

## Opinions for the week of October 31 - November 4, 2016

### **Syl Johnson v. UMG Recordings, Incorporated** No. 16-2943

Submitted October 27, 2016 — Decided October 31, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 16 C 5045 — **Harry D. Leinenweber**, *Judge*.  
Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

### **Order**

Musician Syl Johnson contends in this copyright case that some music publishers have issued recordings that sample one of his songs, Different Strokes, in ways not protected by the doctrine of fair use. (Sampling means incorporating parts of an original recording directly into a new one. The longer the incorporated sample, the less likely the use will be lawful. See 17 U.S.C. §107(3).) Different Strokes was published in 1967 as a single (it rose to Number 17 on Billboard's Rhythm & Blues chart) and reissued in 1968 as part of the album *Dresses Too Short*. Johnson says that it is still under copyright. Through his publishers, Johnson had made a similar contention in an earlier suit (No. 13 C 7057) against more than 80 persons and companies. The 2013 suit, as we call it, was assigned to Judge Gottschall and dismissed in January 2015 on the basis of a settlement. Johnson's new suit was assigned to Judge Leinenweber, who dismissed it on the basis of claim preclusion. The current suit names as defendants six of the 80+ parties sued in 2013. Johnson maintains that the 2013 suit was not really settled and that his own attorney, in cahoots with the defendants, defrauded Judge Gottschall into thinking that it had been. Judge Leinenweber told Johnson (now proceeding without counsel) that this line of argument does not authorize separate litigation and that "you have to go back before Judge Gottschall." Instead of doing that, Johnson filed an appeal... Johnson observes that the current suit seeks relief based on five songs that were not part of the 2013 suit. But Johnson could have included those five songs in the 2013 suit, which like this one contended that the defendants published excerpts of Different Strokes. None of the recordings in question post-dates the 2013 suit. Litigants are not entitled to split their claims into multiple pieces; the branch of preclusion that forbids this, known as merger and bar, requires litigants to raise in one suit all claims and theories that are part of the same transaction and could have been litigated at the same time. See, e.g., *Palka v. Chicago*, 662 F.3d 428, 437 (7th Cir. 2011); *Herrmann v. Cencom Cable Associates, Inc.*, 999 F.2d 223 (7th Cir. 1993). The theory behind the current suit is identical to the theory behind the 2013 suit. If one publisher incorporated samples of Different Strokes into 100 of its releases, Johnson could not file 100 separate suits. He must instead litigate all closely related claims at once. AFFIRMED

### **FTC v. Advocate Health Care Network** No. 16-2492

Argued August 19, 2016 — Decided October 31, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 C 11473 — **Jorge L. Alonso**, *Judge*.  
Before WOOD, *Chief Judge*, and BAUER and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. This horizontal merger case under the Clayton Act depends on proper definition of geographic markets for hospitals. Defendants Advocate Health Care Network and NorthShore University HealthSystem both operate hospital networks in Chicago's northern suburbs. They propose to merge. Section 7 of the Clayton Act forbids asset acquisitions that may lessen competition in any "section of the country." 15 U.S.C. § 18. The Federal Trade Commission and the State of Illinois sued in district court to enjoin the proposed Advocate-NorthShore merger while the Commission considers the issue through its ordinary but slower administrative process. See 15 U.S.C. § 53(b); 15 U.S.C. § 26; *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 260–61 (1972). To obtain an injunction, plaintiffs had to demonstrate a likelihood of success on the merits. 15 U.S.C. § 53(b); 15 U.S.C. § 26; *West Allis Memorial Hospital, Inc. v. Bowen*, 852 F.2d 251, 253 (7th Cir. 1988). To show that the merger may lessen competition, the Commission and Illinois had to identify a relevant geographic market where

anticompetitive effects of the merger would be felt. See *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Plaintiffs relied on a method called the hypothetical monopolist test. That test asks what would happen if a single firm became the sole seller in a proposed region. If such a firm could profitably raise prices above competitive levels, that region is a relevant geographic market. *In re Southeastern Milk Antitrust Litig.*, 739 F.3d 262, 277–78 (6th Cir. 2014). The Commission’s expert economist, Dr. Steven Tenn, chose an eleven-hospital candidate region and determined that it passed the hypothetical monopolist test. The district court denied the motion for preliminary injunction. *Federal Trade Comm’n v. Advocate Health Care*, No. 15 C 11473, 2016 WL 3387163 (N.D. Ill. June 20, 2016). It found that the plaintiffs had not demonstrated a likelihood of success because they had not shown a relevant geographic market. *Id.* at \*5. The plaintiffs appealed, and the district court stayed the merger pending appeal. That stay remains in place... We REVERSE the district court’s denial of a preliminary injunction and REMAND for further proceedings consistent with this opinion. The merger shall remain enjoined pending the district court’s reconsideration of the preliminary injunction motion.

