

## **Opinions for the week of November 28 - December 2, 2016**

### **USA v. Darryl Worthen** No. 15-3521

Argued October 28, 2016 — Decided November 28, 2016

Case Type: Criminal

Southern District of Indiana, New Albany Division. No. 15-cr-00006 — **Sarah Evans Barker**, *Judge*.  
Before RIPPLE, KANNE, and ROVNER, *Circuit Judges*.

KANNE, *Circuit Judge*. As a FedEx driver, Darryl Worthen delivered packages to Scott Maxie—the owner of a gun store in southern Indiana called Muscatatuck Outdoors. Worthen and Maxie knew each other well, as they often conversed during the deliveries. Worthen even considered Maxie to be a friend. But unfortunately, their friendship wasn't strong enough to withstand Worthen's greed. Worthen decided to rob Maxie—and he exploited their friendship to do it... Apart from contravening our longstanding precedent that appeal waivers are generally enforceable, such a rule would have perverse consequences. Many criminal defendants might benefit from waiving their appeal rights. In fact, Worthen so benefitted: in exchange for foregoing his appeal rights, the government agreed to drop some of the charges and further agreed to not seek the death penalty. Worthen perhaps saved his life by waiving his appeal rights. If Worthen could then renege on his deal and maintain an appeal, then why would the government make these kinds of deals in the future? Why wouldn't the government instead just charge defendants like Worthen with all applicable crimes and see what sticks after the appeal? Worthen's proposed rule is as undesirable as it is nonsensical. Here, Worthen "expressly waive[d] his right to appeal [his] conviction and sentence ... on any and all grounds." (R. 45 at 4.) His waiver precludes an appeal. We accordingly DISMISS Worthen's appeal without considering the merits.

### **USA v. Mary Ray** No. 16-1572

Argued November 7, 2016 — Decided November 29, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 3:14CR078-001 — **Jon E. DeGuilio**, *Judge*.  
Before FRANK H. EASTERBROOK, *Circuit Judge*; ANN CLAIRE WILLIAMS, *Circuit Judge*; GARY S. FEINERMAN, *District Judge*.

### **Order**

The only appellate issue in this criminal case is whether the evidence supports the jury's verdicts that Mary Ray committed wire fraud, 18 U.S.C. §1343, by diverting money from the assets of her elderly father-in-law Norman. Ray also was convicted of embezzling funds from a federal program and making false statements on her tax returns; she does not contest her sentences for those crimes. Imprisonment comes to 84 months in total, allocated across the 11 counts of conviction. Ray did not file a motion for acquittal under Fed. R. Crim. P. 29, so only plain error could lead this court to reverse the wire-fraud convictions. See *United States v. Irby*, 558 F.3d 651, 653 (7th Cir. 2009). The evidence at trial shows that in 2013 Ray persuaded her father-in-law (then 84 years old) to give her a power of attorney to manage his funds, worth more than \$600,000. He did so because he deemed her financially prudent, while he thought his other relatives to be spendthrifts. Ray concealed from Norman the fact that she, too, could not be trusted with money and had recently been fired from her job after being caught embezzling (which she did to cover gambling debts). Ray led Norman to believe that she and her husband "were financially okay"; she did not tell him that the couple had filed for bankruptcy in 2010 and that she was no longer employable...  
AFFIRMED

### **Maria N. Gracia v. SigmaTron International, Inc.** No. 15-3311

Argued September 8, 2016 — Decided November 29, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:11-cv-07604 — **Edmond E. Chang**, *Judge*.  
Before FLAUM, ROVNER, and SYKES, *Circuit Judges*.

ROVNER, *Circuit Judge*. Maria Gracia sued her employer, SigmaTron, International, Inc., for sexual harassment and for terminating her in retaliation for reporting sexual harassment. A jury found in favor of SigmaTron on the claim of sexual harassment but returned a verdict for Gracia on the retaliation count. SigmaTron challenges both the judgment in Gracia's favor and the amount of damages awarded by the jury. We affirm.

