

Opinions for the week of November 4 – November 8, 2019

USA v. Scott A. Kuehn No. 19-2217

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Criminal

Southern District of Illinois. No. 3:14-CR-30151-NJR-1 — **Nancy J. Rosenstengel**, *Chief Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y.

SCUDDER, *Circuit Judge*.

ORDER

Scott Kuehn, a federal inmate, appeals orders denying two motions to modify his terms of supervision. Kuehn is serving a 60-month sentence for possession and distribution of child pornography, to be followed by five years of supervised release. About two years before his scheduled release date, Kuehn moved under 18 U.S.C. § 3583(e)(2) to modify his conditions of supervision. Without addressing the merits of Kuehn's request, the district court denied the motion as premature and directed Kuehn to refile it closer to his planned release. A mere 19 days later, Kuehn filed a motion to reconsider, which the court also denied as premature and gave renewed assurance that it would consider Kuehn's request if he filed it within three months of his release. The court also said that it would consider then whether to hold a hearing and appoint counsel. Kuehn's appeal of the first order is untimely, and the district court did not abuse its discretion in the second order, so we dismiss in part and affirm in part.

Helene Tonique Williams v. Toni Preckwinkle No. 19-2214

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 19-cv-3743 — **Rubén Castillo**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y.

SCUDDER, *Circuit Judge*.

ORDER

Helene Tonique Williams, also known as "Helene Re Re T. Williams," a restricted filer in the Northern District of Illinois, sued Toni Preckwinkle, the City of Chicago, Cook County, and the Chicago Police Department's Seventh District, claiming that she was arrested, indicted, and deprived of her gun as retaliation against her for filing lawsuits. She now appeals the district court's termination of her case for failure to comply with the restricted-filer rules. Because she does not offer any reason that the district court's action was erroneous, we dismiss the appeal.

Eric Conner v. Scott Rubin-Asch No. 19-1626

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Prisoner

Eastern District of Wisconsin. No. 17-CV-1388 — **David E. Jones**, *Magistrate Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y.

SCUDDER, *Circuit Judge*.

ORDER

Eric Conner, a Wisconsin inmate, sued a prison psychologist and eight correctional officers for retaliation and deliberate indifference because they removed him from clinical observation, despite his threats of self-harm, after he refused to speak with psychological staff. Conner attempted suicide later that day. The district court entered summary judgment for the defendants. Because Conner lacks evidence that any defendant acted with deliberate indifference or a retaliatory motive, we affirm the judgment.

USA v. Ryan Witter No. 19-1522

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Criminal

Western District of Wisconsin. No. 3:18CR00077-003 — **William M. Conley**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Ryan Witter pleaded guilty to conspiracy to distribute methamphetamine, in violation of 18 U.S.C. §§ 841(a)(1) and 846. The district judge sentenced him to 126 months of imprisonment—below the Sentencing Guidelines range of 168 to 210 months—and three years of supervised release. Witter appeals, but his appointed lawyer asserts that the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738, 744 (1967). We invited Witter to identify potential issues for appeal, see CIR. R. 51(b), but he did not do so. Counsel’s brief explains the nature of the case and addresses the issues that an appeal of this kind might be expected to involve. Because the analysis appears thorough, we limit our review to the subjects that counsel discusses. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014).... We GRANT counsel’s motion to withdraw and DISMISS the appeal.

USA v. Warren Griffin, II No. 19-1479

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Criminal

Southern District of Illinois. No. 18-cr-30136-MJR — **Michael J. Reagan**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Warren Griffin II pleaded guilty to illegally possessing a firearm as a felon, see 18 U.S.C. § 922(g), and was sentenced above the guidelines range to 37 months’ imprisonment. Griffin appeals, but his counsel argues the appeal is frivolous and moves to withdraw. See *Anders v. California*, 386 U.S. 738, 746 (1967). Because counsel’s brief appears thorough, we limit our review to the issues counsel discusses and the additional argument that Griffin raises in his Circuit Rule 51(b) response. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014)....We GRANT counsel’s motion to withdraw and DISMISS the appeal.

