

## Opinions for the week of November 21 - November 23, 2016

### **USA v. Jarvis Washington** No. 15-2656

Argued October 6, 2016 — Decided November 21, 2016

Case Type: Criminal

Northern District of Illinois, Western Division. No. 13 CR 50070-1 — **Frederick J. Kapala**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*;FRANK H. EASTERBROOK, *Circuit Judge*;DANIEL A. MANION,  
*Circuit Judge*.

#### **ORDER**

Jarvis Washington was convicted by a jury of two separate counts under 18 U.S.C. § 922(g)(1) for being a felon in possession of a gun and ammunition. He complains on appeal that the district court failed to instruct the jury that it could not return separate convictions unless it concluded that Washington stored the gun and ammunition at different times or in different places. No such evidence exists, according to Washington; without it, he says, the convictions should merge. Our review, however, is for plain error only, because Washington forfeited this point in the district court. We find no such problem with the conviction and thus we affirm.

### **Jarren Austin v. John Niblick** No. 16-3317

Submitted November 14, 2016 — Decided November 22, 2016

Case Type: Civil

Northern District of Indiana, Fort Wayne Division No. 1:93-cv-217 — **William C. Lee**, *Judge*.  
Before DIANE P. WOOD, *Chief Judge*;RICHARD A. POSNER, *Circuit Judge*;ILANA DIAMOND  
ROVNER, *Circuit Judge*.

#### **ORDER**

This case had its origins in 1991, when officers from the Fort Wayne, Indiana, police force arrested Jarren Austin and allegedly beat him as they did so. In 1993, relying on 42 U.S.C. § 1983 and several state-law theories, Austin sued one of the arresting officers, John Niblick, as well as several other unnamed officers and the City of Fort Wayne. Austin later dismissed his claims against the unnamed officers and the city, leaving Niblick as the sole defendant. Niblick made no effort to defend, however, though nothing indicates that he was not properly served. In 1995 the district court awarded Austin a \$16,998.36 default judgment against the absent officer. By that time, Niblick had moved to Florida. The record then goes silent until December 16, 2014, when Austin filed a pro se “Motion Requesting Extension of Time and Clarification on the Court’s Prior Judgment and Order Dated September 8, 1995” in the U.S. district court for the Northern District of Indiana, which had entered the 1995 judgment. In essence, the motion asked the court to help Austin to collect on the nearly 20-year-old judgment against Niblick. After it caught wind of the litigation, the City of Fort Wayne intervened to defend against Austin’s request that the City pay the judgment, with interest. The district court denied Austin’s motion, finding that Indiana law did not permit him to sue the City... The district court’s order denying Austin’s motion is AFFIRMED.

### **First American Bank v. Federal Reserve Bank of Atlanta** No. 16-1122

Argued October 20, 2016 — Decided November 22, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 14 C 8120 — **John Robert Blakey**, *Judge*.  
Before BAUER, POSNER, and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. This is a complicated case regarding contested liability for a counterfeit check; we shall simplify ruthlessly. In 2013 an Illinois lawyer named David M. Goodson received an email from a person who represented himself or herself to be a woman named “Fumiko Anderson.” The email stated that she wanted to hire Goodson to help her re-cover money that she claimed to be owed in a divorce

proceeding. Later Fumiko told him that her retaining a lawyer had convinced her ex-husband to settle, and that Goodson should expect a substantial check in the mail to cover his fee plus the amount of the settlement, which he was to pass on to her. The check that Goodson received, marked payable to the order of "Law Office David M. Goodson," was drawn on the account of First Aid Corporation (an Illinois manufacturer—doing business as 1st Ayd Corporation—of industrial and sanitation products), at a Chicago bank named First American. The check looked like a real check but actually was counterfeit. The scammers wrote a check on First American for \$486,750.33 to Goodson, which he deposited in his client trust account in Citizens Bank, N.A., one of the defendants in this case. Fumiko told Goodson she needed the money immediately. Goodson directed the bank to transfer it to a Japanese entity that he believed to be Fumiko but actually was part of an Internet-based fraudulent check scheme known as the "Fumiko Bandit." So First Aid had lost the entire \$486,750.33 that had been transferred out of its account by the fraudulent check; the money had been stolen by Fumiko Bandit. First American reimbursed First Aid, its defrauded and therefore unhappy client, but then turned to Citizens Bank in an effort to recover from it the money that it had transmitted to Goodson's Citizens Bank account. Citizens refused, precipitating this suit by First American, which seeks back the \$486,750.33 it has lost and names as defendants not only Goodson and Citizens Bank but also the Federal Reserve Bank of Atlanta, which as we're about to see was involved in the transaction, though only peripherally. There is no merit to the suit... AFFIRMED.

