

Opinions for the week of August 8 - August 12, 2016

American Family Mutual Insurance v. David Williams No. 15-3400

Argued February 23, 2016 — Decided August 8, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:14-cv-00248-SEB-DKL — **Sarah Evans Barker, Judge.**

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

HAMILTON, *Circuit Judge*, concurring.

WOOD, *Chief Judge*. They say every dog has its day. This case is about a dog—specifically, Emma, a black Labrador. Emma lived in Indiana with Anthony and Jeanette Van de Venter, friends of David Williams. When Williams, then visiting the Van de Venters, took Emma outside so that she could relieve herself, she raced off toward an enticing sound and Williams was injured. Before us is the question whether American Family Mutual Insurance (AmFam), the Van de Venter's home insurer, must cover Williams's medical expenses. AmFam said no and brought this suit for a declaratory judgment to confirm its reading of the policy. The district court, however, found in favor of the Van de Venters and Williams. We affirm.

Zero Zone, Inc. v. DOE Nos. 14-2147, 14-2159, & 14-2334

Argued September 30, 2015 — Decided August 8, 2016

Case Type: Agency

United States Department of Energy. Agency No. EERE-2010-BT-STD-0003 & Agency No. EERE-2013-BT-TP-0025

Before BAUER, RIPPLE, and ROVNER, *Circuit Judges*.

RIPPLE, *Circuit Judge*. The United States Department of Energy ("DOE") published two final rules aimed at improving the energy efficiency of commercial refrigeration equipment ("CRE").¹ The first rule adopted new energy efficiency standards for CRE. 79 Fed. Reg. 17,726 (Mar. 28, 2014) (the "New Standards Rule"). The second rule, issued a month later, clarified the test procedures that DOE uses to implement those standards. 79 Fed. Reg. 22,278 (Apr. 21, 2014) (the "2014 Test Procedure Rule"). Petitioners Zero Zone, Inc. ("Zero Zone"), a small business specializing in CRE and Air-Conditioning, Heating and Refrigeration Institute ("AHRI"), a trade association of CRE manufacturers, petitioned for review of both rules. Petitioner North American Association of Food Equipment Manufacturers ("NAFEM"), another trade association of CRE manufacturers, petitioned for review of the first rule. AHRI and Zero Zone moved to consolidate the cases, and we granted the motion. Petitioners challenge both the decisionmaking process and the substance of the final rules. Upon review of those challenges, we conclude that DOE acted in a manner worthy of our deference. The New Standards Rule is premised on an analytical model that is supported by substantial evidence and is neither arbitrary nor capricious. DOE conducted a cost-benefit analysis that is within its statutory authority and is supported by substantial evidence. Its methodology and conclusions were not arbitrary or capricious. It also gave appropriate consideration to the rule's effect on small businesses and the role of other agency regulations. DOE similarly acted within its authority, and within reason, when it promulgated the 2014 Test Procedure Rule. For these reasons, we deny the petitions in their entirety.

Marilyn Zoretic v. John Darge No. 14-2008

Argued January 4, 2016 — Decided August 8, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:1-cv-06011 — **Robert W. Gettleman, Judge.**

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

WILLIAMS, *Circuit Judge*. Marilyn Zoretic and her family were evicted from their apartment twice with the same eviction order. Zoretic sued the deputy sheriffs who carried out the eviction, along with the owners of the unit who initiated the eviction and their agents. Summary judgment was granted to all defendants. On appeal, Zoretic argues that the deputies lacked any legal authority to enter her residence, and that the owners of the unit acted outrageously in initiating the second eviction. Because the deputies did not meet their summary judgment burden of demonstrating they were entitled to judgment as a matter of law on Zoretic's Fourth Amendment claims, we reverse the grant of summary judgment to the deputies. But because Zoretic failed to create a material factual dispute about whether the owners of her unit were extreme and outrageous in pursuing her eviction, we affirm summary judgment on her claims of intentional infliction of emotional distress.

Henrietta Dowlen v. Carolyn Colvin No. 16-1299

Argued July 7, 2016 — Decided August 9, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:15-cv-00377-TAB-JMS — **Tim A. Baker**, *Judge*. Before DIANE P. WOOD, *Chief Judge*; WILLIAM J. BAUER, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

ORDER

Henrietta Dowlen, a 65-year-old who suffers from pain primarily in her arm and neck, appeals the district court's judgment upholding the denial of her application for disability insurance benefits. An administrative law judge found that, despite her impairments, she retained the residual functional capacity to perform her past relevant jobs, first as a mail sorter and then as an insurance claims clerk. Dowlen challenges both the adequacy of the ALJ's RFC finding and the ALJ's conclusion that she could perform her past relevant work. Because substantial evidence supports the ALJ's decision, we affirm.