Reginald Young v. USA No. 18-3415

Submitted May 30, 2019 — Decided November 4, 2019

Case Type: Prisoner

Southern District of Illinois. No. 17-cv-946-JPG-RJD — **J. Phil Gilbert**, *Judge*.

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

EASTERBROOK, *Circuit Judge*. Illinois requires the plaintiff in a medical-malpractice suit to file an affidavit stating that “there is a reasonable and meritorious cause” for litigation. 735 ILCS 5/2-622. The plaintiff needs a physician’s report to support the affidavit’s assertions. The report must show that the physician has reviewed the plaintiff’s medical records and must justify the conclusion that “a reasonable and meritorious cause” exists. This requirement applies to malpractice litigation in federal court because §5/2-622 is a substantive condition of liability. *Hahn v. Walsh*, 762 F.3d 617 (7th Cir. 2014).... Reginald Young, a federal prisoner, filed this suit alleging that physicians at his prison committed malpractice by not performing or authorizing surgery to correct a cataract that causes blurred vision and headaches. Two physicians recommended surgical intervention, but others disagreed; Young maintains that the two physicians’ recommendations prove that the lack of surgery is medical malpractice. But Young did not

provide, with the complaint or later, an affidavit complying with §5/2-622, nor did he ask any physician to prepare the sort of report that would have accompanied such an affidavit. Instead he asserted that a recommendation for surgery is the only medical document he needs. The district judge disagreed and granted a motion by the United States to dismiss the complaint or for summary judgment. 2018 U.S. Dist. LEXIS 151134 (S.D. Ill. Sept. 5, 2018)... We agree with this analysis, which means that the judgment must be AFFIRMED.

Edward Novotny, III v. City of Wauwatosa No. 18-1530

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Civil

Eastern District of Wisconsin. No. 2:17-cv-160-JPS — **J.P. Stadtmueller**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Upset that he received a citation for drunk driving, Edward Novotny sued various defendants (police officers, private security guards, a prosecutor, and the city government of Wauwatosa) for conspiring to violate his rights under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. The district court dismissed two of the defendants for lack of service, and it entered summary judgment for the remaining defendants because Novotny's Fourth Amendment claims were precluded and he could not establish a due process violation. We affirm.

Michael Morris v. Tammy Dickman No. 17-3074

Submitted November 1, 2019 — Decided November 4, 2019

Case Type: Prisoner

Western District of Wisconsin. No. 15-cv-712-wmc — **William M. Conley**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Michael Morris, a Wisconsin inmate, sued a Wisconsin clerk of court and two other state officials under 42 U.S.C. § 1983, alleging that they violated the First Amendment by denying him access to the courts to litigate several petitions for writs of mandamus. The district court dismissed one defendant at screening and later granted the remaining defendants' motion to dismiss. We affirm the judgment because Morris fails to allege that any defendant prevented him from litigating meritorious petitions. This case arose after Morris lost his bids on petitions for writs of mandamus that he filed with Wisconsin's courts. Morris principally blames one state employee—Diane Fremgen (the Clerk of Court for Wisconsin's appellate and supreme court)—for several losses. On review of his dismissed complaint, we accept his factual allegations as true. See *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006)... We have considered Morris's remaining arguments, and none has merit. AFFIRMED

Stacey Mooney v. Illinois Education Associatio No. 19-1774

Argued September 20, 2019 — Decided November 5, 2019

Case Type: Civil

Central District of Illinois. No. 1:18-cv-1439-JBM — **Joe Billy McDade**, *Judge*.

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

Manion, *Circuit Judge*, concurring.