**USA v. Edward Thompson** No. 16-1105

Argued September 22, 2016 — Decided November 22, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13 CR 616 — **Sara L. Ellis**, *Judge*.  
Before BAUER, POSNER, and MANION, *Circuit Judges*.

BAUER, *Circuit Judge*. Defendant–appellant, Edward Thompson, was indicted on one count of possession with intent to distribute 500 grams or more of cocaine in violation of 21 U.S.C. § 841(a)(1). He filed a motion to suppress the cocaine that was seized after he gave his consent for law enforcement to search his apartment. He argued that a series of Fourth Amendment violations led to the discovery of the contraband and that his consent was not voluntary. The district court denied Thompson's motion. We affirm.

**Juan Suarez v. W.M. Barr & Company, Inc.** No. 15-3602

Argued April 12, 2016 — Decided November 22, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 CV 4569 — **Matthew F. Kennelly**, *Judge*.  
Before WOOD, *Chief Judge*, and FLAUM and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Juan Suarez used Goof Off, an extremely flammable product made by W.M. Barr, to remove paint from a basement floor. While doing so, a fire erupted in the basement and severely burned him. Juan and his wife sued Barr, alleging failure to warn and defective design under Illinois law. The Suarezes appeal the district judge's grant of summary judgment in Barr's favor... The judgment of the district court is AFFIRMED in part and REVERSED in part, and the case is REMANDED for proceedings consistent with this opinion.

**Jennifer Krieger v. USA** No. 15-2481

Argued May 24, 2016 — Decided November 22, 2016

Case Type: Prisoner

Southern District of Illinois. No. 3:14-cv-00749-JPG — **J. Phil Gilbert**, *Judge*.  
Before ROVNER, SYKES, and HAMILTON, *Circuit Judges*.

ROVNER, *Circuit Judge*. The first time this appeal was before us, on direct review, Jennifer Krieger was seeking to vacate the twenty-year sentence she received when her friend died after chewing a fentanyl pain patch provided by Krieger. At that time, she objected to the manner in which the government proved that “death resulted” from the distribution of the drugs—as a sentencing factor by a preponderance of the evidence, rather than as an element proved beyond a reasonable doubt—and also argued that the evidence was insufficient to support a finding that the victim’s death had occurred because of the fentanyl. Given the statutory sentencing structure in place at the time, and the fact that the district court found, by a preponderance of the evidence, that death had resulted from the distribution, there was only one sentence that the district court could give, and that was twenty years. The district court expressed discomfort with its lack of discretion and the fact that it appeared that Krieger was being sentenced for homicide despite having been convicted only of distributing fentanyl—concerns that this court echoed on appeal. Nevertheless, based on then current law, we found no error and affirmed the decision of the district court. After Krieger’s sentencing and after her direct appeal, the Supreme Court issued two decisions that touch on the very issues raised at Krieger’s sentencing. Consequently, on June 30, 2014, Krieger filed a petition under 28 U.S.C. § 2255 asking the court to vacate, set aside, and correct her sentence based on new Supreme Court rules that she argues should be applied retroactively on collateral review... The decision of the district court is VACATED and the case is REMANDED for resentencing.