**Hannah Piotrowski v. Menard, Inc.** No. 15-3163

Argued May 23, 2016 — Decided November 29, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 13 CV 05572 — **Mary M. Rowland**, *Magistrate Judge*.  
Before BAUER, POSNER, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Hannah Piotrowski was injured after slipping on two small rocks in the parking lot of a Menard store. She filed this suit alleging that her injuries were due to Menard's negligence, contending that the rocks must have come from a planter that Menard maintained outside the store or from decorative rocks that the store sold in bags of at least forty pounds. We affirm the district court's grant of summary judgment in favor of the store because Piotrowski's belief that she fell as a result of the store's negligence is only speculation, and speculation is not enough to survive summary judgment under Illinois law. That Piotrowski fell in the Menard's parking lot after slipping on two rocks is not enough to support an inference that Menard's negligence caused the fall. In addition, there is no evidence of a pattern of conduct or recurring incident, and the store's general manager and employees regularly monitored the parking lot for unsafe conditions.

**USA v. Joseph Olivo** No. 14-1140

November 29, 2016

Case Type: Criminal

Northern District of Indiana, South Bend Division. No. 12 CR 00110 — **Jon E. DeGuilio**, *Judge*.  
Before ANN CLAIRE WILLIAMS, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*; DAVID F. HAMILTON, *Circuit Judge*.

## ORDER

Joseph Olivo pled guilty to conspiring to distribute marijuana, possessing marijuana with intent to distribute, possessing a firearm in furtherance of a drug trafficking crime, and possessing a firearm as a felon. The district court concluded that Olivo was a career offender under the United States Sentencing Guidelines, and that determination resulted in an advisory guidelines range of 292 to 365 months' imprisonment. The district court sentenced Olivo to 292 months. On appeal, we rejected Olivo's challenge to the district court's denial of his motion to suppress evidence seized at his home, and we affirmed his conviction. *United States v. Olivo*, 597 F. App'x 878 (7th Cir. 2015) (unpublished). The Supreme Court later ruled in *Johnson v. United States*, 135 S. Ct. 2551 (2015) that the residual clause of the Armed Career Criminal Act ("ACCA") is unconstitutionally vague. The Court then granted Olivo's petition for a writ of certiorari and remanded his case to us for further consideration in light of *Johnson*. Like the ACCA's residual clause, the career offender guideline under which Olivo was sentenced provides in its residual clause that a qualifying offense includes an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.1(a)(2) (2013). The parties filed a joint Rule 54 statement of position that asked us to hold Olivo's case pending resolution of *United States v. Hurlburt*, No. 14-3611, *United States v. Gillespie*, No. 15-1686, and *United States v. McGuire*, No. 15-2071, and to resolve Olivo's case in similar fashion... Accordingly, we VACATE Olivo's sentence and REMAND for resentencing.

**Seyon Haywood v. Jody Hathaway** No. 12-1678

Argued October 30, 2013 — Decided November 29, 2016

Case Type: Prisoner

Southern District of Illinois. No. 3:09-cv-00807-MJR-SCW — **Michael J. Reagan**, *Chief Judge*.

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

EASTERBROOK, *Circuit Judge*, dissenting in part.

PER CURIAM. Seyon Haywood, formerly an inmate at Illinois's Shawnee Correctional Center, accused his auto mechanics teacher of attacking him. Guards charged him with making false statements. A disciplinary panel found him guilty and ordered him transferred to segregation for two months; the panel also revoked one month of good-time credit. After these events he was transferred to a different prison, where he remains in custody. Haywood contends in this proceeding under 42 U.S.C. §1983 that these penalties violate his right to speech, protected by the Constitution's First Amendment (applied to states by the Fourteenth). He also alleges that the conditions of his confinement in segregation were cruel and unusual, violating the Eighth Amendment (again applied via the Fourteenth). The district court dismissed the first claim on the pleadings and granted summary judgment to defendants on the second. The only defendant against whom Haywood still seeks damages is Jody Hathaway, Shawnee's Warden during Haywood's time there... The judgment is affirmed with respect to the First Amendment theory and reversed with respect to the Eighth Amendment theory. The case is remanded for proceedings consistent with this opinion.

**USA v. Antoine Allen** No. 16-1752

Submitted October 5, 2016 — Decided November 30, 2016

Case Type: Criminal

Southern District of Indiana, New Albany Division. No. 4:10-cr-00006-005 — **Tanya Walton Pratt**, *Judge*.

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

**ORDER**

Antoine Allen entered a conditional guilty plea to conspiring to distribute cocaine, 21 U.S.C. §§ 846, 841(a)(1), preserving for this direct appeal his challenge to the denial of a motion asserting that the 40-month delay between his indictment and initial appearance violated his Sixth Amendment right to a speedy trial and thus the indictment should be dismissed. But Allen sat on his hands instead of promptly asserting his right to a speedy trial and suffered no obvious prejudice from the delay. Thus, we affirm the district court's ruling on the motion to dismiss.