WOOD, *Chief Judge*. Stacey Mooney is a public-school teacher in Eureka (Illinois) Community School District #140. She is not a member of respondent Illinois Education Association ("IEA"), the union that

serves as the exclusive representative of her employee unit in collective bargaining with the school district. From the time she started as a public employee until June 2018, the District deducted from her paycheck and sent to the union a fair-share fee that contributed to the costs incurred by the union in its labor-management activities. Both the Illinois Public Relations Act, 5 ILCS § 315/6, and existing Supreme Court precedent, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), authorized this fee arrangement. That state of affairs came to an end when, in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), the Supreme Court overruled *Abood* and announced that compulsory fair share fee arrangements violate the First Amendment rights of persons who would prefer not to associate with the union that represents their employee unit. 138 S. Ct. at 2460. Following *Janus*, state employers in Illinois immediately ceased deducting fair-share fees from the paychecks of nonmembers of public sector unions.... For the reasons we set forth in more detail in *Janus v. AFSCME, No. 19-1553*, decided today, we AFFIRM the district court's judgment.

Mark Janus v. American Federation of State No. 19-1553

Argued September 20, 2019 — Decided November 5, 2019

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:15-cv-01235 — **Robert W. Gettleman**, *Judge*.

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

Manion, *Circuit Judge*, concurring.

WOOD, Chief Judge. For 41 years, explicit Supreme Court precedent authorized state-government entities and unions to enter into agreements under which the unions could receive fair-share fees from nonmembers to cover the costs incurred when the union negotiated or acted on their behalf over terms of employment. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). To protect nonmembers' First Amendment rights, fair-share fees could not support any of the union's political or ideological activities. Relying on *Abood*, more than 20 states created statutory schemes that allowed the collection of fair-share fees, and public-sector employers and unions in those jurisdictions entered into collective bargaining agreements pursuant to these laws. In 2018, the Supreme Court reversed its prior position and held that compulsory fair-share or agency fee arrangements impermissibly infringe on employees' First Amendment rights. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2461 (2018). The question before us now is whether Mark Janus, an employee who paid fair-share fees under protest, is entitled to a refund of some or all of that money. We hold that he is not, and so we affirm the judgment of the district court.

USA v. Charles Black, Jr. No. 19-1512

Submitted November 1, 2019 — Decided November 5, 2019

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. 1:11CR00083-001 — **Tanya Walton Pratt**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y.

SCUDDER, *Circuit Judge*.

ORDER

Charles T. Black, Jr., a federal inmate, appeals the denial of his post-judgment motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) because of changes in the sentencing guidelines. Because he waived his right to challenge his sentence, we affirm.

USA v. Brian Gimelson No. 19-1293

Submitted November 1, 2019 — Decided November 5, 2019

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:17CR00094-001 — **Tanya Walton Pratt**, *Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

After Brian Gimelson, an investment banker, created and used a limited liability corporation in his wife's name to sell Caravaggio's painting David with the Head of Goliath, he pleaded guilty to two counts of attempting to evade or defeat taxes in violation of 26 U.S.C. § 7201. The district court sentenced him to 18 months' imprisonment plus restitution. Gimelson appeals, but his appointed counsel asserts that the appeal is frivolous and seeks to withdraw. See *Anders v. California*, 386 U.S. 738 (1967). Gimelson did not respond to counsel's motion. See CIR. R. 51(b). Counsel's brief explains the nature of the case and addresses potential issues that we might expect an appeal of this kind to involve. Because the analysis appears thorough, we limit our review to the subjects that counsel discusses. See *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014). Counsel tells us that she consulted Gimelson and that he does not wish to challenge his guilty plea. Thus, counsel properly avoids discussing the voluntariness of the plea. See *United States v. Konczak*, 683 F.3d 348, 349 (7th Cir. 2012).... Accordingly, we GRANT counsel's motion to withdraw and DISMISS the appeal.

Ricky Franklin v. Express Text, LLC No. 19-2041

Submitted October 9, 2019 — Decided November 6, 2019

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 16 C 9660 — **Robert W. Gettleman**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; WILLIAM J. BAUER, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