Louquetta O'Connor-Spinner v. Carolyn Colvin No. 15-2567

Argued June 8, 2016 — Decided August 9, 2016

Case Type: Civil

Southern District of Indiana, New Albany Division. No. 13-cv-00186 — **Tanya Walton Pratt**, *Judge*. Before BAUER, MANION, and KANNE, *Circuit Judges*.

MANION, *Circuit Judge*. Louquetta O'Connor-Spinner, who is 47, suffers from depression and several physical impairments. Several times since 2001 she has applied for Disability Insurance Benefits and Supplemental Security Income, and six years ago we invalidated the Social Security Administration's denial of her 2004 request for benefits. *O'Connor-Spinner v. Astrue*, 627 F.3d 614 (7th Cir. 2010). We concluded that the assigned administrative law judge had committed two errors relating to O'Connor-Spinner's depression. First, the ALJ had not asked a testifying vocational expert to assess how O'Connor-Spinner's employment prospects would be affected by her moderate limitation on concentration, persistence, and pace. And, second, the ALJ had ignored a psychologist's opinion that O'Connor-Spinner also faces a moderate limitation on her ability to accept instructions from, and respond appropriately to, supervisors. We instructed the Agency to remedy these mistakes, but instead of complying with this simple directive, a different ALJ contradicted his colleague and declared that O'Connor-Spinner's depression is not, and never has been, a severe impairment. O'Connor-Spinner again has sought judicial review, and she argues that the medical evidence contradicts this assertion. We agree, and once more we must remand this case to the Agency for further proceedings.

Beatrice Boyer v. BNSF Railway Company Nos. 14-3131 & 14-3182

August 9, 2016

Case Type: Civil

Western District of Wisconsin. No. 3:14-CV-00260-bbc — **Barbara B. Crabb**, *Judge*.

On Petition For Rehearing And Rehearing En Banc

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

ROVNER, *Circuit Judge*. In his petition for rehearing, attorney Christopher D. Stombaugh argues for the first time that this court lacks the authority under 28 U.S.C. § 1927 to sanction him for filing this case in Arkansas state court (necessitating a removal to federal court and a transfer to the Western District of Wisconsin), because that act took place before the case “appear[ed] on the federal court’s docket.” *Bender v. Freed*, 436 F.3d 747, 751 (7th Cir. 2006). The statute provides that “[a]ny attorney ... admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” § 1927. Stombaugh reads the language regarding admission to practice in federal court as confining our sanctions power to conduct which occurs in federal rather than state court... The petition for rehearing is therefore granted to the limited extent that we now modify our opinion of June 1, 2016, by citing our inherent authority to sanction counsel for misconduct as an alternative ground for our decision to impose sanctions on Stombaugh. No judge in active service having called for a vote on Stombaugh’s request for rehearing en banc, that request is denied.

James Hays v. John Berlau No. 15-3799

Argued June 2, 2016— Decided August 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 9786 — **Joan B. Gottschall**, *Judge*.

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

YANDLE, *District Judge*, dissenting.

POSNER, *Circuit Judge*. In merger litigation the terms “strike suit” and “deal litigation” refer disapprovingly to cases in which a large public company announces an agreement that requires shareholder approval to acquire another large company, and a suit, often a class action, is filed on behalf of shareholders of one of the companies for the sole purpose of obtaining fees for the plaintiffs’ counsel. Often the suit asks primarily or even exclusively for disclosure of details of the proposed transaction that could, in principle at least, affect shareholder approval of the transaction. But almost all such suits are designed to end—and very quickly too—in a settlement in which class counsel receive fees and the shareholders receive additional disclosures concerning the proposed transaction. The disclosures may be largely or even entirely worthless to the shareholders, in which event even a modest award of attorneys’ fees (\$370,000 in this case) is excessive and the settlement should therefore be disapproved by the district judge. In this case, however, the district judge approved the settlement, including a narrow release of claims and the fee for the plaintiff’s lawyers that the company had agreed not to oppose. A shareholder named Berlau, having objected unsuccessfully to the settlement in the district court, has appealed... The oddity of this case is the absence of *any* indication that members of the class have an interest in challenging the reorganization that has created Walgreens Boots Alliance. The only concrete interest suggested by this litigation is an interest in attorneys’ fees, which of course accrue solely to class counsel and not to any class members. Certainly class counsel, if one may judge from their performance in this litigation, can’t be trusted to represent the interests of the class. Because the settlement can’t be approved, we reverse the district court’s judgment. And since class counsel has failed to represent the class fairly and adequately, as required by Federal Rule of Civil Procedure 23(g)(1)(B) and (g)(4), the district court on remand should give serious consideration to either appointing new class counsel, cf. Fed. R. Civ. P. 23(g)(1), or dismissing the suit. Cf. *Robert F. Booth Trust v. Crowley*, *supra*, 687 F.3d at 319. REVERSED AND REMANDED, WITH DIRECTIONS.

