

Opinions for the week of August 1 - August 5, 2016

USA v. John Gabriel No. 15-3427

Argued July 6, 2016 — Decided August 2, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13-cr-00718 — **John J. Tharp, Jr., Judge.**
Before POSNER, SYKES and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* A jury found appellant John Gabriel guilty of producing child pornography and posting it to the internet. The district court sentenced Gabriel, who is 80 years old, to the statutory minimum of 15 years in prison and imposed a life term of supervised release. On appeal Gabriel does not challenge his conviction or his prison term. He argues only that the district court did not justify the length or conditions of the supervised release term. We affirm.

Jacqueline Brown v. Thomas Dart No. 15-3162

Argued May 26, 2016 — Decided August 02, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14-cv-00175 — **John J. Tharp, Jr., Judge.**
Before DIANE P. WOOD, *Chief Judge*; DANIEL A. MANION, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge.*

ORDER

Plaintiff Jeremy Brown, a correctional officer, filed a civil rights lawsuit against his employers, the Sheriff of Cook County and Cook County, Illinois, over adverse employment actions that he alleges were based on race. Defendants answered that the actions were taken as a result of a domestic battery that Jeremy committed against his wife, Jacqueline Brown. Jacqueline appeals the order compelling her deposition testimony about the incident... we affirm the district court's order denying her motion to quash the deposition subpoena.

Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc. No. 15-2526

Argued January 12, 2016 — Decided August 2, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 09 C 3585 — **Matthew F. Kennelly, Judge.**
Before WOOD, *Chief Judge*, and WILLIAMS and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* This appeal pits casinos against racetracks in our circuit's latest encounter with the Blagojevich corruption scandal in Illinois. In 2008, John Johnston, a horse racetrack executive, promised a \$100,000 campaign contribution to then-Governor Rod Blagojevich in exchange for his signature on a bill to tax the largest casinos in Illinois for the direct benefit of the Illinois horseracing industry. After Blagojevich's corruption came to light, the casinos sued the racetracks, alleging a conspiracy to violate the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and state-law claims for civil conspiracy and unjust enrichment. A jury awarded the casinos \$25,940,000 in damages, which was trebled under RICO to \$77,820,000. The racetracks argue on appeal that plaintiffs failed to prove a RICO conspiracy, that the district court erred by allowing plaintiffs to add the state-law claims, and that other asserted errors warrant a new trial. We affirm the district court in all respects except one: the jury did not have legally sufficient evidence to support a verdict finding a conspiracy to engage in a "pattern" of racketeering activity, as required for liability on a RICO conspiracy theory. The casinos are still entitled to the \$25,940,000 in damages on the state-law claims, but not to have those damages trebled under RICO.

USA v. Grover Ferguson No. 15-3753

Argued May 26, 2016 — Decided August 3, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 15-Cr-81 — **Rudolph T. Randa**, *Judge*.

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

HAMILTON, *Circuit Judge*. Defendant Grover Ferguson appeals his sentence. He was seventeen years old when he shot a woman three times during a carjacking, permanently disabling her. The high end of the guideline range for his crime was 217 months in prison. The government recommended a 240-month above-guideline sentence based on the severity of Ferguson's violent actions. The district court, however, imposed a sentence of 600 months (50 years) in prison, or more than 31 years longer than the top of the guideline range. We vacate the sentence and remand for resentencing. The Sentencing Guidelines are, of course, advisory. A judge is free to exercise his or her judgment to depart from them. Such a dramatic variance from a guideline range, however, requires a substantial explanation. *Gall v. United States*, 552 U.S. 38, 50 (2007). The explanation given here does not support a sentence that is more than 31 years and more than two and a half times longer than the top of the guideline range.

Kansas City Southern Railway Co. v. Sny Island Levee Drainage District No. 15-2760

Argued April 5, 2016 — Decided August 3, 2016

Case Type: Civil

Central District of Illinois. No. 13-3144 — **Richard Mills**, *Judge*.