ORDER

In this successive appeal we revisit Ricky Franklin's claim that Express Text violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by sending him 115 unwanted text messages between July 2015 and September 2016. Under the statute, Express Text can be liable only if it made any call or sent any text message to Franklin using an automatic telephone dialing system. See 47 U.S.C. § 227(b)(1)(A); *Blow v. Bijora, Inc.*, 855 F.3d 793, 798 (7th Cir. 2017) (explaining that the statute applies to text messages). Throughout this litigation, Express Text has maintained that it merely offers its users an online platform that disseminates text messages and does not itself send messages. (Express Text also maintains that its platform is not an automatic telephone dialing system. The district court, however, did not rely on this point for either grant of summary judgment, and we need not address the issue to resolve this case.) In August 2017, the district court granted summary judgment for Express Text, concluding that it was not liable under the TCPA because it did not send or initiate anything; instead, one of its users, WorldWin Events, sent the offending texts to Franklin. On Franklin's appeal from that ruling, we vacated and remanded so that "Franklin [could] seek reasonable discovery." *Franklin v. Express Text, LLC*, 727 F. App'x 853, 856 (7th Cir. 2018). In doing so, we determined that the district court had abused its discretion in denying Franklin's Rule 56(d) motion. *Id.* The district court, in granting the 2017 summary judgment, had relied almost exclusively on the affidavit of Express Text's Chief Operating Officer. Franklin was unable to respond to that evidence "without an opportunity to ask how Express Text's system works or inquire into the relationship between WorldWin and Express Text." *Id.* at 855....The judgment of the district court is AFFIRMED.

USA v. Robert Fox No. 18-3087

Submitted November 1, 2019 — Decided November 6, 2019

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:15CR00025-001 — **Jane Magnus-Stinson**, *Chief Judge*.

Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

A jury found Robert Fox guilty of two counts of Hobbs Act robbery, 18 U.S.C. § 1951(a), and two counts of brandishing a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c)(1)(A)(ii). In Fox's first appeal, we affirmed his conviction but vacated his sentence and remanded for resentencing in light of *Dean v. United States*, 137 S. Ct. 1170 (2017). *United States v. Fox*, 878 F.3d 574, 580 (7th Cir. 2017), cert. denied, 138 S. Ct. 1603 (2018), and reh'g denied, 138 S. Ct. 2617 (2018). On remand, the district court imposed a lower sentence, but Fox filed a notice of appeal. Fox's appointed counsel asserts that the appeal is frivolous and moves to withdraw under *Anders v. California*, 386 U.S. 738 (1967). Counsel's brief explains the nature of the case and addresses potential issues that an appeal of this kind might involve. Because the analysis in counsel's brief appears thorough, we limit our review to the subjects that counsel discusses and those that Fox raises in response. See CIR. R. 51(b); *United States v. Bey*, 748 F.3d 774, 776 (7th Cir. 2014). Fox does not oppose his attorney's request to withdraw, but he believes that he could raise nonfrivolous arguments with different counsel or pro se. In reviewing the potential arguments, however, we identify no nonfrivolous issues to appeal....We GRANT counsel's motion to withdraw and DISMISS the appeal.

Wisconsin Legislature v. Joshua Kaul No. 19-1835

Argued September 6, 2019 — Decided November 7, 2019

Case Type: Civil

Western District of Wisconsin, No. 3:19-cv-00038-wmc — **William M. Conley**, *Judge*.

Before FLAUM, SYKES, and ST. EVE, *Circuit Judges*.

Sykes, *Circuit Judge*, concurring.

ST. EVE, *Circuit Judge*. A state can speak in litigation only through its agents and may select its agents without the interference of the federal courts. Typically, a state chooses to designate a singular attorney general to defend its interests, but nothing in the United States Constitution mandates this procedure, or even the existence of an attorney general position. The State of Wisconsin has chosen to have an attorney general as its representative, but it also has recently provided a mechanism by which its legislature (or either of its constitutive houses) can intervene to defend the State's interest in the constitutionality of its statutes. Relying on this provision, the Wisconsin Legislature moved to intervene in this lawsuit in which the Wisconsin Attorney General was already defending state law. The district court denied the motion. Though we acknowledge that federal law does not mandate that a state speak in a single voice, we conclude that Federal Rule of Civil Procedure 24 expresses a preference for it. The Legislature's motion to intervene as of right was appropriately denied because the Legislature did not demonstrate that the Attorney General is an inadequate representative of the State's interest absent a showing he is acting in bad faith or with gross negligence. The district court has discretion still to permit the Legislature to intervene as a second voice for the State, or even perhaps on its own behalf, but nothing in the record demonstrates an abuse of that discretion. We therefore affirm the district court's decision in all respects.