**William Avila v. Reed Richardson** No. 15-1201

Decided November 30, 2016

Case Type: Prisoner

Submitted July 27, 2015

Eastern District of Wisconsin. No. 2:12-cv-00228-WEC — **William E. Callahan, Jr.**, *Magistrate Judge*.

Before WILLIAM J. BAUER, *Circuit Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; DAVID F.

HAMILTON, *Circuit Judge*.

**ORDER**

Petitioner William L. Avila seeks federal habeas corpus relief from his state court convictions for sexually assaulting a child, sexually exploiting a child, and possessing child pornography. Avila pled guilty under a plea agreement that left each side free to make its own sentencing recommendation. The state court

sentenced Avila to 35 years in prison. Avila seeks habeas relief on the ground that he received ineffective assistance of counsel. His primary theory has been that his lawyer was ineffective in telling him he faced only a five-year sentence, and that if he had known he faced a much heavier sentence, he would not have pled guilty. In an earlier appeal, we reversed a denial of relief and ordered an evidentiary hearing in the district court. *Avila v. Richardson*, 751 F.3d 534 (7th Cir. 2014). The district court held the hearing and again denied relief. Avila's new appeal from that decision has been referred to the earlier panel as a successive appeal. After reviewing the briefs, we concluded that oral argument was not necessary. Based on the district court's findings of fact, which were not clearly erroneous, we affirm the denial of relief.

**Dustan Dobbs v. George McLaughlin** No. 16-2135

Argued November 4, 2016 — Decided December 1, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. Case No. 15 cv 8032 — **Sharon Johnson Coleman**, *Judge*. Before FLAUM and KANNE, Circuit Judges, and MAGNUS- STINSON, District Judge.\*

KANNE, Circuit Judge. Dustan Dobbs hired Appellees George McLaughlin, John Gehlhausen, and Anthony Argeros as his attorneys on a contingency fee basis. Appellees filed Dobbs's product-liability claim against DePuy Orthopedics in the DePuy ASR Hip Implant Multidistrict Litigation in the Northern District of Ohio. DePuy subsequently offered to settle all claims in that litigation. Despite advice and pressure from McLaughlin, Dobbs refused to settle and discharged Appellees. Later, Dobbs changed his mind and decided to accept the settlement offer. Because the employment contract was inoperative when Dobbs settled, Appellees sought compensation under a quantum meruit theory. The district court awarded attorneys' fees in the full amount of the original contract. Dobbs argues that the district court abused its discretion by not analyzing the factors that Illinois courts look to when calculating reasonable attorneys' fees under quantum meruit. We agree... On remand, the district court may conclude that the full contingency fee is a reasonable award. We do not intend to insinuate that some lesser award is required. Our conclusion is limited to the ruling that the district court erred by failing to consider evidence related to the relevant factors under Illinois law for determining reasonable attorneys' fees under *quantum meruit*. **III. CONCLUSION** For the foregoing reasons, we VACATE the district court's award of attorneys' fees and REMAND the case for further proceedings consistent with this opinion.

**USA v. Kenneth Raney** No. 15-3574

Argued November 3, 2016 — Decided December 1, 2016

Case Type: Criminal

Western District of Wisconsin. No. 12-cr-00100 — **William M. Conley**, *Chief Judge*. Before BAUER, MANION, and HAMILTON, *Circuit Judges*.

MANION, *Circuit Judge*. Kenneth Raney appeals for the second time the district court's decision to impose an additional two-year term of supervised release after revoking his previous release term. We vacated Raney's initial sentence because the district court did not provide any justification for the length of the supervised release term. On remand, the court has adequately explained its decision. Raney has also waived his challenge to the supervised release condition to which he objects. Therefore, we affirm.

