

Opinions for the weeks of December 21 - December 31, 2015

USA v. Frederick Garner Nos. 13-3506 & 15-3661

Argued November 6, 2015 — Decided December 21, 2015

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:09-cv-739 — **Larry J. McKinney**, *Judge*.

Southern District of Indiana, Indianapolis Division. No. 05-cr-0194-01 — **Larry J. McKinney**, *Judge*.

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

WOOD, *Chief Judge*. In 2007 Frederick Garner was convicted by a jury for federal gun and drug crimes; the court imposed a sentence of 322 months' imprisonment. Garner appealed, but counsel filed a no-merit brief under *Anders v. California*, 386 U.S. 738 (1967). We agreed with that assessment and dismissed the appeal. See *United States v. Garner*, 281 F. App'x 571 (7th Cir. 2008). About a year later, Garner filed a motion for relief under 28 U.S.C. § 2255, in which he asserted that he had received ineffective assistance of counsel. That motion lay dormant until January 2013, when new counsel revived it with an amendment raising two new arguments: (1) the enhancement of his sentence using a state conviction that was later vacated violated Garner's due process rights, and (2) his attorney was ineffective for failing to object to the introduction at both the guilt and sentencing stages of evidence that came directly from plea negotiations... All that remains is to dispose of the two appeals before us: No. 13-3506, which complains about the district court's rationale in the § 2255 case, and No. 15-3661, which is an untimely appeal from the resentencing. Because Garner prevailed in the § 2255 proceeding, he is not entitled to take an appeal in that case. We therefore DISMISS No. 13-3506. What remains is Garner's appeal from his resentencing, No. 15-3661. His notice of appeal in the criminal case is untimely (by quite a lot), but the time-bar of Federal Rule of Appellate Procedure 4(b) is not jurisdictional. See *Bowles v. Russell*, 551 U.S. 205, 212 (2007). Here, the government has agreed not to invoke Rule 4(b), and so the appeal in No. 15-3661 is properly before us. For the reasons we have already stated, we VACATE the new criminal sentence and REMAND this case to the district court for full resentencing, at which both sides will be free to present all their arguments. *So ordered*.

Carmen Carothers v. County of Cook No. 15-1915

Argued November 12, 2015 — Decided December 21, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 6620 — **Joan Humphrey Lefkow**, *Judge*.

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

BAUER, *Circuit Judge*. Plaintiff-appellant, Carmen Carothers ("Carothers"), filed a second amended complaint against the Office of Transitional Administrator, Earl Dunlap, and the County of Cook (collectively, the "Defendants"). Carothers alleged disability discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), as well as race discrimination, sex discrimination, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). The district court granted the Defendants' motion for summary judgment, and Carothers appealed. For the reasons that follow, we affirm the district court's opinion.

Kellie Lehouillier v. Carolyn Colvin No. 15-1516

Argued November 17, 2015 — Decided December 21, 2015

Case Type: Civil

Western District of Wisconsin. No. 14-cv-52-bbc — **Barbara B. Crabb**, *Judge*.

Before JOEL M. FLAUM, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

Two years after fracturing her right femur, Kellie Lehouillier applied for Social Security disability benefits claiming that she no longer could work because of that leg injury and other impairments, including a congenital heart defect. An agency Administrative Law Judge concluded that Lehouillier was still capable of performing unskilled, sedentary work. The agency's Appeals Council upheld that determination, as did a district court when Lehouillier sought judicial review under 42 U.S.C. § 405(g). Lehouillier appeals from the district court's ruling, which we affirm.

USA v. James Jones No. 15-1129

Argued October 7, 2015 — Decided December 21, 2015

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12 CR 697-2 — **Virginia M. Kendall**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

ORDER

James Jones pleaded guilty to possession with intent to distribute crack cocaine, 21 U.S.C. § 841(a)(1), and was sentenced to prison and supervised release. His plea agreement includes a broad appeal waiver. Despite that waiver, Jones filed this appeal challenging several conditions of supervised release as unconstitutionally vague and asking for a full resentencing. We dismiss the appeal.

Raul Salazar-Garcia v. Emely Galvan-Pinelo No. 15-2983

Argued December 3, 2015 — Decided December 22, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 09644 — **Edmond E. Chang**, *Judge*.

