circuit Judge*. In 1993, Eric Alvarado was granted disability benefits due to his impairments, which included a severe learning disorder. In 2004, the Social Security Administration stopped paying those benefits after determining that, despite his severe learning disorder, Alvarado could do certain relatively simple jobs. Because that determination was supported by substantial evidence, we affirm.

Rose Presser v. Acacia Mental Health Clinic No. 14-2804

Argued April 6, 2016 — Decided September 1, 2016
Case Type: Civil
Eastern District of Wisconsin. No. 2:13-cv-00071-JPS — **J.P. Stadtmueller**, *Judge*.
Before FLAUM, RIPPLE, and HAMILTON, *Circuit Judges*.
HAMILTON, *Circuit Judge*, concurring in part and dissenting in part.

RIPPLE, *Circuit Judge*. Relator and plaintiff Rose Presser filed a qui tam action under the False Claims Act, 31 U.S.C. § 3729 et seq. (“FCA”), and its Wisconsin analog, the Wisconsin False Claims Act, Wis. Stat. § 20.931 et seq. (“WFCA”), on behalf of the United States and the State of Wisconsin against defendants Acacia Mental Health Clinic, LLC (“Acacia”) and Abe Freund, the principal owner of Acacia. Ms. Presser alleges that Acacia and Mr. Freund engaged in “upcoding,” provided unnecessary medical procedures, and then charged the federal and state governments for those expenses. The district court granted the defendants’ motion to dismiss the complaint for failure to state a claim of fraud with particularity as required by Federal Rule of Civil Procedure 9(b). We affirm that judgment except as it relates to the claims against both defendants regarding the use of an improper billing code. We hold that Ms. Presser has stated those allegations with sufficient particularity and therefore reverse the district court’s judgment on those claims and remand for further proceedings.

Patrick Werner v. Edward F. Wall No. 14-1746
Argued April 6, 2016 — Decided September 1, 2016
Case Type: Prisoner
Eastern District of Wisconsin. No. 2:12-cv-00096-CNC — **Charles N. Clevert, Jr.**, *Judge*.
Before FLAUM, RIPPLE, and HAMILTON, *Circuit Judges*.
HAMILTON, *Circuit Judge*, dissenting in part.

RIPPLE, *Circuit Judge*. In 1999, Patrick Werner was convicted of multiple sex offenses in Wisconsin state court. The state trial court sentenced him to ten years of imprisonment and to ten consecutive years of probation. Because Mr. Werner had been convicted of more than one sex offense, he was a Special Bulletin Notification (“SBN”) sex offender under Wisconsin law. After a denial of parole in late 2009, Mr. Werner’s release was deferred until his mandatory release date of March 21, 2010. At that time, Mr. Werner and his probation agents were unable to secure an approved residence as required by his rules of supervision. Consequently, the Wisconsin Department of Corrections (“DOC”) Division of Community Corrections detained him pursuant to Administrative Directive No. 02-10... which set out a procedure addressing release-eligible SBN sex offenders who lacked an approved residence... Mr. Werner brought this action pro se in the district court under 42 U.S.C. § 1983. He claimed that his continued detention beyond his mandatory release date was unlawful and named as defendants various DOC officials and several of his probation agents... The district court ultimately granted summary judgment in favor of the defendants on all of Mr. Werner’s claims... we affirm the judgment of the district court.

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](#).