**Robert Gallagher v. Nathan O’Connor** No. 16-1594

Submitted October 27, 2016 — Decided October 31, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 7859 — **Charles R. Norgle**, *Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

**ORDER**

Robert Gallagher appeals the dismissal of his suit under 42 U.S.C. § 1983 alleging that the Village of Lyons and one of its police officers, Officer Nathan O’Connor, violated his constitutional rights during an October 2013 arrest and subsequent criminal prosecution in state court. The district court concluded that “nonmutual claim preclusion” barred his suit because Gallagher previously sued other defendants for alleged violations stemming from the same events. But claim preclusion requires mutuality of parties, and O’Connor and the Village were not in privity with the defendants whom Gallagher had sued. We affirm in part, vacate in part, and remand.

**Michael Koziara v. BNSF Railway Company** No. 16-1577

Argued September 20, 2016 — Decided October 31, 2016

Case Type: Civil

Western District of Wisconsin. No. 13 C 834 — **James D. Peterson**, *Judge*.

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

POSNER, *Circuit Judge*. The Federal Railroad Safety Act forbids a railroad to discharge or otherwise discriminate against an employee for conduct protected by the Act, including notifying the railroad that he has suffered a work-related injury. 49 U.S.C. § 20109(a), (a)(4). The plaintiff in this case was employed by BNSF Railway Company, the second-largest North American freight railroad, and brought this suit against the railroad for violating the provisions of the Railroad Safety Act that we just cited. A jury returned a verdict in favor of the plaintiff and awarded him damages, and the defendant, having failed to persuade the district judge to award judgment to it despite the jury’s verdict, has appealed... We end by expressing doubt that the plaintiff should have been entitled to bring this lawsuit at all. For remember that he did so years after he had struck out first with the arbitral board (the National Railroad Adjustment Board), which ruled that he’d “failed to prove that ... Veitz gave him permission to remove the ties,” and then with OSHA, which rejected his complaint on the same grounds on which the adjustment board had rejected it. Ordinarily arbitration is final; having lost to the arbitrator or arbitrators, you can’t restart the entire process by suing. We don’t say the plaintiff was *precluded* (by some doctrine of preclusion, such as *res judicata*) from suing, only that the kind of

protracted litigation that he initiated and pursued is suggestive of desperation rather than of merit. We conclude that the judgment must be reversed with instructions to dismiss the suit.

**USA v. Corey Mitchell** No. 16-1541

Argued October 6, 2016 — Decided October 31, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 15-CR-47 — **Lynn Adelman**, *Judge*.

Before DIANE P. WOOD, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*.

**ORDER**

Corey Mitchell appeals his convictions for armed bank robbery and using a firearm during a “crime of violence,” in violation of 18 U.S.C. § 2113(a), (d) and 18 U.S.C. § 924(c)(1)(A)(i). He would like this court to consider his argument that armed bank robbery is no longer a crime of violence for purposes of § 924(c), in light of the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). We decline to do so, however, because Mitchell waived his right to contest the § 924(c) conviction...

AFFIRMED.

**James Ablan v. Bank of America Corporation** No. 16-1072

Argued September 14, 2016 — Decided October 31, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 11 C 4493 — **Charles R. Norgle**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

**ORDER**

James Ablan is a financing broker who in 2003 contracted with Tax Strategies Group, a company that purchased commercial properties for resale to investors. The contract made him the company’s exclusive financing representative and required Tax Strategies to pay him commissions for loans he secured on its behalf. In 2006 Ablan approached Merrill Lynch in an attempt to secure a loan for an acquisition Tax Strategies was pursuing. Merrill Lynch agreed to finance the acquisition a month later. Around the same time, however, Tax Strategies terminated its agreement with Ablan and severed their relationship. Protracted litigation ensued over disputed commissions related to the Merrill Lynch loan. Ablan and Tax Strategies eventually settled their dispute. Ablan then sued Bank of America, Merrill Lynch’s successor, alleging that Merrill Lynch: (1) tortiously interfered with his contract with Tax Strategies; (2) failed to fulfill a promise to Ablan that he would receive certain commissions related to the financing agreement and is therefore liable under promissory estoppel; and (3) conspired with Tax Strategies to deprive him of commissions he was owed. The district court, sitting in diversity and applying Illinois law, found no evidence of tortious interference or detrimental reliance and granted summary judgment for Bank of America on all claims. The judge’s order did not specifically address the civil conspiracy claim. On appeal Ablan does not contest the judge’s rulings against him on his claims for tortious interference and promissory estoppel. He argues only that the judge overlooked the conspiracy claim and seeks a remand to allow the court to specifically address it... AFFIRMED