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

WOOD, *Chief Judge*. Raul Salazar Garcia and Emely Galvan Pinelo, both Mexican citizens, dated only briefly in 2001 and early 2002. But their relationship had one lasting consequence: in October 2002, Galvan gave birth to a child, D.S., in Monterrey, Nuevo León, Mexico. Although Galvan at all times has had physical custody of D.S., Salazar played an active part in the child's life. In 2013, Galvan and D.S. moved to Chicago. Salazar now seeks D.S.'s return to Mexico under the Hague Convention on Civil Aspects of International Child Abduction, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 (Oct. 25, 1980), to which both Mexico and the United States are parties. In the United States, it has been implemented through the International Child Abduction Remedies Act (ICARA), 22 U.S.C. § 9001 *et seq.* The Convention "entitles a person whose child has wrongfully been removed to the United States in violation of the Convention to petition for return of the child to the child's country of 'habitual residence,' unless certain exceptions apply." *Norinder v. Fuentes*, 657 F.3d 526, 529 (7th Cir. 2011). Once the child is in that country, the local courts are empowered to resolve any questions about custody, support, or other family law matters. This case presents us with three questions. First, we must determine whether, for the purpose of determining "rights of custody" under the Convention, a petitioner's proof of foreign law should be treated as a question of law or a question of fact. Second, we must decide whether Salazar has shown that he had sufficient rights over D.S. at the time of the retention to trigger the Convention's protections. Finally, we must evaluate whether the district court went beyond the bounds of its discretion when it declined to allow D.S. to stay in the United States pursuant to the Convention's mature-child exception. We conclude that the Hague Convention is no exception to the general rule, reflected in Federal Rule of Civil Procedure 44.1, that an issue about foreign law is a question of law, not fact, for purposes of litigation in federal court. We agree with the district court that Salazar had the necessary custodial right (referred to in Mexico either by its Latin name, *patria potestas*, or occasionally by its Spanish name, *patria potestad*) over D.S. at the time when Galvan refused to permit his return to Mexico. Because D.S.'s habitual residence is Mexico (a point that is now uncontested), Galvan's retention of D.S. is wrongful under the Convention. Finally, although we consider it a close question, we conclude that the district court had adequate reason

to refuse to defer to D.S.'s indications that he prefers to stay in the United States. We therefore affirm the district court's judgment.

Myron Kykta v. Jeff Ciaccio No. 15-2533

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Civil

Northern District of Illinois, Western Division. No. 13-cv-50325 — **Frederick J. Kapala**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Myron Kykta was found with drugs on his person and in his car after two deputy sheriffs from Winnebago County, Illinois, stopped and arrested him without a warrant. The deputies later turned up guns and more drugs when they searched Kykta's house without a warrant, and eventually he pleaded guilty in state court to possession of cannabis with intent to deliver, 720 ILCS 550/5(g), and unlawful use of a weapon by a felon, *id.* § 5/24-1.1(a). In this lawsuit under 42

U.S.C. § 1983, Kykta claims that the deputies arrested him and conducted the searches without probable cause, and that during the state criminal case they lied about their investigation. The district court granted the defendants' motion for judgment on the pleadings, see FED. R. CIV. P. 12(c), reasoning that, because of Kykta's guilty pleas, the doctrines of res judicata and collateral estoppel precluded his Fourth Amendment claim about his arrest and the searches. Moreover, the court continued, Kykta's assertion that the defendants had lied during the criminal case essentially was a claim for malicious prosecution. And that claim, the court reasoned, was not cognizable as a matter of federal constitutional law because Illinois provides an adequate tort remedy for malicious prosecution. We agree with the court's ruling on Kykta's claim of malicious prosecution, but we conclude that neither res judicata nor collateral estoppel bars the Fourth Amendment claim... In sum, the defendants did not establish that Kykta's guilty pleas have any preclusive effect on his Fourth Amendment claim. The dismissal of Kykta's claim for malicious prosecution is AFFIRMED, but the dismissal of his Fourth Amendment claim is VACATED, and the case is REMANDED for further proceedings consistent with this order.

USA v. Margarito Garcia-Fragoso No. 15-2512

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Criminal

Eastern District of Wisconsin. No. 12-CR-00256 — **Lynn Adelman**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Margarito Garcia-Fragoso appeals from the district court's denial of his motion under 18 U.S.C. § 3582(c)(2) for a sentence reduction based on the retroactive application of Amendment 782 to the sentencing guidelines. Because Garcia-Fragoso's sentence was already below the amended guidelines range and the court did not have the discretion to go any lower, we affirm.

Harkamal Singh v. Loretta Lynch No. 15-2307

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Agency

Board of Immigration Appeals. No. A087-760-934

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Harkamal Singh, a native and citizen of India, petitions for review of an order upholding the denial of his application for asylum and withholding of removal—based on past persecution on account of an imputed political opinion—as well as for protection under the Convention Against Torture (CAT). We deny the petition in part and dismiss it in part.

USA v. Daniel Eckstrom No. 15-2108

Argued November 18, 2015 — Decided December 22, 2015

Case Type: Criminal

Northern District of Indiana, Hammond Division. No. 2:13CR84-001 — **Philip P. Simon**, *Chief Judge*. Before RICHARD A. POSNER, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

ORDER

Daniel Eckstrom was sentenced to 240 years in prison after he sexually abused his daughter from the time she was eight until she was twelve, produced thousands of photos and hundreds of videos of his conduct, and distributed the images to others on the internet. He also produced child pornography involving two other children. He pleaded guilty to seven counts of producing child pornography, *see* 18 U.S.C. § 2251(a); one count of distribution, *see id.* § 2252(a)(2); and one count of possession, *see id.* § 2252(a)(4). Eckstrom challenges his sentence, arguing that the district court failed to consider mitigating factors under 18 U.S.C. § 3553(a). Eckstrom's argument is without merit, so we affirm the judgment of the district court.