Ruben Lopez Ramos v. William Barr No. 19-1728

Argued September 25, 2019 — Decided November 7, 2019

Case Type: Agency

Board of Immigration Appeals No. A039-091-760

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

RIPPLE, *Circuit Judge*. Ruben Lopez Ramos brings this petition to review the removal decision of the Board of Immigration Appeals ("BIA"). He claims that the statutory scheme set forth in the since-amended 8 U.S.C. § 1401 (1968)(amended 1986) and §§ 1431–32 (1968) (amended 2000) violates the Equal Protection guarantee of the Fifth Amendment's Due Process Clause because those provisions prevent him from deriving citizenship through his United States citizen mother. The Immigration Judge ("IJ"),

noting that the immigration court lacks jurisdiction over constitutional questions, limited her analysis to the provisions of the Immigration and Nationality Act (“INA”) and denied Mr. Lopez’s motion to terminate removal proceedings. The BIA affirmed without opinion the decision of the IJ. Mr. Lopez timely seeks review of the removal decision here. Because the statutory scheme has a rational basis, there is no equal protection violation. Consequently, we deny the petition for review.

Amanda Burger v. County of Macon No. 18-3430

Argued September 6, 2019 — Decided November 7, 2019

Case Type: Civil

Central District of Illinois.

No. 18-cv-3119 — **Colin S. Bruce**, *Judge*.

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

KANNE, *Circuit Judge*. Under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), local governments may be liable for violating individuals’ rights guaranteed by federal law. But local governments are responsible only for “their own illegal acts”; they are not responsible for others’ acts falling outside an official local-government policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986). After Amanda Burger was fired from her job at the State’s Attorney’s Office in Macon County, Illinois, she sued the county for allegedly firing her in violation of her federal constitutional rights. The district court dismissed the case, concluding that Burger failed to state a federal claim against the county. Because the alleged illegal conduct was directed by an officer of the State of Illinois, and not Macon County, we affirm.

Edith McCurry v. Kenco Logistic Services, LLC No. 18-3206

Argued April 11, 2019 — Decided November 7, 2019

Case Type: Civil

Central District of Illinois. No. 16-CV-2273 — **Colin S. Bruce**, *Judge*.

Before SYKES, SCUDDER, and ST. EVE, *Circuit Judges*.

SYKES, *Circuit Judge*. Edith McCurry worked at an Illinois warehouse owned by Mars, Inc., the well-known candy maker, and operated by Kenco Logistics Services, a third-party management firm. In March 2015 Kenco lost its contract with Mars and laid off its employees at the warehouse, including McCurry. More than a year later, she filed two rambling pro se complaints accusing Kenco, Mars, and several of her supervisors of discriminating against her based on her race, sex, age, and disability. She also alleged that Kenco and Mars conspired to violate her civil rights. The district court consolidated the suits and dismissed some of the claims. The defendants then moved for summary judgment on the rest. McCurry’s response violated the local summary-judgment rule, so the judge accepted the defendants’ factual submissions as admitted and entered judgment in their favor. McCurry retained counsel and appealed....AFFIRMED; ORDER TO SHOW CAUSE ISSUED.

Kevin Clanton v. USA No. 18-3060

Argued September 11, 2019 — Decided November 7, 2019

Case Type: Civil

Southern District of Illinois. No. 3:15-cv-124 — **Nancy J. Rosenstengel**, *Chief Judge*.

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

BARRETT, *Circuit Judge*. For four years, nurse practitioner Denise Jordan treated Kevin Clanton’s severe hypertension. Jordan, an employee of the U.S. Public Health Service, failed to properly educate Clanton about his disease or to monitor its advancement. Clanton’s hypertension eventually developed into Stage V kidney disease requiring dialysis and a transplant, and he sued the United States under the Federal

Tort Claims Act for Jordan's negligent care. After a five-day bench trial, the district court found the United States liable. The court determined that Clanton had not contributed at all to his own injuries, noting that Clanton did not understand why it was so important to take his medication and to attend all appointments. The court awarded Clanton nearly \$30 million in damages. The government appeals the court's comparative-negligence determination and three aspects of the court's rulings on damages. We agree with the government that the court erred in its analysis of comparative negligence, so we vacate the judgment and remand for the court to apply the proper legal standard. As for damages, however, we find no reversible error....We VACATE the judgment and REMAND the case for further proceedings consistent with this opinion.