USA v. Robert Miller No. 15-3584

Submitted May 23, 2016 — Decided August 10, 2016
Case Type: Criminal
Central District of Illinois. No. 3:09-cr-30039-RM-BGC-1 — **Richard Mills**, *Judge*.
Before WOOD, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. The defendant pleaded guilty to possessing crack cocaine with intent to sell it, in violation of 21 U.S.C. § 841(a)(1), and in 2010 he was sentenced to 210 months' imprisonment (the bottom of the applicable guidelines range), which the district judge reduced by 20 percent—to 168 months—the following year at the request of the government in exchange for cooperation given to it by the defendant. Four years later the defendant sought a further reduction in his prison term, to 134 months, because Amendment 782 to the Sentencing Guidelines had made a retroactive two-level reduction in the guidelines sentencing range that had been applicable when he was sentenced. See U.S.S.G. § 1B1.10(d). The comments accompanying the amendment say that in deciding whether to grant such a motion the district judge *must* consider "the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment" and *may* consider the defendant's post-sentencing conduct.

U.S.S.G. § 1B1.10 Application Notes 1(B)(ii), (iii)... It's true that the client is usually held to answer for the mistakes of his lawyer, but the mistake in this case has been so easily rectified on appeal by the now lawyerless appellant that we think it should be overlooked. Since the district judge might decide to grant the sentence reduction once he's assured that the defendant has taken courses toward the GED, since the judge erred in describing the defendant's disciplinary infractions as recent, and since he seems not to have considered whether the defendant is likely to remain a danger to the community when he is released from prison, years from now, we vacate the judgment and remand the case for further proceedings consistent with our opinion. VACATED AND REMANDED

Dirk Witter v. CFTC No. 15-3535
Submitted July 22, 2016 — Decided August 10, 2016
Case Type: Agency
Commodity Futures Trading Commission. No. 08-R045.
Before WOOD, *Chief Judge*, and ROVNER and HAMILTON, *Circuit Judges*.

WOOD, *Chief Judge*. This is a tale of miscommunication. Our task is to decide where the resulting loss must fall. It involves some futures transactions that Dirk Witter, whose broker was TransAct Futures, was trying to stop. Witter contends that he telephoned Robert Skelton, an employee of TransAct, with instructions to cancel several standing orders. What is clear is that Skelton did not do so, and Witter lost \$23,000 on the resulting market position. What is unclear is why Skelton did not act: Witter says that Skelton disregarded his instructions, but Skelton says that Witter never told him to cancel all seven of the working orders at issue. Witter filed a complaint against TransAct and Skelton with the Commodity Futures Trading Commission, see 7 U.S.C. § 18(a), but it found that neither one had violated the Commodity Exchange Act. See *id.* § 6(b). Witter has filed a petition for review from that decision, but we conclude that the Commission's decision was supported by the evidence, and thus we deny the petition.

USA v. Qais Hussein Nos. 15-3389 & 15-3392
USA v. Majdi Odeh
Argued May 20, 2016 — Decided August 10, 2016
Case Type: Criminal
Southern District of Illinois. No. 14-CR-30177 — **David R. Hendon**, *Judge*.
Before FLAUM and MANION, *Circuit Judges*, and ALONSO, *District Judge*.

MANION, *Circuit Judge*. Qais Hussein and Majdi Odeh ran two convenience stores in southern Illinois where they sold counterfeit goods and illegally traded cash or ineligible items for food stamps. They also

filed false tax returns on behalf of their businesses. They were eventually indicted in a four-count indictment and pleaded guilty to all counts. As part of the plea agreement, Hussein and Odeh waived their right to appeal their sentences so long as their sentences were within the advisory guideline range. The district court sentenced Hussein and Odeh each to a within-guidelines term of imprisonment of 85 months. Nonetheless, the defendants appeal, arguing the government breached the plea agreement by not recommending reductions for acceptance of responsibility, and not recommending a sentence at the low end of the range for Odeh. The defendants also attempt to challenge the loss calculation on appeal. However, because the defendants waived their right to appeal, we dismiss these appeals.