Judy Powell v. Webster Smith No. 15-2009

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:15-cv-00533-WTL-DML — **William T. Lawrence**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Judy Powell sued Webster Smith, the director of the Indianapolis District Office of the Equal Employment Opportunity Commission, referring obliquely to the EEOC, executive orders, the United States Constitution, and the International Court of Justice. Powell attached to the complaint medical records, an op-ed written by former President Jimmy Carter, correspondence with the EEOC, and other documents. The district court could not discern a plausible federal claim and dismissed the complaint as frivolous and for failure to state a claim under 28 U.S.C. § 1915(e)(2). The court invited Powell to clarify her allegations, but her response failed to cure the identified deficiencies, so the court entered judgment against her. Powell's brief on appeal does not mention the district court's dismissal of her complaint, much less offer any coherent argument regarding that dismissal. The appeal is therefore dismissed for failing to raise any cognizable argument. *See* FED. R. APP. P. 28(a)(8); *Anderson v. Hardman*, 241 F.3d 544, 545–46 (7th Cir. 2001).

USA v. David Tresch No. 15-1993

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 12-cr-00658 — **Edmond E. Chang**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

After David Tresch was arrested for mail fraud, see 18 U.S.C. § 1341, he posted \$45,000 as security on a \$100,000 appearance bond. He later pleaded guilty and was sentenced to 27 months' imprisonment. He also was ordered to pay \$1.1 million in restitution and a \$100 special assessment. The district court then applied the \$45,000 to Tresch's monetary obligations, see 28 U.S.C. § 2044, and denied his motion to exonerate the bond, see FED. R. CRIM. P. 46(g). Tresch appeals this decision, which we affirm.

Wayne Norman v. AllianceOne Receivables Management No. 15-1780

Case Type: Civil

Submitted December 22, 2015 — Decided December 22, 2015

Northern District of Illinois, Eastern Division. No. 14 C 5930 — **Edmond E. Chang**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Wayne Norman appeals from the grant of summary judgment against him in this suit under the Telephone Consumer Protection Act, see 47 U.S.C. § 227(b)(1)(A)(iii). He contends that AllianceOne used an autodialer to make seven unsolicited calls to his cell phone. Autodialers use computer software to dial a phone number automatically and then, once a call is answered, the software connects the call recipient to a live representative. The Act forbids this. See *Mims v. Arrow Fin. Servs., LLC*, 132 S.Ct. 740, 745 (2012). The district court granted summary judgment after AllianceOne produced evidence showing that its calls to Norman were dialed manually, which the Act permits. Because that evidence is undisputed, we affirm.

USA v. Raul Vivas-Ceja No. 15-1770

Argued December 2, 2015 — Decided December 22, 2015

Case Type: Criminal

Western District of Wisconsin. No. 3:14CR00055-001 — **William M. Conley**, *Chief Judge*.

Before KANNE and SYKES, *Circuit Judges*, and GILBERT, *District Judge*.

SYKES, *Circuit Judge*. Raul Vivas-Ceja pleaded guilty to illegally reentering the United States after removal, the maximum sentence for which is raised to 20 years if the defendant has been convicted of an "aggravated felony" prior to removal. See 8 U.S.C. § 1326(b)(2). As relevant here, the definition of "aggravated felony" is supplied by the definition of "crime of violence" in 18 U.S.C. § 16(b), which includes "any ... offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The district court concluded that Vivas-Ceja's Wisconsin conviction for fleeing an officer was a crime of violence under § 16(b), raising the maximum sentence to 20 years. The court imposed a sentence of 21 months. Vivas-Ceja appeals, arguing that § 16(b)'s definition of "crime of violence" is unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Fifth Amendment's Due Process Clause prohibits the government from depriving a person of liberty under a statute "so vague that it fails to give ordinary people fair notice ... or so standardless that it invites arbitrary enforcement." *Id.* at 2556. In *Johnson* the Supreme Court held that sentencing a defendant under the so-called "residual clause" of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2)(B)(ii), violates this prohibition. Section 16(b) is materially indistinguishable from the ACCA's residual clause. We hold that it too is unconstitutionally vague according to the reasoning of *Johnson*. We therefore vacate Vivas-Ceja's sentence and remand for resentencing.

David Davenport v. Brian Rodgers No. 15-1622

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Prisoner

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

Southern District of Indiana, Indianapolis Division. No. 1:14-cv-0207-JMS-WGH — **Jane E. Magnus-Stinson**, *Judge*.

ORDER

David Davenport has sued Brian Rodgers, a civilian mail clerk at the jail where he was a pretrial detainee, for intercepting and giving to prosecutors letters in which he acknowledges his crimes. The district court ruled that, based on Davenport's allegations and the undisputed facts, Rodgers is entitled to judgment as a matter of law. Because that ruling is correct, we affirm the judgment for Rodgers.

Earnest Johnson, Jr. v. Federal Marine Terminals No. 15-1535

Submitted December 22, 2015 — Decided December 22, 2015

Case Type: Prisoner

Eastern District of Wisconsin. No. 13-CV-490-JPS — **J.P. Stadtmueller**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Earnest Johnson sued his former employer, Federal Marine Terminals, Inc., claiming under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, that the company had discriminated against him because he is African American. The district court granted summary judgment to FMT on the ground that Johnson had not filed a timely administrative charge against the company and thus could not bring a lawsuit under Title VII. We affirm the judgment.