Jade Green v. Jack Howser No. 18-2757

Argued September 11, 2019 — Decided November 7, 2019

Case Type: Civil

Southern District of Illinois. No. 3:16-cv-00863 — **Stephen C. Williams**, *Magistrate Judge*.
Before RIPPLE, ROVNER, and BARRETT, *Circuit Judges*.

BARRETT, *Circuit Judge*. Tolstoy said that every unhappy family is unhappy in its own way, and that observation rings true here. When Jack and Angela Howser decided that Angela's estranged daughter, Jade Green, was failing to provide a suitable home for Jade's daughter, E.W., they enlisted the local police, the sheriff's office, the county prosecutor, and a private investigator to help them wrest custody of E.W. from Jade. Together, the group agreed that they would arrest Jade while Jade's husband was out of the house so that the Howsers could take the child. So, after midnight one Sunday night, a caravan that included the sheriff, a sheriff's deputy, the Howsers, and the Howsers' private investigator set out for Jade's home to arrest her for writing Angela a \$200 check that had bounced. Once Jade was in handcuffs, an officer gave Jack the all-clear to come inside. The sheriff did not allow Jade to designate a custodian for E.W. or obtain her consent to giving E.W. to the Howsers. Instead, over Jade's protests, the sheriff let Jack carry her daughter away. Jade sued the Howsers under 42 U.S.C. § 1983 for conspiring with state officials to violate her due process right to make decisions regarding the care, custody, and control of her child. A jury returned a verdict in her favor, and the Howsers ask us to overturn it. They contend that there is insufficient evidence to support the verdict and that it is contaminated by an evidentiary error in any event. They also find fault with several aspects of the damages award. We reject all of the Howsers' arguments....The judgment is AFFIRMED.

USA v. Arthur Robinson No. 18-2295

Argued October 2, 2019 — Decided November 7, 2019

Case Type: Criminal

Southern District of Illinois. No. 3:17-CR-30041-DRH-1 — **David R. Herndon**, *Judge*.
Before BAUER, RIPPLE, and HAMILTON, *Circuit Judges*.

PER CURIAM. Arthur Robinson pleaded guilty to unlawfully possessing a firearm. At his sentencing hearing, the district court considered and rejected defense counsel's argument that the Sentencing Guidelines calculation double counted Mr. Robinson's past convictions. Mr. Robinson raised the argument again when he had the opportunity to speak. He also attempted to mitigate his conduct by explaining the circumstances surrounding his arrest. The court rejected Mr. Robinson's arguments as frivolous and then revoked the three-point reduction for acceptance of responsibility that it had granted him earlier. Because the district court clearly erred in concluding that Mr. Robinson did not accept responsibility, we vacate the judgment and remand for resentencing.

LHO Chicago River, L.L.C. v. Joseph Perillo No. 19-1848

Argued September 26, 2019 — Decided November 8, 2019

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:16-cv-6863 — **Charles P. Kocoras**, *Judge*.
Before BAUER, MANION, and ST. EVE, *Circuit Judges*.

MANION, *Circuit Judge*. Defendants appeal the denial of their request for Lanham Act attorney fees following the plaintiff's voluntary dismissal of its trademark infringement suit. The lone question here is whether the Supreme Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014)—a patent case—should guide district courts faced with Lanham Act attorney fees applications. Most of our sister circuits have answered that question in the affirmative, but we have never addressed the issue. The opportunity now presents itself, and for all the reasons herein, we join our sister circuits in holding that...Because the district judge here did not address the parties' fee dispute under *Octane*, we VACATE the attorney fees order and REMAND so he may do so.