Mark Rosado v. Billy Gonzalez No. 15-3155

Argued May 24, 2016 — Decided August 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-03733 — **Rebecca R. Pallmeyer**, *Judge*.
Before WOOD, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. On September 7, 2012, two Chicago Police Department (“CPD”) officers, Defendants Billy Gonzalez and Christian Ramirez, pulled over a car driven by Plaintiff Mark Rosado for failing to use a turn signal. After stopping the car, the officers “claimed to have seen” a badge and handcuffs, as well as a handgun in plain view “between the brake lever and center console.” The officers arrested Rosado for unlawful possession of a weapon by a felon and for violating the armed habitual criminal statute. Defendant Officer Robert Kero approved the officers’ report as establishing probable cause. Rosado was bound over for trial on September 8, 2012, after a probable cause hearing. Rosado spent the next year and a half in jail fighting the criminal charges. In February 2014, Rosado received a copy of the dash cam video taken the evening he was arrested, which, contrary to the officers’ accounts, showed that Rosado had used his turn signal, and it was operable. The state court, relying on the video, found that the officers could not have seen the traffic infraction. Accordingly, it granted Rosado’s motion to quash his arrest and suppress evidence. In light of the grant of the motion, the state dismissed the case *nolle prosequi* on April 14, 2014... The same fate befalls Rosado’s claim of failure to intervene. “In order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation” *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005). The underlying constitutional violation here is a time-barred false-arrest claim. Because the claim of false arrest is time-barred, the derivative claim of a failure to intervene during the false arrest is also time-barred. Finally, because Rosado has not argued on appeal that the district court improperly dismissed his due-process and respondeat-superior claims on the merits, we do not address them here. **II. CONCLUSION** For the foregoing reasons, we AFFIRM the district court’s dismissal of Rosado’s suit.

Jesus Ali v. Final Call, Inc. No. 15-2963

Argued March 30, 2016 — Decided August 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 6883 — **Gary S. Feinerman**, *Judge*.
Before WOOD, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

WOOD, *Chief Judge*. Carpenters have a saying: measure twice, cut once. This litigation might have been averted if that adage had been observed here. In 1984, Jesus Muhammad-Ali painted a portrait of the leader of the Nation of Islam, Louis Farrakhan. In 2013, Ali sued The Final Call, a newspaper that describes itself as the “propagation arm of the Nation of Islam,” for copyright infringement. The Final Call, it turned out, admittedly had sold over a hundred copies of Ali’s Farrakhan portrait. Ali nonetheless lost his case after a bench trial. He now appeals, arguing that the district court misstated the elements of a

prima facie copyright infringement claim and erroneously shifted to him the burden of proving that the copies were unauthorized. Ali is correct, and The Final Call proved no defense. We therefore reverse.

Joshua Birtchman v. LVNV Funding, LLC Nos. 15-2044, 15-2082, 15-2109

Tia Robinson v. eCast Settlement Corporation

Alphonse Owens v. LVNV Funding, LLC

Argued June 1, 2016 — Decided August 10, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:14-cv-02083 — **Jane E. Magnus-Stinson**, *Judge*.

Northern District of Illinois, Eastern Division. No. 1:14-cv-08277 — **Manish S. Shah**, *Judge*.

Southern District of Indiana, Indianapolis Division. No. 1:14-cv-00713 — **Jane E. Magnus-Stinson**, *Judge*.

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

WOOD, *Chief Judge*, dissenting.

FLAUM, *Circuit Judge*. In each of these consolidated cases, a debt collector filed a proof of claim, defined as “a written statement setting forth a creditor’s claim,” Fed. R. Bankr. P. 3001(a), for a time-barred debt in a Chapter 13 bankruptcy proceeding. After successfully objecting to the proof of claim, the debtor sued the debt collector in federal court, alleging that the act of filing a proof of claim on a stale debt violates §§ 1692e and 1692f of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”). In each case, the district court granted the defendant debt collector’s motion to dismiss. For the reasons that follow, we affirm those decisions.

William Rabinak v. United Brotherhood of Carpenters Pension Fund No. 15-1717

Argued December 8, 2015 — Decided August 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 CV 1904 — **Manish S. Shah**, *Judge*.

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

WILLIAMS, *Circuit Judge*. When William Rabinak retired and received the calculation of his pension benefit, he thought something was off. The annual salaries listed did not appear to take into account quarterly payments of \$2,500 he received for serving on his organization’s Executive Board, so he appealed and maintained those payments should have been counted. The pension fund appeals committee denied his appeal. Controlled as we are by a standard of review that asks only whether the decision was arbitrary and capricious, we affirm the denial. The plan’s definition of compensation includes only “salary,” and the \$2,500 quarterly payments for Board service were paid separately from Rabinak’s weekly salary payments and coded differently as well. The conclusion that the payments at issue were not salary payments under this particular plan was not arbitrary and capricious.

Thomas Janusz, Jr. v. City of Chicago No. 15-1330

Argued February 11, 2016 — Decided August 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 03 CV 4402 — **Joan B. Gottschall**, *Judge*.