**Owner-Operator Independent Drivers Association, Inc. v. U.S. Dept. of Transportation** No. 15-3756

Argued September 13, 2016 — Decided October 31, 2016

Case Type: Agency

On Petition for Review of the Final Rule of the Federal Motor Carrier Safety Administration. FMCSA-2010-0167.

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

HAMILTON, *Circuit Judge*. Since 1935, federal law has regulated the hours of service of truck drivers operating in interstate commerce. The regulations are intended to reduce fatigue-related accidents, and they require drivers to keep paper records showing their driving time and other on-duty time. Compliance has long been an issue, though, because it is easy to insert an error in paper records, whether intentionally or not. In 2012, Congress directed the Department of Transportation to issue regulations to require most interstate commercial motor vehicles to install electronic logging devices (ELDs). ELDs are linked to vehicle engines and automatically record data relevant to the hours of service regulations: whether the engine is running, the time, and the vehicle's approximate location. The devices are intended to improve drivers' compliance with the regulations, to decrease paperwork, and ultimately to reduce the number of fatigue-related accidents. Congress instructed the Department in promulgating the rule to consider other factors as well, such as driver privacy and preventing forms of harassment enabled by the ELDs. 49 U.S.C. § 31137. The Federal Motor Carrier Safety Administration, which is part of the Department of Transportation, promulgated the final rule requiring ELDs in 2015. Electronic Logging Devices and Hours of Service Supporting Documents, 80 Fed. Reg. 78,292 (Dec. 16, 2015) ("Final ELD Rule"), codified in 49 C.F.R. Pts. 385, 386, 390, and 395. Petitioners Mark Elrod, Richard Pingel, and the Owner-Operator Independent Drivers Association (OOIDA) brought this action for judicial review of the final rule. Elrod and Pingel are professional truck drivers, and OOIDA is a trade organization. They argue that the agency's final rule should be vacated for five reasons. We uphold the final rule and deny their petition.

**Daniel Coker v. Megan Brennan** No. 16-2334

Submitted October 31, 2016 — Decided November 1, 2016

Case Type: Civil

Central District of Illinois. No. 14-2093 — **Harold A. Baker**, *Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

The U.S. Postal Service fired Daniel Coker as a mail handler after he accrued too many unscheduled absences. An arbitrator upheld the decision to fire him, and Coker brought this suit. He principally claims that, in firing him, the Postal Service violated an earlier settlement agreement. He also sued his union for breaching its duty to represent him fairly in the arbitration. After a bench trial, the district court concluded that the claims against the Postal Service lacked merit; it also granted the union summary judgment. Because the Postal Service did not breach the settlement and the union acted reasonably, we affirm the judgment.

**Thomas M. McCarthy v. Thomas J. Vilsack** No. 16-2058

Submitted October 31, 2016 — Decided November 1, 2016

Case Type: Civil

Western District of Wisconsin. No. 15-cv-312-bbc — **Barbara B. Crabb**, *Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Two years after he was not interviewed for two positions with the U.S. Department of Agriculture, Thomas McCarthy brought this employment-discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634. The district court granted summary judgment for the government after concluding that McCarthy had not

contacted an equal employment opportunity counselor with the agency in a timely manner—a prerequisite for filing suit—and that equitable tolling was not warranted. We affirm.