Villas at Winding Ridge v. State Farm Fire and Casualty No. 19-1731

Argued September 23, 2019 — Decided November 8, 2019

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:16-cv-3301 — **Tanya Walton Pratt**, *Judge*.
Before EASTERBROOK, HAMILTON, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. In June 2013, a storm passed over Villas at Winding Ridge ("Winding Ridge"), a condominium complex located in Indiana, causing some minor damage from hail. Winding Ridge did not discover the damage until almost a year later when a contractor inspected the property to estimate the cost of replacing its aging roofs. Remembering its one-year State Farm Fire and Casualty Company ("State Farm") insurance policy, Winding Ridge submitted a claim to State Farm. Winding Ridge and State Farm inspected the property and exchanged estimates on the amount of the loss, but they could not reach an agreement. Winding Ridge subsequently demanded an appraisal under the insurance policy, and State Farm complied. After exchanging competing appraisals, the umpire upon whom both sides had agreed issued an award, which later became binding. Winding Ridge filed suit against State Farm alleging breach of contract, bad faith, and promissory estoppel. The parties cross-moved for summary judgment. The district court granted in part and denied in part Winding Ridge's cross-motion for partial summary judgment and granted State Farm's motion for summary judgment. Winding Ridge now appeals the district court's ruling on State Farm's motion for summary judgment. We affirm. We hold that the policy is unambiguous and enforceable. There is also no evidence that State Farm breached the policy or acted in bad faith when resolving the claim.

Hosam Smadi v. William True No. 19-1370

Submitted November 1, 2019 — Decided November 8, 2019

Case Type: Prisoner

Southern District of Illinois. No. 3:18-cv-02149-JPG — **J. Phil Gilbert**, *Judge*.
Before AMY C. BARRETT, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*.

ORDER

Hosam Smadi, a federal inmate, alleges that prison officials violated the First Amendment by blocking his communications with an attorney, an ambassador, and others. He seeks to enjoin their actions and pursue damages from them under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the seminal case that implied a limited damages remedy under the Fourth Amendment against federal agents. The district court ruled that, after *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), *Bivens* does not apply to First Amendment claims for damages. It then rejected Smadi's request for injunctive relief and dismissed the complaint with prejudice at screening. See 28 U.S.C. § 1915A(b)(1). In resolving Smadi's First Amendment claims, in particular his request for injunctive relief, we would benefit from the assistance of counsel in the district court...Accordingly, we VACATE the dismissal of the

First Amendment claims and REMAND the case for further proceedings with recruited counsel; in all other respects, we AFFIRM. In light of this decision, we remove the strike that Smadi incurred in the district court.

Mabel Heredia v. Capital Management Services, L No. 19-1296

Argued September 20, 2019 — Decided November 8, 2019

Case Type: Civil

Eastern District of Wisconsin. No. 1:17-cv-00284-WCG — **William C. Griesbach**, *Judge*.

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

ROVNER, *Circuit Judge*. Capital Management Services, L.P. (CMS) is a debt collector, and therefore regularly sends out dunning letters to debtors hoping to collect past-due debts. The Fair Debt Collection Practices Act (FDCPA) highly regulates the content of those letters to prevent debt collectors from using abusive practices that prey on vulnerable debtors. See 15 U.S.C. § 1692(e). Mabel L. Heredia received four collection letters from CMS—and claims that the language in this correspondence violated the FDCPA. CMS disagreed and filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), which the district court granted. Upon our de novo review (see *Marquez v. Weinstein, Pinson & Riley, P.S.*, 836 F.3d 808, 810 (7th Cir. 2016)), we find that Heredia has plausibly alleged that the dunning letter violated the FDCPA....Because these questions of whether particular statements are deceptive or misleading, however, are almost always questions of fact, the ultimate decision on this question is one in the province of a district court. We therefore VACATE the judgment of the district court and REMAND this case for further proceedings consistent with this opinion.

SEC v. Gary S. Williky No. 19-1243

Submitted September 16, 2019 — Decided November 8, 2019

Case Type: Civil

Southern District of Indiana, Indianapolis Division. No. 1:15-cv-00357-WTL-MJD — **William T. Lawrence**, *Judge*.