**Larry Frazier v. John Varga** No. 15-266

Argued September 28, 2016 — Decided December 1, 2016

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 1:11-cv-07484 — **Sharon Johnson Coleman**, *Judge*. Before KANNE, SYKES, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Just days after his release from prison in 1995, petitioner Larry Frazier entered the apartment of a sixty-two-year-old woman and attempted to rob her at gunpoint. For his troubles, he received a bullet wound. Frazier was convicted of home invasion and sentenced to sixty years. The sentence was increased because of the victim's age. After failing to obtain relief from the conviction and sentence in the state courts, Frazier sought federal habeas corpus relief under 28 U.S.C. § 2254. He now appeals the district court's denial of his petition. We affirm. Frazier's sole claim on appeal is that his trial lawyer was ineffective by failing to warn him he faced a potentially longer sentence based on the victim's age. To reach the merits of Frazier's claim, we would need to overcome several procedural obstacles, but one is decisive at the most basic procedural level. The one claim he pursues on appeal was not presented in the district court. "[A]rguments in a federal habeas petition which were not raised to the district court are not properly raised for the first time on appeal." *Mertz v. Williams*, 771 F.3d 1035, 1043 (7th Cir. 2014), citing *Sanders v. Cotton*, 398 F.3d 572, 583 (7th Cir. 2005).

**Thaddeus Jones v. Michelle Qualkinbush** No. 16-3514

Submitted October 6, 2016 — Decided December 2, 2016

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 1:16-cv-08977 — **Robert W. Gettleman**, *Judge*.  
Before WOOD, *Chief Judge*, RIPPLE and WILLIAMS, *Circuit Judges*.

RIPPLE, *Circuit Judge*. This case, which arises out of our motions practice, is an appeal from the denial of a preliminary injunction in a dispute among the parties about the placement of certain referendum propositions on the November ballot. These propositions principally concern the local mayoral election in Calumet City and term limits on candidates for that office. Steven Grant and Calumet City Concerned Citizens (together, the "Petition Plaintiffs") sought to place on the ballot a proposition that, if approved by the voters, would impose mayoral term limits. The County Clerk refused to place the proposition on the ballot on the ground that Calumet City's current administration already had placed three other propositions on the ballot, and state law permitted no more than three propositions in any single election. The City's new ballot initiatives appeared to target specifically Thaddeus Jones, an alderman who had announced he was running for mayor. Mr. Jones therefore also brought suit against the city officials. Together, the Petition Plaintiffs and Mr. Jones (together, the "plaintiffs") sought injunctive relief in the district court, claiming that the actions of the city officials violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Constitution of Illinois. The district court denied a preliminary injunction, and the plaintiffs appealed. Because preparations for the election were underway, we granted expedited review and, after considering the submissions of the parties, affirmed summarily the order of the district court. At that time, we also indicated that we would issue an opinion in due course... The district court did not abuse its discretion in denying the preliminary injunction. The record evidence supports the district court's determination that the plaintiffs' request for such relief was not timely and that considerable harm would have been visited on the electoral system if the requested relief had been granted. Moreover, Mr. Jones's individual claims were not ripe for adjudication at the time that we rendered our decision. AFFIRMED

**Robert Yates v. USA** No. 16-3048

Argued November 29, 2016 — Decided December 2, 2016

Case Type: Prisoner

Western District of Wisconsin. No. 16-cv-207-bbc — **Barbara B. Crabb**, *Judge*.  
Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Thirteen years ago, Robert Yates was sentenced as an armed career criminal under 18 U.S.C. §924(e). The district court concluded that he had six qualifying prior convictions; the statute provides that three or more require an enhanced sentence. After the Supreme Court held in *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), that the "residual clause" in §924(e)(2)(B)(ii) is unconstitutionally vague, and made that decision retroactive, *Welch v. United States*, 136 S. Ct. 1257

(2016), Yates filed this collateral attack. He contends that after *Samuel Johnson* only two qualifying convictions remain, so that 28 U.S.C. §2255(f)(3) restarts the time for collateral review. The prosecutor concedes that the petition is timely and that *Samuel Johnson* knocks out three of the six convictions but maintains that Yates's conviction of battery by a prisoner, in violation of Wis. Stat. §940.20(1), qualifies as a violent felony under the "elements clause" of §924(e)(2)(B)(i) because it "has as an element the use, attempted use, or threatened use of physical force against the person of another". *Samuel Johnson* does not affect the elements clause of §924(e). See, e.g., *Stanley v. United States*, 827 F.3d 562 (7th Cir. 2016). The district court agreed with the prosecutor and dismissed this proceeding. 2016 U.S. Dist. LEXIS 79058 (W.D. Wis. June 17, 2016)... AFFIRMED

**USA v. Jeremiah Berg** No. 16-2948

Submitted October 12, 2016\* — Decided December 2, 2016

Case Type: Criminal

Eastern District of Wisconsin. No. 10-CR-207 — **William C. Griesbach**, *Chief Judge*.