Narayan Chetri v. Loretta E. Lynch No. 15-1220

Argued October 7, 2015 — Decided December 22, 2015

Case Type: Agency

Board of Immigration Appeals. No. A200-571-131

Before WILLIAM J. BAUER, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

ORDER

Narayan Khatri Chetri, a Nepalese citizen, sought asylum, withholding of removal, and protection under the Convention Against Torture based on harm he suffered at the hands of Maoist Party members because of his contrary political views. The immigration judge ("IJ") concluded that the harm was not severe enough to be deemed persecution and, in any case, the Nepalese government is not unwilling or unable to control the Maoist Party and its supporters. Because these conclusions are supported by substantial evidence, we deny the petition.

Alliance for Water Efficiency v. James Fryer No. 15-1206

Argued September 9, 2015 — Decided December 22, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 115 — **Jeffrey Cole**, *Magistrate Judge*.

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

EASTERBROOK, *Circuit Judge*. Alliance for Water Efficiency engaged James Fryer to analyze how urban water agencies' programs affect the elasticity of demand for water during droughts. The Alliance agreed to coordinate several sponsors of Fryer's analysis. Fryer prepared a draft report, which left the Alliance dissatisfied, and it filed this suit in an effort to prevent Fryer from publishing the report. But the California Department of Water Resources, one of the project's sponsors, is happy with Fryer's work and willing to present his findings under its auspices. The parties consented to final decision by a magistrate judge. See 28 U.S.C. §636(c)(3). After settlement negotiations, the parties agreed to go their separate ways. Fryer promised to remove the Alliance's name from his report and to issue it under California's sponsorship. He also promised to provide his data to the Alliance, which would issue a separate report in its own name. During a hearing on March 13, 2014, the judge stated (without objection from the litigants) that "[t]he parties have decided that they have a binding settlement agreement today even though there will be a written agreement [later]." Counsel then proceeded to "put on the record the material terms of the settlement." The first and foremost of these is that "James Fryer may prepare his own report for DWR [California] provided he removes all references to the Alliance for Water Efficiency, AWE, in his report. Conversely, AWE will prepare its own report for the remaining funding participants of the Project Advisory Committee excluding DWR."... The district court's injunction is vacated because it contains terms on which the parties have not agreed. If Fryer should violate any provision of the March 13 settlement, the Alliance can pursue a remedy in damages—in federal court if the injury exceeds \$75,000, and otherwise in state court. (The March 13 agreement specifies venue: the Alliance will sue Fryer only in California, and Fryer will sue the Alliance only in Illinois. This means that the Alliance cannot return to the Northern District of Illinois with any further contention that Fryer has failed to keep his promises.) Some of the magistrate judge's language suggests that he wanted Fryer to turn additional data over to the Alliance or a consultant, but no such requirement appears in the injunction or in any judgment satisfying Fed. R. Civ. P. 58. Fryer is therefore under no obligations beyond those undertaken in the settlement agreement.
REVERSED

Caesars Entertainment Operating Co. v. BOKF, N.A. No. 15-3259

Argued December 10, 2015 — Decided December 23, 2015

Case Type: Bankruptcy from District Court

Northern District of Illinois, Eastern Division. No. 15 C 6504 — **Robert W. Gettleman**, *Judge*.

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

POSNER, *Circuit Judge*. This is an immense, and immensely complicated, bankruptcy proceeding, but the issue presented by the appeal is straightforward, enabling us to spare the reader a mountain of details. For both the bankruptcy judge, and the district judge to whom the bankruptcy judge's ruling was unsuccessfully appealed, based their decisions on a question of statutory interpretation. We must decide simply whether their interpretation was correct... We don't say that the stay sought by CEOC must be granted—that's an issue for the bankruptcy judge to resolve in the first instance—but only that both he and the district judge erred in thinking that section 105(a) as interpreted in *Fisher* and *Teknek* foreclosed such a procedure. That was a misreading of the statute and our cases. The denial of the injunction sought by CEOC is therefore vacated and the case remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED

Martin Mendoza-Sanchez v. Loretta Lynch No. 15-2551

Submitted July 22, 2015 — Decided December 23, 2015

Case Type: Agency

Board of Immigration Appeals. No. A038-780-186.