**Miguel Perez-Fuentes v. Loretta E. Lynch** No. 14-2504

Argued September 20, 2016 — Decided November 22, 2016

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A200-140-987

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

BAUER, *Circuit Judge*. Petitioner Miguel Perez-Fuentes, a native and citizen of Mexico, seeks review of the Board of Immigration Appeals’ decision affirming the denial of his application for cancellation of removal... The Board affirmed the denial based on the Immigration Judge’s alternate determination that Perez-Fuentes did not establish the requisite hardship for cancellation... Perez-Fuentes challenges several aspects of his hearing. He contends that the IJ improperly excluded evidence and failed to develop the record as required by 8 U.S.C. § 1229a(b)(1) and 8 C.F.R. § 1240.32(b). We dismiss Perez-Fuentes’ petition for review, in part for lack of jurisdiction, and deny the remainder of the petition.

**USA v. Colbi Andry** No. 16-1113

Argued September 15, 2016 — Decided November 23, 2016

Case Type: Criminal

Northern District of Illinois, Eastern Division. No. 13-CR-843-2 — **Harry D. Leinenweber**, *Judge*.

Before JOEL M. FLAUM, *Circuit Judge*; DANIEL A. MANION, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

**ORDER**

Colbi Andry was charged in a superseding indictment with six counts of wire fraud, in violation of 18 U.S.C. § 1343, based on his participation in a scheme to defraud homeowners seeking mortgage loan modifications. Following trial, a jury convicted Andry on all counts. The district court determined that Andry’s guideline offense level was 26 based on its finding that the loss totaled \$122,000 and its imposition of a three-level enhancement for Andry’s role in the offense. Given Andry’s criminal history category, this resulted in an advisory guideline sentencing range of 63 to 78 months’ imprisonment. The district court sentenced Andry to 48 months’ imprisonment. Andry appeals, arguing the evidence presented at trial constituted an impermissible variance from the indictment and that the district court erred in determining the amount of loss involved and in enhancing his offense level by three for his role in the offense. We affirm.

**USA v. Damian Patrick** No. 15-2443

Argued May 24, 2016 — Decided November 23, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 13-CR-234 — **Rudolph T. Randa**, *Judge*.

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

WOOD, *Chief Judge*, dissenting.

EASTERBROOK, *Circuit Judge*. Police in Wisconsin arrested Damian Patrick while he was in a car on a public street and found him armed. That led to this federal prosecution, because Patrick's criminal record made it unlawful for him to possess firearms. 18 U.S.C. §922(g)(1). The district court denied his motion to keep the gun out of evidence... Patrick pleaded guilty but reserved the opportunity to contest the validity of his arrest, and thus the validity of the gun's seizure. He now appeals from the 57-month sentence he received... AFFIRMED.

**USA v. Michael Flournoy** No. 14-2325

Argued September 15, 2016 — Decided November 23, 2016

Case Type: Criminal

Northern District of Illinois, Western Division. No. 3:12-cr-50044 — **Frederick J. Kapala**, *Judge*.

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

MANION, *Circuit Judge*. Following a jury trial, Michael Flournoy was convicted of one count of conspiring to possess cocaine and one count of attempting to possess cocaine. Flournoy appeals, claiming he is entitled to a new trial because the prosecutor made inappropriate comments during closing argument and because the government presented testimony from a cooperating witness that conflicted with that witness's plea agreement. Flournoy also claims that the district court erred in adding several discretionary conditions to the terms of his supervised release without explanation. We affirm Flournoy's conviction, but remand for resentencing.

**Anthony Rodriguez v. Greg Gossett** No. 13-1877

Argued February 9, 2015 — Decided November 23, 2016

Case Type: Prisoner

Southern District of Illinois. No 3:10-cv-00077-DRH-SCW — **David R. Herndon**, *Judge*.

Before ROVNER and SYKES, *Circuit Judges*, and WOOD, *District Judge*.

WOOD, *District Judge*. Anthony Rodriguez was convicted of two counts of predatory criminal sexual assault of a child following a jury trial in the State of Illinois in 1997. Rodriguez has petitioned for a writ of habeas corpus, contending that he was deprived of effective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and now appeals the district court's denial of his petition. Because we conclude that the Illinois Appellate Court did not unreasonably apply the Strickland standard, we affirm the district court's denial of Rodriguez's habeas petition.

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](#).