Before DIANE P. WOOD, *Chief Judge*; MICHAEL S. KANNE, *Circuit Judge*; DIANE S. SYKES, *Circuit Judge*.

**ORDER**

Jeremiah Berg filed this successive appeal challenging the district court's denial of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). Berg stands convicted of conspiring to distribute marijuana, being a felon in possession of a firearm, and distributing cocaine. The district court sentenced Berg to 240 months' imprisonment, which was below the applicable Sentencing Guidelines range of 262 to 327 months. Berg contends that Amendment 782 to the Guidelines reduced this range. It didn't: although Amendment 782 reduced the offense levels for most drug-related offenses, the district court did not base Berg's sentence on his drug-related convictions; it instead based the sentence on his felon-in-possession conviction, which carried a higher adjusted offense level than did his other convictions. Because Amendment 782 did not alter the offense level for Berg's firearm offense, the overall sentencing range remains the same as before... For these reasons, we AFFIRM the district court's decision.

**Jennifer Kirk v. DOJ** No. 16-2469

Argued November 16, 2016 — Decided December 2, 2016

Case Type: Civil

Southern District of Illinois. No. 15-CV-571-NJR-PMF — **Nancy J. Rosenstengel**, *Judge*.

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

EASTERBROOK, *Circuit Judge*. Normally a district court may reduce a criminal sentence only within 14 days of its imposition. Fed. R. Crim. P. 35(a). But if a prisoner provides substantial assistance to prosecutors after being sentenced, a district court may reduce the sentence at any time on the prosecutor's motion. Fed. R. Crim. P. 35(b). Jennifer Kirk enjoyed one such reduction; the district judge cut her sentence (for mail and wire fraud) from 188 to 110 months. Kirk contends that she provided additional assistance after that reduction and is entitled to a further reward, but the United States Attorney has declined to file a second motion under Rule 35(b). Kirk then filed this suit under the Administrative Procedure Act, 5 U.S.C. §702, asking a district judge to set aside the prosecutor's decision not to file the motion that would permit the court to reduce her sentence further. The district judge dismissed the complaint, giving two reasons. 2016 U.S. Dist. LEXIS 57323 (S.D. Ill. Apr. 29, 2016). First, the judge thought that whether to make a Rule 35(b) motion is committed to agency discretion by law, bringing Kirk's claim within the scope of the exclusion to APA review in 5 U.S.C. §701(a)(2). Second, the judge believed that the right way for a prisoner to obtain review of the prosecutor's decision is by a collateral attack under 28 U.S.C. §2255-and the APA forecloses actions when another adequate remedy is available. 5 U.S.C. §704. These two reasons are incompatible. If §2255 supplies a means of review, then the decision is not committed to agency discretion by law; but if the decision is committed to agency

discretion, then by definition review under §2255 is impermissible. We think that both parts of the district judge's reasoning are mistaken but that the judgment is nonetheless correct... AFFIRMED

**USA v. Juan Briseno** No. 15-2347

Argued September 9, 2016 — Decided December 2, 2016

Case Type: Criminal

Northern District of Indiana, Hammond Division. No. 11 CR 00077 — **Philip P. Simon**, *Chief Judge*.  
Before POSNER, MANION, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Juan Briseno was convicted of multiple racketeering crimes relating to his participation in a street gang. On appeal he seeks a new trial, arguing that during closing arguments, the government improperly referenced evidence pertaining to a prior acquittal, impermissibly shifted the burden of proof to him, and vouched for government witnesses in an inappropriate fashion. But Briseno failed to object at trial to any of these statements, and none was so egregious that the trial judge should have intervened. Although earlier in the trial the government highlighted evidence relating to an attempted murder for which Briseno had been acquitted, that evidence was also relevant to several other distinct charges that were submitted to the jury. And while the government did erroneously shift the burden of proof by suggesting that Briseno could be acquitted only if the jury concluded that the government's witnesses had testified falsely, that error was made harmless by multiple curative instructions from the judge and by the significant evidence weighing in the government's favor. Finally, the statements that Briseno argues constitute improper vouching are better viewed as permissible appeals to the jurors' common sense. In addition, Briseno complains that the jury instruction on the RICO conspiracy charge was internally inconsistent and confusing, since it required the government to prove an agreement as to the commission of "at least two acts of racketeering" but not "two or more specific acts." We find no error in this instruction, as it mirrors our pattern jury instruction on the topic and comports with our case law. So we affirm Briseno's 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](#).