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

POSNER, *Circuit Judge*. The petitioner, a citizen of Mexico, asks us to vacate an order of the Board of Immigration Appeals affirming an immigration judge's denial of his application, based on the Convention

Against Torture (an international convention to which the United States belongs), for deferral of removal. He contends that removal (which would mean returning him to Mexico) would result in his death—a form of torture within the meaning of the Convention, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, Senate Treaty Doc. No. 100–20, p. 20, 1465 U.N.T.S. 85, Art. 1(1); 8 C.F.R. § 1208.18(a)(4)(iii)—at the hands of the notorious Mexican drug cartel La Linea... We explained in *Rodriguez-Molinero* that if the Mexican government could be expected to protect the petitioner from the drug cartel that wanted to kill him, if he were returned to Mexico, the risk that he would be tortured or killed might be too slight to entitle him to deferral of removal. The immigration judge in that case had remarked that the Mexican government was *trying* to control the drug gangs, but it is success rather than effort that bears on the likelihood of a person’s being killed or tortured if removed to Mexico. *Rodriguez-Molinero v. Lynch*, *supra*, 2015 WL 9239398, at *6. In the present case, as in *Rodriguez-Molinero*—unsurprisingly since it too is about deferral of removal to Mexico of a Mexican citizen who appears to be in the sights of one of the powerful Mexican drug cartels—no evidence has been presented that the Mexican government can protect the citizen from torture at the hands of local public officials or to which local public officials are willfully blind. As we said earlier in this opinion, “acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.” 8 C.F.R. § 1208.18(a)(7). Mendoza-Sanchez appears to have a strong case for deferral of removal. But as explained at the beginning of this opinion, at the government’s request we have decided to remand the case to the Board of Immigration Appeals— which we trust will pay careful heed to the analysis in this opinion and in *Rodriguez-Molinero*. REMANDED

Julia Egan v. David Pineda No. 15-2011

Submitted November 13, 2015 — Decided December 23, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 12 C 9034 — **Gary S. Feinerman**, *Judge*.
Before POSNER, RIPPLE, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The district judge imposed a \$5,000 sanction on lawyer Lewis Spicer for misconduct in representing plaintiff Egan in this case, which alleged sex discrimination and the creation of a hostile work environment. The judge imposed the sanction pursuant to the inherent authority of federal judges to sanction attorneys for actions taken “in bad faith.” *Chambers v. NASCO Inc.*, 501 U.S. 32, 45–46 (1991); *Johnson v. Cherry*, 422 F.3d 540, 548–49 (7th Cir. 2005). Bad faith can be “recklessly making a frivolous claim,” *Mach v. Will County Sheriff*, 580 F.3d 495, 501 (7th Cir. 2009), which is an accurate description of the conduct for which Spicer was sanctioned. And the claim he advanced on behalf of his client, the plaintiff, was not only frivolous but also damaging to the defendant... Moreover, the record contradicts his claim that “when the errant allegation was brought to the attention of Mr. Spicer, he promptly sought to have it withdrawn and stipulated that Paragraph 75 contained incorrect and untrue allegations.” The error was discovered during Egan’s deposition. That took place in January 2014. Not until July 2014, six months later, did Spicer file a stipulation stating that “Paragraph 75 of the Complaint contains an incorrect and untrue allegation regarding sexual assault.” The district judge’s imposition of the \$5,000 sanction on attorney Spicer was amply justified. AFFIRMED

Roy Mitchell v. Edward Wall No. 15-1881

Submitted October 29, 2015 — Decided December 23, 2015

Case Type: Civil

Western District of Wisconsin. No. 15-cv-108-wmc — **William M. Conley**, *Chief Judge*.
Before WOOD, *Chief Judge*, and POSNER and EASTERBROOK, *Circuit Judges*.

POSNER, *Circuit Judge*. Roy Mitchell—physically a man, psychologically a woman—appeals from the denial of her motion for a preliminary injunction to compel the probation officers assigned to supervise her to alter the conditions of her probation, as by allowing her to reside with her family rather than in the

men's homeless shelter to which she is currently assigned and referring her to counseling and treatment programs for her gender dysphoria. She has spent much of her adult life either homeless or behind bars. After a recent stint in a Wisconsin state prison, from which she was released on probation, she filed the present suit, seeking relief under 42 U.S.C. § 1983 against two administrators in the Wisconsin Department of Corrections, two doctors at Columbia Correctional Institution, and three probation officers in Dane County, Wisconsin. The suit alleges that during her incarceration the administrators and the doctors were deliberately indifferent to her acute need for psychological and hormonal therapy for her gender dysphoria—therapy recommended by a consultative psychologist of the Department of Corrections—and further that her probation officers demonstrated deliberate indifference to her condition by prohibiting her from moving from a men's homeless shelter to her mother's house and from dressing as a woman in public. She seeks damages but in the interim seeks a preliminary injunction compelling the probation officers to permit her to move in with her mother and sister and dress like a woman, and to refer her to the treatment programs she needs. The district judge, scrutinizing the complaint for compliance with 28 U.S.C. § 1915(e)(2)(B), allowed the plaintiff to proceed with her claims against the two prison doctors but not against the other defendants. He denied her motion for a preliminary injunction on the grounds that she hadn't complied with the rules governing injunctive relief, that the injunctive relief she sought was unrelated to the merits of her claims against the doctors (the only claims that had survived the judge's screening of her complaint), and that she had failed to demonstrate either that she was likely to prevail on the underlying claims or would suffer irreparable harm if the injunctive relief she sought was denied. The present appeal is limited to the denial of the preliminary injunction... And so it is in this case. For as we explained in *Gjertsen*, the Supreme Court's decision in *Munsingwear* establishes that "since the requirement of vacating the lower-court order when it becomes moot on appeal is for the benefit of the loser in the lower court, he can waive it, and does so by failing to invoke it." 757 F.2d at 203 (emphasis added). APPEAL DISMISSED