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

WILLIAMS, *Circuit Judge*. Thomas Janusz sued the City of Chicago and several of its police officers, alleging that the officers had acted unlawfully in

arresting him. The district court granted summary judgment in favor of the City and the officers. In doing so, it applied the single-recovery rule and found that in a separate but related state court action, Janusz had already obtained the damages to which he was entitled. We conclude that the district court correctly found that the single-recovery rule barred Janusz from recovering damages in his federal lawsuit, since both lawsuits involve a single, indivisible set of injuries for which Janusz has already received compensation. We also agree with the district court that Janusz is judicially estopped from arguing that the judgment in the state action was not fully satisfied—a position at odds with several statements he made to the state court. So we affirm the district court’s judgment.

Carmen Franklin v. Parking Revenue Recovery Services, Inc. No. 14-3774

Argued September 10, 2015 — Decided August 10, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 02578 — **Edmond E. Chang**, *Judge*.
Before FLAUM, RIPPLE, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Carmen Franklin and Jenifer Chism parked their cars in a Chicago-area lot owned by Metra, the public commuter railroad, and operated by CPS Chicago Parking, LLC. (“CPS”). The lot offers parking spaces to the public at the rate of \$1.50 per day. CPS says the two failed to pay and sent them violation notices demanding payment of the \$1.50 fee and a \$45 nonpayment penalty. When they still did not pay, CPS referred the matter for collection to Parking Revenue Recovery Services, Inc. (“Parking Revenue”), which sent them collection letters for the \$46.50 total due. Franklin and Chism responded with this class action against Parking Revenue alleging violations of the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.* The district court entered summary judgment for Parking Revenue, holding that the FDCPA does not apply because the unpaid parking obligations are not “debts” as that term is defined in § 1692a(5). We reverse. The obligations at issue here—unpaid parking fees and nonpayment penalties—are “debts” within the meaning of the FDCPA. That statutory term comprises obligations “arising out of” consumer “transactions.” Parking in a lot that is open to all customers subject to stated charges is a “transaction.” The obligation that arises from that transaction is a “debt,” and an attempt to collect it must comply with the FDCPA.

Kenneth Morris v. Byran Bartow No. 14-3482

Argued September 22, 2015 — Decided August 10, 2016

Case Type: Prisoner

Eastern District of Wisconsin. No. 03-C-1078 — **William C. Griesbach**, *Chief Judge*.
Before FLAUM, WILLIAMS, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. In 2000, petitioner Kenneth Morris shot and killed his friend Billy Smith. The substantive issue in this appeal is whether Morris was coerced to plead guilty in state court to first-degree reckless homicide. That issue lies behind unusually complex layers of procedural issues that have accreted over more than fifteen years. In the end, we agree with the district court that Morris is not entitled to a writ of habeas corpus on any theory. Morris was under strong pressures when he decided to plead guilty, but the evidence does not show that his guilty plea was involuntary. Even though he was represented by new counsel immediately after pleading guilty, Morris and his new lawyer did not challenge his guilty plea as involuntary in the state trial court. Nor did Morris raise the issue with his appellate lawyer, who did not deny Morris his right to effective assistance of counsel... The state courts’ rejection of Morris’s claim that his appellate lawyer provided ineffective assistance in his direct appeal was not contrary to or an unreasonable application of Supreme Court decisions or based on an unreasonable view of the facts. Morris’s stand-alone claim that his guilty plea was coerced is subject to *de novo* review, but we find no violation of his federal constitutional rights. The judgment of the district court denying Morris’s petition for a writ of habeas corpus is AFFIRMED.

Gemini International, Inc. v. BCL-Burr Ridge, LLC No. 16-1083

Submitted July 25, 2016 — Decided August 11, 2016

Case Type: Bankruptcy from District Court

Northern District of Illinois, Eastern Division. No. 15 C 8118 — **Sara L. Ellis**, *Judge*.

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

POSNER, *Circuit Judge*. The appellants (defendants below) in this proceeding are the wife of, and businesses controlled by, the debtor in a Chapter 7 bankruptcy proceeding. The appellees (plaintiffs below) are creditors of the debtor who contend that the appellants' assets rightfully belong to the debtor's estate and so should, pursuant to 11 U.S.C. § 542(a), be turned over to the debtor's trustee, liquidated, and the proceeds given to the plaintiffs, who to repeat are the debtor's creditors. To obtain this and other relief, the plaintiffs filed an adversary complaint in the bankruptcy court seeking to have the defendants deemed alter egos of the debtor. Pursuant to 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033, the bankruptcy court recommended to the district court that judgment on the pleadings (sought by the plaintiffs) should be granted. The district court did so, saying the "undisputed facts substantially show" that the defendants were alter egos of the debtor and the corporate veils should [therefore] be pierced and the assets "brought into the Debtor's bankruptcy estate." The next week, with the alter ego issue settled and no stay or appeal on the horizon, the bankruptcy court ordered the defendants' assets turned over to the debtor's estate... The bankruptcy court's order implementing the district court's decision regarding the estate's entitlement to the defendants' assets was therefore valid, and is in any event not challenged by the appellants. The appeal is therefore DISMISSED.