**Larry Moore v. St. John's Hospital** No. 16-1813

Submitted October 31, 2016 — Decided November 1, 2016

Case Type: Civil

Central District of Illinois. No. 15-4177 — **Sue E. Myerscough**, *Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Larry Moore, a civil detainee at Rushville Treatment and Detention Center, claims in this suit under 42 U.S.C. § 1983 that St. John's Hospital, a private medical center, and Wexford Health Sources, the contract healthcare provider at Rushville, denied him due process by deliberately ignoring his medical needs. Moore asserts that a nurse at St. John's Hospital, where he was to undergo surgery to remove hemorrhoids and repair a suspected torn colon, was rude and made disparaging remarks about his status as a sex offender. Moore also asserts that the operating room was so unsanitary that he decided to refuse the surgery (which, other physicians later decided, would have been unnecessary). The district court screened Moore's complaint, see 28 U.S.C. § 1915A(b)(1), and concluded that it does not state a claim because neither the hospital nor Wexford is accused of maintaining an unconstitutional custom, policy, or practice that caused the alleged denial of medical care. See *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 692 (1978) (concluding that § 1983 imposes liability on a municipal defendant "that, under color of some official policy, 'causes' an employee to violate another's constitutional rights"); *Daniel v. Cook Cty.*, No. 15-2832, 2016 WL 4254934, at \*3--6 (7th Cir. Aug. 12, 2016) (discussing *Monell* as applied to county jail). The district court also noted that Moore did not suffer any injury as a result of being sent to the unsanitary operating room because he refused treatment after seeing the room. Moreover, the court reasoned, the nurse's rude comments, although inappropriate and unprofessional, did not amount to a constitutional violation. See *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000) (concluding that prisoner administrator's racially disparaging remarks did not violate Constitution). The court dismissed the suit with prejudice... DISMISSED.

**Ronald Grason v. Jay Stewart** No. 16-1499

Submitted October 31, 2016 — Decided November 1, 2016

Case Type: Civil

Central District of Illinois. No. 15-2138 — **Harold A. Baker**, *Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Ronald Grason appeals the dismissal of his lawsuit under 42 U.S.C. § 1983 alleging that Jay Stewart, the director of the Illinois Department of Financial and Professional Regulation, violated his due process rights by revoking his medical license without a hearing. We affirm.

**Scott Gillespie v. USA** No. 16-1465

Submitted October 31, 2016 — Decided November 1, 2016

Case Type: Civil

Eastern District of Wisconsin. No. 15-CV-0434 — **Lynn Adelman**, *Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

## ORDER

Scott and Debra Gillespie sued the United States for a refund of all federal income taxes they paid for 2009, based on their position that they did not have taxable earnings. The district court dismissed the action after concluding that the Gillespies had not initially filed a claim for refund with the IRS, as required by 26 U.S.C. § 7422(a). The Gillespies appeal this dismissal, and we affirm the judgment.

### **USA v. Lloyd B. Lockwood** No. 15-3856

Argued September 22, 2016 — Decided November 1, 2016

Case Type: Criminal

Central District of Illinois. No. 2:12-cr-20070 — **Harold A. Baker**, *Judge*.

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

MANION, *Circuit Judge*. This case returns for a second time. Lloyd Lockwood appeals his 120-month sentence for possession of a destructive device. Previously, we vacated Lockwood's first sentence of the same length. This time, for the reasons set forth below, we affirm.

### **Joseph Trzeciak v. George Petrich** No. 15-3355

Submitted October 31, 2016 — Decided November 1, 2016

Case Type: Prisoner

Northern District of Indiana, Hammond Division. No. 2:10 CV 358 — **John E. Martin**, *Magistrate Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

## ORDER

Joseph Trzeciak appeals from an order denying his motion to vacate the dismissal of a suit under the diversity jurisdiction claiming attorney malpractice. We affirm that decision.

### **USA v. Deandre Armour** No. 15-2170

Argued May 24, 2016 — Decided November 1, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 1:13-cr-00159-SEB-DKL-01 — **Sarah Evans Barker**, *Judge*.

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

HAMILTON, *Circuit Judge*. This appeal stems from an attempted bank robbery. It presents issues concerning the defendant's sentence and the definition of a "crime of violence" in 18 U.S.C. § 924(c), which provides extra punishment for use of a firearm in committing a crime of violence. We affirm the district court's judgment for the most part, but we must remand for re-sentencing on one count of conviction because the court imposed a mandatory minimum sentence under § 924(c) without a jury finding on the key fact.