USA v. Bryce Woods No. 15-1495

Argued November 18, 2015 — Decided December 23, 2015

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 11 CR 595-2 — **Virginia M. Kendall**, *Judge*.
Before POSNER, MANION, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The defendant was found guilty of multiple counts of health care fraud, 18 U.S.C. § 1347, and Judge Kendall sentenced him to 70 months in prison (a shade under six years). His appeal argues only that he should be resentenced because the judge did not address one of his arguments for a lighter sentence—that after committing the fraud he landed an honest job and performed it in exemplary fashion, demonstrating that he has been rehabilitated. The fraud was the brainchild of a pair of companies (both run by the same doctor) for which the defendant worked. The companies purported to provide psychological services to residents of nursing homes. The boss of the enterprise directed the defendant, who had significant administrative duties, to file almost 34,000 claims for Medicare reimbursement for services that either were not provided at all or did not comply with Medicare requirements for reimbursement. The defendant, although not a psychologist, conducted some of the phony treatment sessions himself; others were conducted by unqualified graduate students. Had the claims of Medicare reimbursement been paid in full, the government would have been out almost \$3.5 million between 2006 and 2011; as it was, the government paid the fraudulent enterprise only \$1.5 million. Judge Kendall correctly calculated a guidelines range for the defendant of 70 to 87 months, and the sentence she imposed was thus at the bottom of the range... Since the defendant's employment argument borders on the frivolous, the sentencing judge was entitled to ignore it, and to focus as she did on the other, more substantial arguments that the defendant made for leniency, having to do with the extent of his participation in the conspiracy and his lack of any other criminal history. The judge also discussed at length the details of the offense and the defendant's family background. We are confident that she imposed an appropriately individuated sentence. AFFIRMED

Dianne Khan v. USA No. 14-3292

Argued November 18, 2015—Decided December 23, 2015

Case Type: Civil

Eastern District of Wisconsin. No. 2:14-cv-00285-LA — **Lynn Adelman**, *Judge*.
Before POSNER, MANION, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. In 2006, twelve U.S. Marshals arrested Dianne Khan in her apartment for making false statements to the federal Department of Housing and Urban Development. (She was found guilty of the offense later that year and sentenced to five years' probation.) The marshals were waiting for her in the apartment, and when she entered they confronted her at gunpoint. Why twelve marshals with drawn guns were thought necessary to arrest a woman for a nonviolent offense has not been explained. When she asked to use the bathroom, a marshal first patted her down and then watched her pull down her underwear, urinate, and wipe and cleanse herself according to a Muslim ritual that she observes. The marshals handcuffed her and refused to allow her to cover her head. And while attempting to buckle her seatbelt in the back seat of the squad car that was to take her to jail, a marshal touched her breasts three or four times, though apparently this was attributable to his clumsiness, rather than being intentional. In June, three months after her arrest, Khan wrote to the Marshals Service Office of Inspection (now called the Office of Professional Responsibility) describing the indignities to which she'd been subjected during the arrest and complaining about the absence of any female agents, her having to expose herself to a male agent in her bathroom, being patted down, and having her breasts touched by a male agent because he didn't know how to fasten the seat belt on her. The letter did not ask the Office of Inspection to discipline the marshals who had arrested her or pay her compensation for the way she'd been treated—which, if her allegations are true (a big if, since we have only her allegations), seems indeed improper. The Office replied to the letter about two weeks later, stating that it took her complaint of mistreatment by the arresting marshals "very seriously." But in a second letter, sent three months later, the Chief of the Office of Inspection told her she was "not entitled to know the outcome of the investigation" because of "privacy issues." Three years later, however, through the intercession of a Senator, Khan learned that the Marshals Service had in 2006 "reviewed the incident and found no evidence of misconduct" and had therefore "closed the case."... The judgment of the district court is AFFIRMED.

Dorothy Cain v. City of Muncie No. 15-2225

Case Type: Civil

Submitted December 22, 2015 —Decided December 28, 2015

Southern District of Indiana, Indianapolis Division. No. 13-cv-01127 — **Sarah Evans Barker**, *Judge*.
Before DIANE P. WOOD, *Chief Judge*; JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

ORDER

Dorothy Cain, a former Parks Department employee for the City of Muncie, Indiana, sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, claiming that she suffered sex discrimination and was retaliated against when she complained. The district court granted summary judgment for the City, and Cain appeals. We dismiss the appeal.