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

WOOD, *Chief Judge*. The Sny Island Levee Drainage District ("the District" or "Sny") was organized in 1880 in the Circuit Court of Pike County, Illinois, to protect the District from flooding and surface water runoff from the Mississippi River. The Kansas City Southern Railway Company ("KC") and the Norfolk Southern Railway Company ("Norfolk") both operate main line railways over the Mississippi River Flood Plain in the District. The District is permitted under state law to assess properties within its territory in order to maintain the levees. The Railroads have now sued the District for the second time, alleging, as they did in the earlier case, that the District used an assessment calculation formula that discriminated against them in violation of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), 49 U.S.C. § 11501. After a 12-day bench trial, the district court found for Sny. Its finding was supported by the evidence, and so we affirm.

USA v. George Robey No. 15-2172

Argued April 7, 2016 — Decided August 3, 2016

Case Type: Criminal

Southern District of Indiana, Indianapolis Division. No. 12 CR 00027-001 — **Sarah Evans Barker**, *Judge*.

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

KANNE, *Circuit Judge*. Defendant George Robey operated a modern-day "chop shop"—he and his associates stole cars, altered their identities using office and computer equipment, and then sold them. He was convicted by a jury, and the district court sentenced him to 110 months' imprisonment and three years of supervised release. Robey appeals his conviction and sentence on three grounds. First, he argues that he did not receive a speedy trial, in violation of the Speedy Trial Act and the Sixth Amendment. Second, Robey contends that the district court erred in allowing the government to amend the indictment by dropping nineteen of the twenty-five charges. Third, he argues that the district court erred at sentencing by finding that Robey's theft of ten vehicles, in addition to the four vehicles forming the basis of his conviction, constituted relevant conduct. We affirm.

Srinivasa Musunuru v. Loretta E. Lynch No. 15-1577

Argued October 29, 2015 — Decided August 3, 2016

Case Type: Civil

Eastern District of Wisconsin, Milwaukee Division. No. 2-14-cv-00088 — **Lynn Adelman**, *Judge*.
Before FLAUM, MANION, and ROVNER, *Circuit Judges*.

MANION, *Circuit Judge*. Srinivasa Musunuru is a native and citizen of India who desires to become a lawful permanent resident through the Immigration and Nationality Act's employment-based immigrant visa process. At one point in time, he was the beneficiary of two visa petitions, the first filed by his previous employer, Vision Systems Group ("VSG"), and the second filed by his current employer, Crescent Solutions. Those visa petitions were assigned priority dates, which placed him in a long line of those eligible to receive a limited number of immigrant visas. The priority date assigned to VSG's visa petition allowed him to file an application with the United States Custom and Immigration Service ("USCIS") for adjustment of status to permanent resident. But when an immigrant visa finally became available to Musunuru, USCIS did not adjust his status. Instead, it revoked VSG's visa petition... Musunuru filed a petition for judicial review under the Administrative Procedures Act. He claimed that the statutory portability provision that kept VSG's visa petition valid while he "ported" from VSG to Crescent Solutions also gave him a procedural right to pre-revocation notice and an opportunity to respond, as well as a right to administratively challenge the revocation. He also claimed that USCIS's application of the regulations denied him his right to procedural due process as protected by the Fifth Amendment. The district court granted USCIS's motion to dismiss. It found that the regulations did not entitle Musunuru to pre-revocation notice or an opportunity to respond, and that Musunuru did not have standing to administratively challenge the revocation. The district court also found that Musunuru's Fifth Amendment rights were not violated... Because USCIS applied the regulations in a manner inconsistent with the statutory portability provisions of the AC21 and should have provided to Musunuru's current employer notice and an opportunity to respond, we REVERSE and REMAND.

USA v. Oscar Orona-Ibarra No. 15-1176

Argued October 28, 2015 — Decided August 3, 2016

Case Type: Criminal

Central District of Illinois. No. 14-CR-10050 — **Joe Billy McDade**, *Judge*.