### **Kiril Vidinsky v. Loretta E. Lynch** Nos. 13-2478 & 13-3263

Argued October 30, 2014 — Decided November 1, 2016

Case Type: Agency

Petitions for Review of Decisions of the Board of Immigration Appeals. No. A096-533-945

Before WILLIAMS and HAMILTON, *Circuit Judges*

HAMILTON, *Circuit Judge*. Petitioner Kiril Vidinski is a native of Bulgaria. He entered the United States as a visitor in 1998 but overstayed his visa. He married a United States citizen, Constance Leterski, in 2002, and in 2005 he and Ms. Leterski filed petitions seeking legal permanent resident status for him. Before those petitions were resolved, Ms Leterski told an investigator for Immigration and Customs Enforcement (ICE) that the marriage had been a sham to obtain immigration benefits for Vidinski (and money for her). Removal proceedings resulted in a final order to remove Vidinski, and the Board of Immigration Appeals dismissed his appeal and later denied his motion to reopen proceedings based on ineffective assistance of counsel. He now seeks judicial review, arguing primarily that he was entitled to cross-examine Ms. Leterski, whose affidavit was critical to the marriage fraud issue. We dismiss in part and deny the remainder of the petitions on their merits.

**Ricky Kawczynski v. American College of Cardiology** No. 16-2419

Submitted October 31, 2016 — Decided November 2, 2016

Case Type: Civil

Western District of Wisconsin. No. 15-cv-757-bbc — **Barbara B. Crabb**, *Judge*.

Before ILANA DIAMOND ROVNER, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Ricky Kawczynski asserts that cardiac patients often submit to treatment without receiving enough information from physicians to weigh the potential dangers and benefits. Explaining that he wants to remedy this perceived problem, Kawczynski brought this action under the diversity statute, 28 U.S.C. § 1332, claiming that the American College of Cardiology, the American College of Cardiology Foundation, and the president of the former have promulgated treatment guidelines which fail to require that cardiologists give patients clear “risk versus benefit data.” Kawczynski posits that the defendants’ failure to instruct doctors to provide this information violates Wisconsin statutes governing defective products, see WIS. STAT. § 895.047, and fraudulent drug advertising, see *id.* § 100.182. And, he alleges, the untimely deaths of two relatives who were undergoing cardiac treatment might have been avoided had they been given better information, since, Kawczynski says, “both family members likely would have chosen other treatment options with different outcomes.” The district court dismissed the suit with prejudice, reasoning that neither of the Wisconsin statutes on which Kawczynski relies governs the associations or their treatment guidelines. And, the court added, Kawczynski could not sue on behalf of his deceased family members because he had not been appointed as the personal representative of either estate... Accordingly, because Kawczynski lacks standing, the district court lacked subject-matter jurisdiction to reach the merits of his lawsuit. The judgment is MODIFIED to reflect a dismissal for lack of jurisdiction and, as modified, is AFFIRMED.

**USA v. Arturo Flores** No. 16-1456

Submitted October 27, 2016 — Decided November 2, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 11 CR 643-1 — **James B. Zagel**, *Judge*.

Before RICHARD A. POSNER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; KENNETH F. RIPPLE, *Circuit Judge*.

**ORDER**

Arturo Flores was sentenced below his applicable guidelines range to 168 months’ imprisonment for conspiring to possess and distribute heroin and cocaine, 21 U.S.C. §§ 846, 841(a)(1). Flores later moved under 18 U.S.C. § 3582(c)(2) for a reduced sentence based on Amendment 782 to the sentencing guidelines, which retroactively lowered by two the base offense level for his crimes. The district court denied his motion after concluding that the original sentence appropriately reflected the seriousness of the offense and Flores’s criminal history. We affirm.

**USA v. Maria Carbajal** No. 16-1681

Argued October 5, 2016 — Decided November 3, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 14 CR 561-2 — **Samuel Der-Yeghiayan**, *Judge*.  
Before WILLIAM J. BAUER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

**ORDER**

Maria Porcayo Carbajal pleaded guilty to using a false identification card that misrepresented her daughter's age. Because she used the card to prolong sexual abuse of her daughter, the district court sentenced her to the statutory maximum of 5 years' imprisonment. See 18 U.S.C. § 1028(a)(2) and (b)(2). Porcayo Carbajal challenges that sentence on three grounds: (1) the district court did not address her arguments that she was not a "willing" offender; (2) it did not explain the sentence; and (3) the sentence is too long. The district court considered her arguments, sufficiently explained the sentence, and it was reasonable, so we affirm the judgment.

**Luis Flores-Andrade v. Loretta Lynch** No. 15-3160

Argued October 5, 2016 — Decided November 3, 2016

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A205-278-576

Before WILLIAM J. BAUER, *Circuit Judge*; JOEL M. FLAUM, *Circuit Judge*; MICHAEL S. KANNE, *Circuit Judge*.