Steven D. Lisle, Jr. v. Guy Pierce No. 14-3047

Argued October 28, 2015 — Decided August 11, 2016

Case Type: Prisoner

Central District of Illinois. No. 13-4025 — **James E. Shadid**, *Chief Judge*.

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

HAMILTON, *Circuit Judge*. Petitioner Steven D. Lisle, Jr. was convicted of first degree murder and aggravated battery with a firearm and was sentenced to 37 years in prison. He seeks a writ of habeas corpus because he contends that the state trial court admitted as evidence testimonial statements made by the surviving victim in violation of the Confrontation Clause of the Sixth Amendment. The district court denied the writ, and we affirm. The state courts did not apply Supreme Court precedent unreasonably in holding that the testimony in question, about a wounded man's statement to his aunt while waiting for an ambulance that Lisle had shot him, was not a "testimonial" out-of-court statement and thus was permitted under the Confrontation Clause.

David Kristofek v. Village of Orland Hills No. 14-2919

Argued December 4, 2015 — Decided August 11, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11 CV 7455 — **Samuel Der-Yeghiayan**, *Judge*.

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

WILLIAMS, *Circuit Judge*. While working as a part-time police officer for the Village of Orland Hills, David Kristofek cited and arrested a driver for several car-insurance-related infractions. Following a flurry of phone calls between the driver's mother, several local politicians, and Thomas Scully, the Village's chief of police, the driver was released and the citations against him were voided. Several months later, Kristofek participated in a police training session that involved two hypothetical instances of official police misconduct. Based on these hypotheticals, Kristofek became concerned that official misconduct may

have occurred involving the voided citations. After Kristofek shared this concern with two other officers and with the FBI, Scully fired him. Kristofek sued Scully and the Village, and the district court granted their motion for summary judgment. On appeal, Kristofek claims that the district court erred in holding that his statements to his colleagues and the FBI about the voided citations were not protected under the First Amendment. We agree. Kristofek was speaking as a private citizen about a matter of public concern, and his interest in speaking outweighed Scully's interest in promoting efficiency within the department. Kristofek also claims that the district court erroneously held that the Village was not liable for Scully's actions under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). But the district court correctly rejected Kristofek's *Monell* claim, since Scully did not possess the requisite authority to unilaterally fire Kristofek or to set departmental firing policy. So we reverse the district court's judgment relating to Kristofek's First Amendment retaliation claim against Scully, but affirm it as to Kristofek's *Monell* claim against the Village.

Ashoke Deb v. Sirva Incorporated No. 14-2484

Argued October 29, 2015 — Decided August 11, 2016

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:13-cv-01245-TWP-DML — **Tanya Walton Pratt, Judge.**

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

ROVNER, *Circuit Judge.* Ashoke Deb contracted with an Indian moving company, Allied Lemuir, to move his belongings from Calcutta, India to St. John's, Canada, but his belongings never left India. He now seeks to hold the defendants, two United States companies, SIRVA, Inc. and Allied Van Lines, Inc., responsible for the improper disposal and loss of his personal property in connection with his move. SIRVA and Allied moved to dismiss the complaint, arguing that Deb had failed to state a claim for which the court could grant relief, that he had failed to join a necessary party, and that the United States federal courts were not the proper venue for his claim. The district court agreed with the latter argument and dismissed on the grounds of forum non conveniens. Deb appeals. Because we have determined that the district court did not hold the defendants to their burden of demonstrating that India was an available and adequate forum for this litigation, we vacate and remand the case to the district court to do so.

Maurice Evans v. Stephanie Dorethy No. 15-3531

Argued July 7, 2016 — Decided August 12, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 14-cv-7018 — **John W. Darrah, Judge.**

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

PER CURIAM. An Illinois jury convicted Maurice Evans of felony murder based on the felony "mob action," which led to the death of Daniel McKenzie. Evans argued on direct appeal that the trial court violated his Sixth Amendment right to have a jury determine every factual element required for conviction. He contended that the trial court should have allowed the jury to determine whether the underlying offense of mob action had a felonious purpose independent of the killing. The last state court to address this issue concluded that the trial court "adequately apprised" the jury. Evans renewed his claim in his petition for collateral relief under 28 U.S.C. § 2254, but the district court denied relief. It reasoned that Evans's claim improperly asks a federal court to review a state court's interpretation of state law. We find that Evans's petition does, in fact, properly present a federal claim: the denial of his Sixth Amendment right to have a jury determine each element of a state crime. But Evans's assertion that Illinois defines felony murder to include "independent felonious intent" as a factual element is wrong. We thus affirm the district court's denial of Evans's petition.