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

EASTERBROOK, *Circuit Judge*, dissenting.

WOOD, *Chief Judge*. It is a crime for a noncitizen who has previously been removed to reenter the United States without the permission of the Attorney General. 8 U.S.C. § 1326(a). A person commits this crime in any location in the United States where she is "found." *Id.* § 1326(a)(2). Another statute provides that venue in these cases is proper wherever in the United States the violation may occur or where the accused person "may be apprehended." 8 U.S.C. § 1329... Oscar Orona-Ibarra is a noncitizen who reentered the country after removal, in violation of section 1326. He was arrested on unrelated charges in Texas and was "found" by federal immigration officials while in custody in Texas. Federal officials then transferred him from Texas to the Central District of Illinois, where he ultimately was charged with violating section 1326. We hold that this district was not a permissible venue, because he did not commit any element of the crime there: he did not reenter the country in Illinois, he was not "found" in Illinois, and he was not "apprehended" in Illinois. We therefore reverse the district court's judgment and remand for further proceedings.

Joseph Jordan v. Randall Hepp No. 14-3613

Argued January 5, 2016 — Decided August 3, 2016

Case Type: Prisoner

Eastern District of Wisconsin. No. 2:07-cv-00382-RTR — **Rudolph T. Randa**, *Judge*.

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

WOOD, *Chief Judge*. This case is, in spirit, a companion to our recent decision in *Imani v. Pollard*, No. 14-3407, 2016 WL 3434673 (7th Cir. June 22, 2016). It, too, raises the question whether a criminal

defendant's right to self-representation — acknowledged by the Supreme Court in *Faretta v. California*, 422 U.S. 806 (1975)—was infringed. In our case, Joseph Jordan was on trial for reckless homicide in Wisconsin. He moved to waive counsel and represent himself because he feared that his court-appointed attorney was not up to the job. The court denied his motion. What happened at trial, in Jordan's view, vindicated his fears: his attorney failed to object to a series of improper statements during the state's closing argument when the prosecutor vouched for the credibility of a witness. Jordan now seeks *habeas corpus* relief, either on the basis of the denial of his *Faretta* right or his failure to receive the assistance of counsel to which the Sixth Amendment entitles him. We conclude that he is entitled to proceed on the latter ground, and thus we reverse and remand for a hearing under 28 U.S.C. § 2254(e)(2).

Glenn Bradford v. Richard Brown No. 15-3706

Argued April 14, 2016 — Decided August 4, 2016

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division. No. 2:13-cv-00410-JMS-WGH — **Jane E. Magnus-Stinson**, *Judge*.

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

HAMILTON, *Circuit Judge*, dissenting.

POSNER, *Circuit Judge*. In 1993 Glenn Bradford was convicted in an Indiana state court of a murder and arson committed in Evansville the previous year, and was sentenced to 80 years in prison, where he remains. In 2013 he filed this federal habeas corpus suit, in which he claims that he can prove his innocence. He asks for a new trial, which the district judge denied, precipitating this appeal... The judgment denying habeas corpus is AFFIRMED.

Kleen Products LLC v. International Paper Company Nos. 15-2385 & 15-2386

Argued December 8, 2015 — Decided August 4, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 10 C 5711 — **Harry D. Leinenweber**, *Judge*.

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

WOOD, *Chief Judge*. The antitrust laws prohibit competing economic actors from colluding to agree on prices, either directly or through such mechanisms as output restrictions. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990). That is just what the plaintiffs in the case before us allege the producers and sellers of containerboard did. The plaintiff-purchasers filed this suit under Sherman Act § 1, 15 U.S.C. § 1, seeking to recover treble damages for the overcharges they allegedly paid. See Clayton Act § 4, 15 U.S.C. § 15. What brings the case before us at this time—well before the merits have been resolved—is the district court's decision to certify a nationwide class of purchasers under Federal Rule of Civil Procedure 23. The defendants, International Paper Company, Georgia-Pacific LLC, Temple-Inland Inc., RockTenn CP, LLC, and Weyerhaeuser Company (to whom we will refer collectively as Defendants unless the context requires otherwise), asked us to accept this interlocutory appeal from the certification decision pursuant to Rule 23(f). We agreed to do so. Finding no abuse of discretion in the district court's decision, however, we affirm.