**ORDER**

Luis Flores-Andrade, a 45-year-old Mexican citizen, petitions for review of an order of the Board of Immigration Appeals upholding an immigration judge's denial of his request for cancellation of removal, see 8 U.S.C. § 1229b(b). The Board agreed with the IJ's conclusion that Flores-Andrade was ineligible for relief because he had left the United States for more than 90 days, see 8 U.S.C. § 1229b(d)(2). Flores-Andrade contends that he returned before the 90-day cutoff. We dismiss Flores-Andrade's petition for review in part for lack of jurisdiction and deny the remainder of the petition.

**USA v. John Thomas** No. 15-2509

Submitted October 27, 2016 — Decided November 3, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 14 CR 216-1 — **James B. Zagel**, *Judge*.  
Before POSNER, FLAUM, and RIPPLE, *Circuit Judges*.

POSNER, *Circuit Judge*. The defendant pleaded guilty to committing wire fraud, in violation of 18 U.S.C. § 1343, by submitting fraudulent invoices to an Illinois town (Riverdale), which reimbursed him for \$374,000 claimed in the invoices but not owed him by the town. The district judge sentenced him to 60 months in prison to be followed by 36 months of supervised release. The appeal challenges the conditions of supervised release and not the prison sentence, but asks us to order a full resentencing of the defendant... The errors we've enumerated were serious. The government joins the defendant in asking us to reverse the judgment with instructions for a full resentencing. See, e.g., *United States v. Harper*, 805 F.3d 818, 822 (7th Cir. 2015); *United States v. Downs*, 784 F.3d 1180, 1182 (7th Cir. 2015). The judgment is reversed and the case remanded with instructions for a full resentencing of the defendant.

**Sandra Hall v. Ann Flannery** No. 15-2602

Argued February 17, 2016 — Decided November 4, 2016

Case Type: Civil

Southern District of Illinois. No. 13 CV 914 — **Staci M. Yandle**, *Judge*.

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

WILLIAMS, *Circuit Judge*. Chelsea Weekley suffered a skull fracture as an infant and underwent surgery 17 years later to fix it. She died several days after the surgery, and her mother, Sandra Hall, sued the hospital and the surgeons. Hall argued that the surgery caused Weekley to suffer a seizure and die, and that the surgeons should have prescribed anti-seizure medication. But the defendants argued that no seizure had occurred and that a heart-related ailment was the likely cause of death. A jury trial was held and the jury found in the defendants' favor. On appeal, Hall argues that the district judge erroneously permitted three of the defendants' experts to opine about Weekley's likely cause of death. We conclude that Hall forfeited her arguments as to two of these experts by making perfunctory and underdeveloped arguments concerning the experts' testimony, qualifications, and methodology. However, we find that the third expert lacked the requisite qualifications to opine that Weekley's heart ailment was the likely cause of death. Because there is a significant chance that the erroneous admission of this expert testimony affected the outcome of the trial, we vacate the district court's judgment and remand for further proceedings.

**Midwest Fence Corporation v. U.S. Dept. of Transportation** No. 15-1827

Argued January 12, 2016 — Decided November 4, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 10 C 5627 — **Harry D. Leinenweber**, *Judge*.

Before BAUER and HAMILTON, *Circuit Judges*, and PETERSON, *District Judge*.

HAMILTON, *Circuit Judge*. Plaintiff Midwest Fence Corporation challenges federal and state programs that offer advantages in highway construction contracting to disadvantaged business enterprises, known as DBEs. For purposes of federally funded highway construction, DBEs are small businesses that are owned and managed by "individuals who are both socially and economically disadvantaged," 49 C.F.R. § 26.5, primarily racial minorities and women, who have historically faced significant obstacles in the construction industry due to discrimination, § 26.67(a). Pursuant to the federal DBE program, states that accept federal highway funding must establish DBE participation goals for federally funded highway projects and must attempt to reach those goals through processes tailored to actual market conditions. Plaintiff Midwest Fence is a specialty contractor that focuses its business on guardrails and fencing. Because of its size and specialization, it usually bids on projects as a subcontractor. Midwest Fence is not a DBE. It alleges that the defendants' DBE programs violate its Fourteenth Amendment right to equal protection under the law. Midwest Fence named as defendants the United States Department of Transportation (USDOT), the Illinois Department of Transportation (IDOT), and the Illinois State Toll Highway Authority (the Tollway). ... We conclude that the IDOT and Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination. Midwest Fence has failed to present a genuine dispute of fact on this point. The judgment of the district court is AFFIRMED.

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](#).