Before BAUER, BRENNAN, and ST. EVE, *Circuit Judges*.

BAUER, *Circuit Judge*. Gary Williky appeals a judgment in favor of the Securities and Exchange Commission (“SEC”) that followed a bifurcated settlement agreement regarding Williky’s fraudulent conduct while working for the Indiana-based company Imperial Petroleum, Inc. (“Imperial”). This court addressed the details of Imperial’s fraudulent scheme in *United States v. Wilson*, 879 F.3d 795 (7th Cir. 2018). Imperial fraudulently purchased finished biodiesel and resold it while claiming government incentives and tax-credits available to companies producing biodiesel from raw feedstock. Jeffery Wilson, Imperial’s ex-CEO, hired Williky to artificially inflate Imperial’s stock through a series of “wash and match trades” and “scalping” emails. In the 1990s, Williky similarly engaged in a pattern of “wash and match trades” for another company led by Wilson. As part of Imperial, Williky acquired millions of shares of its stock but failed to lawfully report his ownership levels when his shares surpassed five percent. At issue in this appeal is Williky’s conduct once the Imperial fraud unraveled. By July 2011, Williky knew Imperial misrepresented the source of its biodiesel to investors and, by November, knew the complete extent of Imperial’s fraud. Williky sold off the entirety of his Imperial shares by February 27, 2012, and avoided a loss of \$798,217. The SEC sued to permanently enjoin Williky from violating federal securities law, to enjoin Williky from acting as an officer or director of a public company, and to disgorge his financial gains. The SEC further sought to impose financial penalties, including a civil penalty for Williky’s insider trading. Before Williky faced his deposition, he entered into a bifurcated settlement with the SEC, conceding his involvement in the fraudulent scheme and agreeing that the district court would determine the financial remedies to be assessed. The SEC requested the statutory maximum civil penalty of \$2,394,651 for insider trading, calculated as three times Williky’s avoided losses. Williky objected, arguing that the SEC’s proposed judgment ignored his cooperation with various governmental agencies investigating Imperial’s fraud. The district court denied the request for the maximum civil penalty as excessive and entered a

judgment of \$1,596,434, equal to two times the avoided losses. On appeal, Williky argues that the judgment still ignores his cooperation as a whistleblower and is thus an abuse of discretion. We find that the district court adequately assessed the value of Williky's cooperation and affirm.

USA v. Brandon Shoffner No. 18-3448

Argued October 2, 2019 — Decided November 8, 2019

Case Type: Criminal

Central District of Illinois. No. 2:16-cr-20062-JES-EIL-1 — **James E. Shadid**, *Judge*.

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

PER CURIAM. After Brandon Shoffner was convicted of unlawful possession of a firearm, he successfully appealed to this court his sentence of 84 months' imprisonment, a sentence below the applicable Sentencing Guidelines range. In an unpublished order, we vacated that sentence because the district court had miscalculated the base offense level. We further noted that the district court had not specified whether its imposition of a six-level increase for punching the arresting officer, see U.S.S.G. § 3A1.2(c)(1), was based on a belief that it was required to find, as a matter of law, see *United States v. Alexander*, 712 F.3d 977, 978 (7th Cir. 2013), that the punch created a substantial risk of serious injury or whether the court had found, as a factual matter, that the punch created a serious risk of injury. We directed the district court to clarify whether it understood that U.S.S.G. § 3A1.2(c)(1) requires an explicit factual finding. On remand, the district court, a different judge presiding, conducted a sentencing hearing. Even though our earlier decision had decreased his applicable advisory guidelines range, Mr. Shoffner received the same sentence. He now appeals again and submits that the district court erred procedurally by not explaining why it believed that the imposed sentence was appropriate and by failing to engage with his arguments in mitigation. After examination of the record, we conclude that these arguments have merit. The district court failed to explain adequately the reason for the sentence imposed and did not analyze as carefully as it should have the arguments submitted in mitigation. Accordingly, we vacate the judgment of the district court and remand the case for resentencing.

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](#).