USA v. Darrell Duncan No. 15-3485

Argued May 24, 2016 — Decided August 12, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 3:15-cr-46-RLM — **Robert L. Miller, Jr.**, *Judge*.
Before ROVNER, SYKES, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. The only issue in this appeal is whether a conviction under Indiana's robbery statute, Indiana Code § 35-42-5-1, includes as an element "the use, attempted use, or threatened use of physical force against the person of another" such that it qualifies as a violent felony under the elements clause of the definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(i). Our conclusion that Indiana robbery is a violent felony might seem about as interesting as a prediction that the sun will rise in the east tomorrow. Nevertheless, the intricate law that has developed around the classification of prior convictions for recidivist sentencing enhancements can produce some surprising results. See, e.g., *Mathis v. United States*, 579 U.S. —, 136 S. Ct. 2243 (2016) (burglary conviction not a violent felony under ACCA); *Johnson v. United States*, 559 U.S. 133 (2010) (battery conviction not a violent felony under ACCA); *United States v. Gardner*, 823 F.3d 793, 804 (4th Cir. 2016) (North Carolina common law robbery conviction not a violent felony under ACCA). A person can commit robbery under Indiana Code § 35-42-5-1 by taking property by "putting any person in fear." The statute itself does not tell us what the person must fear. Indiana case law teaches that the answer is fear of bodily injury. A conviction for such "robbery by fear" thus has as an element "the use, attempted use, or threatened use of physical force against the person of another." A conviction for robbery under the Indiana statute qualifies under the still-valid elements clause of the ACCA definition of violent felony... Finally, Duncan argues that the Indiana statute contains no requirement that the victim's fear of injury be reasonable. He theorizes that a person could be convicted of robbery under Indiana law if he "took property from an alektorophobe by showing him chickens, or a pteromerhanophobe by taking him on an airplane." Such a scheme could, he argues, fulfill the requirement that the victim be placed in fear of physical harm or injury while failing to comply with § 924(e)(2)(B)(i)'s requirement that the crime involve a threat of physical force. But in "applying the categorical approach, we are concerned with the ordinary case, not fringe possibilities." *United States v. Taylor*, 630 F.3d 629, 634 (7th Cir. 2010), citing *James v. United States*, 550 U.S. 192, 208 (2007) (categorical approach does not require that every conceivable factual offense qualify), over-ruled on other grounds by *Samuel Johnson*, 576 U.S. —, 135 S. Ct. 2551, and citing *United States v. Woods*, 576 F.3d 400, 404 (7th Cir. 2009). Perhaps some extraordinary set of circumstances could arise in which a defendant could be guilty of robbery by placing someone in fear of bodily injury *without* threatening physical force. As shown by Duncan's imaginative suggestions, such circumstances would be outliers, to put it mildly. See *Taylor*, 630 F.3d at 634 ("Taylor argues that there are ways to touch someone in a rude, insolent, or angry manner using a deadly weapon that do *not* necessarily involve the use, attempted use, or threatened use of force. While there may be hypothetical situations where this might be true (one involving utensils at a particularly contentious Thanksgiving dinner came up during oral argument), such possibilities are outliers.") (emphasis in original). In the ordinary case, robbery by placing a person in fear of bodily injury under Indiana law involves an explicit or implicit threat of physical force and therefore qualifies as a violent felony under § 924(e)(2)(B)(i). The judgment of the district court is AFFIRMED.

Guihu Yang v. Loretta Lynch No. 15-3357

Argued June 8, 2016 — Decided August 12, 2016

Case Type: Agency

Board of Immigration Appeals. No. A089-678-703

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

MANION, *Circuit Judge*. Guihu Yang, a 52-year-old Chinese citizen from Shanxi province, petitions for review of the denial of his application for asylum based on his fears of forced sterilization under China's one-child policy. Because substantial evidence supports the IJ's conclusions that Yang was not credible and

that he did not adequately corroborate his account, we deny the petition.

Woodman's Food Market, Inc. v. Clorox Company No. 15-3001

Argued February 12, 2016 — Decided August 12, 2016

Case Type: Civil

Western District of Wisconsin. No. 14-cv-734-slc — **Stephen L. Crocker**, *Magistrate Judge*.

Before WOOD, *Chief Judge*, ROVNER, *Circuit Judge*, and BLAKEY, *District Judge*.