John Tate v. SCR Medical Transportation Inc. No. 15-1447

Argued December 15, 2015 — Decided December 28, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 10165 — **Samuel Der-Yeghiayan**, *Judge*.
Before BAUER, POSNER, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. John Tate filed this suit pro se, seeking leave to proceed *in forma pauperis*. The suit charges the defendant (Tate's former employer, a company engaged in providing non-emergency medical transportation for disabled persons and veterans) with having discriminated against him and then having retaliated against him for complaining about the discrimination. See 42 U.S.C. §§ 2000e *et seq.* (Title VII of the Civil Rights Act of 1964) and 42 U.S.C. §§ 12101 *et seq.* (Americans with Disabilities Act). The district judge dismissed the suit, without allowing the plaintiff to amend the complaint, on the authority of 28 U.S.C. § 1915(e)(2)(B)(ii). That section, a counterpart to Fed. R. Civ. P. 12(b)(6), requires dismissal of a complaint filed by a plaintiff seeking to proceed *in forma pauperis* if the complaint "fails to state a claim on which relief may be granted." The actual word in the statute is "case" rather than "complaint," but by analogy to Rule 12(b)(6) ("a party may assert the following defenses [to a claim for relief in any pleading] by motion: ... failure to state a claim upon which relief can be granted") we have read "case" in section 1915(e)(2)(B)(ii) to mean "complaint." *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1025 n. 5 (7th Cir. 2013). The judge ruled that Tate's complaint failed to state such a claim because it contained "little more than conclusory legal jargon such as that he [the plaintiff] was 'subjected to sexual harassment,' and that he 'complained,' that he 'believe[d he] was discriminated against because of [his] disability' and his 'sex, male, and in retaliation for engaging in protected activity.'" The judge continued that Tate had placed "checks in a variety of boxes provided on his complaint form with conclusory statements such as that the Defendant 'failed to reasonably accommodate the plaintiff's disabilities.'" ... Had the judge told the plaintiff before dismissing his suit what was missing from the complaint, or had he dismissed just the complaint and not the suit and informed the plaintiff of a plaintiff's right to rectify the deficiencies of his complaint in an amended complaint, we might have been spared this appeal, and the district judge a remand. See *Hughes v. Farris*, No. 15-1801, 2015 WL 8025491, at *1–2 (7th Cir. Dec. 7, 2015); *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998); *Grayson v. Mayview State Hospital*, 293 F.3d 103, 108–09 (3d Cir. 2002). The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Joshua Howard v. William Pollard No. 15-8025

Submitted December 4, 2015 — Decided December 29, 2015

Case Type: Miscellaneous

Eastern District of Wisconsin. No. 15-CV-557 — **Rudolph T. Randa**, *Judge*.

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

PER CURIAM. The pro se plaintiffs in this case—a group of inmates at the Waupun Correctional Institution in Wisconsin—brought this federal action against the governor of Wisconsin, the prison warden, and roughly 30 other persons. They alleged (among other things) that the defendants were violating the Eighth Amendment by providing inadequate mental-health services and by permitting overcrowding at Wisconsin's prisons. The plaintiffs filed a motion for class certification, which the district court denied on the ground that, because they were proceeding pro se, the plaintiffs could not adequately represent a class. The plaintiffs now petition this court under Federal Rule of Civil Procedure 23(f) for permission to appeal the district court's decision. We deny the petition.

Zhong Li v. Loretta Lynch No. 15-2257

Submitted December 4, 2015 — Decided December 30, 2015

Case Type: Agency

Board of Immigration Appeals. No. A087-998-980

Before KENNETH F. RIPPLE, *Circuit Judge*; ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*.

ORDER

Zhong Li, a 24-year-old Chinese citizen, asserts that he was persecuted in his home country for attending an underground Christian church. He petitions for review of the denial of his applications for asylum, withholding of removal, and protection under the Convention Against Torture. Because the record does not compel a conclusion contrary to that of the immigration judge's, we deny the petition.

USA v. Antonio West No. 14-2514

Argued April 6, 2015 — Decided December 30, 2015

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 11 CR 61 — **Charles P. Kocoras**, *Judge*.

Before POSNER and SYKES, *Circuit Judges*, and SIMON, *Chief District Judge*.

SYKES, *Circuit Judge*. Antonio West was indicted for possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1). The gun in question—an old M1 carbine—apparently belonged to his late father and was found in the attic of the family home during a consensual search for a stolen television. No fingerprints were recovered from the gun, and there was conflicting evidence about whether West actually lived at the house at the time. The government's case for possession rested heavily on West's admission to the police that the gun was his. West's attorney moved to suppress the statement based on expert testimony that West has a low IQ, suffers from mental illness, and scored high on the Gudjonsson Suggestibility Scale, a psychological test that measures a person's degree of suggestibility. The district judge denied the motion, finding that West was competent to waive his *Miranda* rights and did so voluntarily. West's attorney then moved to admit the expert testimony at trial for three purposes: to assist the jury in assessing the reliability of the confession, to negate the intent element of the offense, and to explain West's unusual demeanor should he choose to testify. The government objected to admission of the expert testimony on the last two grounds but agreed that the evidence was admissible on the issue of the reliability of West's confession. The judge excluded the expert evidence altogether, and the jury found West guilty. West argues that excluding the expert testimony was reversible error. We agree. The reliability of a confession is a factual question for the jury, and the expert's testimony was relevant and admissible on that issue. The government acknowledged as much in the district court, though it now defends the judge's ruling. Because the government's case turned largely on the jury's acceptance of West's confession, the exclusion of the expert testimony was not harmless error. We reverse and remand for a new trial.