Ana Veronica Jimenez Ferreira v. Loretta Lynch No. 15-2603

Argued June 8, 2016 — Decided July 12, 2016 Reissued as Opinion August 5, 2016

Case Type; Agency

Petition for Review of an Order of the Board of Immigration Appeals No. A200 892 195

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

PER CURIAM. Ana Veronica Jimenez Ferreira, a 40-year-old native and citizen of the Dominican Republic, applied for asylum and withholding of removal based on her membership in a social group that she describes as Dominican women in relationships they cannot leave. Jimenez testified in immigration court that she fled to the United States because the government of her home country would not protect her from her common-law husband, who had raped, beaten, and kidnapped her, and who continually stalked her and threatened to kill her and her two children. The immigration judge denied relief on the grounds that Jimenez was not credible and lacked corroborating evidence, and the Board of Immigration Appeals upheld the IJ's decision. The agency's adverse credibility determination was based largely on purported inconsistencies between Jimenez's testimony at the removal hearing and her earlier statements to an asylum officer during a "credible-fear" interview. We conclude that the agency erred by (1) failing to address Jimenez's argument that the notes from the credible-fear interview are unreliable and therefore an improper basis for an adverse credibility finding and (2) ignoring material documentary evidence that corroborates Jimenez's testimony. Accordingly, we grant Jimenez's petition for review and remand for further proceedings.

Teledyne Technologies Inc. v. Raj Shekar No. 15-2349

Argued May 23, 2016 — Decided August 5, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15 C 1392 — **Ronald A. Guzman**, *Judge*.
Before BAUER, POSNER, and WILLIAMS, *Circuit Judges*.

BAUER, *Circuit Judge*. Teledyne Technologies, Inc. ("Teledyne") obtained a temporary restraining order and, later, a preliminary injunction against its former employee, Raj Shekar ("Shekar"). Both required Shekar to return Teledyne's equipment and electronic information, which he retained following his termination. Since Shekar refused to comply with either order, Teledyne filed a motion for rule to show cause why Shekar should not be held in contempt. The district court granted the motion and scheduled an evidentiary hearing. Prior to the hearing, Shekar filed a motion to vacate the preliminary injunction. Ultimately, the district court issued an order holding Shekar in contempt and denying his motion to vacate the preliminary injunction. Shekar appeals both rulings... This appeal is DISMISSED.

USA v. Joel Rivas No. 13-3526

Argued September 16, 2015 — Decided August 5, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 10 CR 617 — **Amy J. St. Eve**, *Judge*.
Before POSNER, EASTERBROOK, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. A fingerprint examiner testified at trial that he was certain the partial fingerprint found on a 9 millimeter handgun belonged to Joel Rivas. Rivas wanted to cast doubt on the reliability of the method the examiner used by questioning him about an unrelated case in which the FBI used the same method to erroneously conclude that the fingerprint of an Oregon lawyer was on a bag containing detonating devices used in terrorist bombings in 2004 in Spain. The district court did not infringe Rivas's rights under the Confrontation Clause when it ruled the defense could not refer to that case when cross-examining the fingerprint examiner. The examiner in Rivas's case was not involved in the other case, and the two cases were wholly unrelated, so the testimony was of only marginal relevance. Rivas's counsel was not prevented from questioning the examiner on the reliability of the fingerprint identification method, and counsel pursued multiple lines of cross-examination in an attempt to convince the jury that the government had not proven that the fingerprint belonged to Rivas. Since he was given ample opportunity to cross examine the witness, Rivas's Sixth Amendment right to confrontation was not violated. We affirm his conviction.

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](#).