WOOD, *Chief Judge*. Does size matter? Not always, as this case illustrates. The dispute before us arose when Clorox decided to sell the largest-sized containers of its products only to discount warehouses such as Costco and Sam's Club. Ordinary grocery stores, including plaintiff Woodman's Food Market, had to content themselves with smaller packages. Taking the position that package size is a promotional service, Woodman's sued Clorox for unlawful price discrimination under subsection 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e). The district court denied Clorox's motion to dismiss for failure to state a claim. Later it rejected Clorox's motion to dismiss the case on mootness grounds. After that, the district court certified both rulings for interlocutory appeal under 28 U.S.C. § 1292(b). We accepted the appeal, and we now reverse.

Alex Daniel v. Cook County Sheriff's Office No. 15-2832

Argued May 26, 2016 — Decided August 12, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 11 C 2030 — **Jorge L. Alonso**, *Judge*.

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

HAMILTON, *Circuit Judge*. In this appeal we address a specific piece of evidence that has divided the judges of the Northern District of Illinois. In a number of cases, including this one, plaintiffs have asserted that medical care at the Cook County Jail falls below constitutional standards as a matter of official policy, custom, or practice. The evidence question is whether such plaintiffs may use as evidence the 2008 findings from a U.S. Department of Justice investigation of health care at the Jail. The investigation found systemic flaws in the Jail's scheduling, record-keeping, and grievance procedures that produced health care below the minimal requirements of the United States Constitution. If those findings are admissible for the truth of the matters asserted, they go a long way toward meeting a plaintiff's burden of proving an unconstitutional custom, policy, or practice under *Monell v. Department of Social Services*, 436 U.S. 658, 694–95 (1978). The Department of Justice Report is hearsay if used to assert the truth of its contents, and the district court held that the Report was not admissible to prove the truth of its findings. But we conclude it should be admitted under the hearsay exception for civil cases in Federal Rule of Evidence 803(8)(A)(iii) for factual findings from legally authorized investigations. The district court granted summary judgment for defendants because the plaintiff had not offered evidence of an unconstitutional official custom, policy, or practice. We determine that he has offered sufficient evidence on summary judgment, and we therefore reverse and remand.

Ismael Lozano-Zuniga v. Loretta Lynch No. 15-2488

Argued February 19, 2016 — Decided August 12, 2016

Case Type: Agency

Board of Immigration Appeals. A200-778-163

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

ROVNER, *Circuit Judge*. Ismael Lozano-Zuniga is a native and citizen of Mexico. He arrived in the United States in April 2002, when he was fourteen years old, but was not admitted or paroled by an immigration officer. Lozano-Zuniga came to the attention of the Department of Homeland Security (Department) after an arrest and conviction for driving under the influence, and on September 17, 2010, the Department issued a notice to appear, charging Lozano-Zuniga with removability pursuant to INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), for having entered the country without being admitted or paroled... The record does not compel a conclusion that Lozano-Zuniga proved eligibility for withholding of removal or protection under CAT. Consequently, the petition for review is DENIED.

Syed Rizvi and Prime Builders v. Allstate Corporation No. 15-2469

Argued April 14, 2016 — Decided August 12, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 6924 — **Thomas M. Durkin**, *Judge*.
Before POSNER, KANNE, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. We hold in this appeal that a separate basis for federal subject matter jurisdiction is necessary when, in a federal supplemental proceeding, a judgment creditor seeks to maintain an action under 735 Ill. Comp. Stat. § 5/2-1402(c)(6) against a third party on the ground that the third party is indebted to the judgment debtor. Such an action is sufficiently independent of the underlying case as to require its own basis for subject matter jurisdiction. There was no separate basis for jurisdiction in this case, so we affirm the judgment of the district court dismissing the supplemental proceeding for lack of subject matter jurisdiction.

Paul Moriconi v. Travis Koester No. 15-2175

Argued January 7, 2016 — Decided August 12, 2016

Case Type: Civil

Central District of Illinois. No. 3:11-cv-03022 — **Thomas P. Schanzle-Haskins**, *Magistrate Judge*.
Before FRANK H. EASTERBROOK, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

ORDER

Paul Moriconi, the owner of a bar near a college campus, was tased four times by police who responded to calls regarding a fight at Moriconi's bar. Moriconi sued several officers for excessive force and false arrest, but on appeal the only claim remaining is his excessive force claim against Deputy Koester (the officer who tased him). Following a jury trial and verdict in favor of Deputy Koester, Moriconi sought a new trial, claiming the verdict was against the manifest weight of the evidence. Moriconi appeals the denial of his motion for a new trial, along with the district court's exclusion, *in limine*, of evidence that Deputy Koester had tased others in the past. We affirm.

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](#).