Rufino A. Estrada-Martinez v. Loretta E. Lynch No. 15-1139

Case Type: Agency

Board of Immigration Appeals. No. A073-223-323

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

MANION, *Circuit Judge*, concurs.

HAMILTON, *Circuit Judge*. Petitioner Rufino Antonio Estrada-Martinez faces removal to Honduras, a country that he fled in 1994 after police there detained and tortured him. An immigration judge granted Estrada relief from removal, finding that he will more likely than not face torture if he is removed to Honduras. The Board of Immigration Appeals disagreed regarding the likelihood that Estrada will be tortured, so it reversed the judge's grant of relief. Estrada has petitioned for review. He claims both eligibility for "withholding of removal" under the Immigration and Nationality Act ("the Act") and the United Nations Convention Against Torture ("the Convention") and eligibility for "deferral of removal" under only the Convention. Estrada is not eligible for withholding of removal because he was convicted in an Illinois state court of statutory rape in 1996, and the Board has characterized his conviction as "particularly serious." Committing a crime that the Attorney General deems "particularly serious" bars withholding of removal under the Act and the Convention. We do not have jurisdiction to review that discretionary judgment unless a petitioner presents a legal or constitutional question, and Estrada's attempt to frame his challenge to the "particularly serious crime" determination as a legal issue is not persuasive. Estrada

may well be eligible, however, for deferral of removal under the Convention. As noted, the immigration judge found it more likely than not that Estrada will be tortured if he is removed to Honduras. The Board was required to review that factual finding only for clear error, not *de novo*. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I. & N. Dec. 586, 590 (BIA 2015). In this case the Board failed to apply the clear error standard of review, so we reverse the Board with respect to Estrada's request for deferral of removal. We remand for reconsideration of the immigration judge's decision under the correct standard of review.

Gregory Jean-Paul v. Timothy Douma No. 14-3088

Argued November 18, 2015 — Decided December 31, 2015

Case Type: Prisoner

Eastern District of Wisconsin. No. 12-C-697 — **Patricia J. Gorence**, *Magistrate Judge*.
Before POSNER, MANION, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Gregory Jean-Paul, a Wisconsin prisoner, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 arguing that he did not knowingly and intelligently waive his right to counsel on his direct criminal appeal in state court. The district court denied relief. We affirm the judgment because the state appellate court reasonably concluded that his waiver was knowing and intelligent.

CFE Group, LLC v. FirstMerit Bank, N.A. No. 14-2554

Submitted August 4, 2015 — Decided December 31, 2015

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 C 8021 — **William T. Hart**, *Judge*.
Before POSNER, KANNE, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. The principal question in this appeal is whether the district court correctly refused to enjoin a state court from adjudicating a case that the state-court plaintiff had voluntarily dismissed in an earlier incarnation in federal court. In the earlier federal case, FirstMerit Bank had sued CFE Group, LLC and related parties (for simplicity, CFE) to enforce a promissory note and guaranties. CFE moved to dismiss that complaint. The district court granted the motion and dismissed FirstMerit's complaint without prejudice, but with leave to amend. Rather than amend, FirstMerit filed a notice of voluntary dismissal of the action under Federal Rule of Civil Procedure 41(a)(1)(A)(i). FirstMerit then filed a new complaint in an Illinois state court asserting the same claims. CFE moved to dismiss the new suit, arguing that the earlier federal dismissal meant that FirstMerit's claims were barred by claim preclusion (*res judicata*). The state trial court denied the motion. CFE responded to that denial by filing this new federal action asking the district court to enjoin the state court under the relitigation exception to the federal Anti-Injunction Act, 28, U.S.C. § 2283. The district court refused, ruling that the dismissal of the first federal case was not a judgment on the merits and therefore did not preclude the state action. The district court dismissed this action with prejudice. CFE has appealed. We affirm. We agree with the district court's reasoning and add that CFE's request for an injunction was also barred by the Full Faith and Credit Act, 28 U.S.C. § 1738. We affirm the district court's judgment dismissing the case. We also find that the appeal is frivolous and that sanctions on CFE are appropriate under Federal Rule of Appellate Procedure 38.

Jeffrey Brown v. UAL Corporation No. 13-2800

Argued December 15, 2015 — Decided December 31, 2015

Case Type: Bankruptcy from District Court

Northern District of Illinois, Eastern Division. No. 13 cv 2385—**Ronald A. Guzmán**, *Judge*.
Before BAUER, POSNER, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Jeffrey Brown, a former flight attendant for United Airlines, appeals from a district court decision upholding the bankruptcy court's denial of his motion to reopen the company's Chapter 11 bankruptcy, which was closed in 2009. Brown wanted the bankruptcy case reopened so that he could pursue pre-petition state-law claims of employment discrimination arising from his discharge in 2001. The district court agreed with the bankruptcy judge that Brown's years of inaction had amounted to an abandonment of those claims. We affirm. The bankruptcy court did not abuse its discretion by denying Brown's motion to reopen.

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](#).