

Opinions for the week of January 11 – January 15, 2021

Dustin Higgs v. T. Watson No. 20-2129

Argued January 5, 2021 — Decided January 11, 2021

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division. No. 2:16-cv-321 — **Jane Magnus-Stinson**, *Chief Judge*.

Before WOOD, BRENNAN, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. In 1996 Dustin Higgs participated in the kidnapping and murder of three young women on federal property in Maryland. Federal charges followed. A jury returned guilty verdicts across the board, and Higgs received nine death sentences. The district court also imposed a 45-year consecutive sentence for Higgs's use of a firearm during the crimes, in violation of 18 U.S.C. § 924(c). Housed in the U.S. Penitentiary in Terre Haute, Indiana, Higgs filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the Southern District of Indiana seeking to invalidate his § 924(c) convictions based on the Supreme Court's 2019 decision in *United States v. Davis*. Rather than reaching the merits of this claim, the district court dismissed the petition after concluding that Higgs was unable to satisfy the savings clause in 28 U.S.C. § 2255(e) and therefore unable to pursue habeas corpus relief under § 2241. We agree. Because there is nothing structurally inadequate or ineffective about using § 2255 to bring a *Davis*-based claim, Higgs cannot seek relief under § 2241.

Russell Armfield v. Sonja Nicklaus No. 18-3702

Argued October 30, 2020 — Decided January 11, 2021

Case Type: Prisoner

Northern District of Illinois, Eastern Division. No. 1:17-cv-03331 — **Thomas M. Durkin**, *Judge*.

Before MANION, ROVNER, and SCUDDER, *Circuit Judges*.

MANION, *Circuit Judge*. Russell Armfield, along with Kimothy Randall and Tyrene Nelson, was charged with first-degree murder in Illinois state court for the 2004 shooting death of Al Copeland in southwest Chicago. The jury convicted Armfield. He appealed the conviction on the grounds that a transcript disclosed inadvertently to the jury violated his constitutional rights under the Sixth Amendment's Confrontation Clause. He lost. He then pursued a collateral attack in state court alleging ineffective assistance of counsel. He lost again. He then filed for federal habeas relief via 28 U.S.C. § 2254. The district court denied relief and Armfield appeals. Although Armfield's positions have been well briefed and argued by appointed counsel, we affirm denial of habeas relief on Armfield's Confrontation Clause claim because the state's strong case against him renders any constitutional error harmless. We also reject Armfield's ineffective assistance claim; he cannot show trial counsel's shortcomings resulted in prejudice.

Lisa Marie Montgomery v. T. J. Watson No. 21-1052

January 12, 2021

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division. No. 2:21-cv-00020-JPH-DLP — **James P. Hanlon**, *Judge*.

Before DIANE S. SYKES, *Chief Judge*; FRANK H. EASTERBROOK, *Circuit Judge*; THOMAS L. KIRSCH II, *Circuit Judge*.

ORDER

In December 2004 Lisa Marie Montgomery murdered Bobbie Jo Stinnett, who was then eight months pregnant, and cut the baby out of her womb, claiming the child as her own. In 2007 a federal jury in the

Western District of Missouri convicted her of kidnapping resulting in death and recommended a sentence of death. The district court imposed the capital sentence. The Eighth Circuit affirmed on direct appeal... and her petition for postconviction relief under 28 U.S.C. § 2255 failed. On October 16, 2020, the Department of Justice announced an execution date of December 8, 2020. Montgomery responded with several actions in the District of Columbia and elsewhere seeking to delay the execution. As a result of that litigation, on November 23, 2020, the execution was rescheduled to today at 5 p.m.... Last night the district court issued a stay of execution. The government appealed and filed an emergency motion to vacate the stay. This morning we ordered a response, and Montgomery has now complied... Because Montgomery has not overcome the strong presumption against last-minute stays, *Bucklew*, 139 S. Ct. at 1134, and has not made a strong showing of a likelihood of success on her proposed *Ford* claim, *Nken*, 556 U.S. at 434, we vacate the district court's stay of execution.

Melissa Thornley v. Clearview AI, Inc. No. 20-3249

Argued January 4, 2021 — Decided January 14, 2021

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 20-cv-3843 — **Sharon Johnson Coleman**, *Judge*.

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

HAMILTON, *Circuit Judge*, concurring.

WOOD, *Circuit Judge*...The question now before us is whether, on the allegations of the operative complaint, the plaintiffs—Melissa Thornley and others, on behalf of themselves and a proposed class—have shown standing... Oddly, Thornley insists that she lacks standing, and it is the defendant, Clearview AI, Inc., that is championing her right to sue in federal court. That peculiar line-up exists for reasons that only a civil procedure buff could love: the case started out in an Illinois state court, but Clearview removed it to federal court. Thornley wants to return to state court to litigate the BIPA claims, but Clearview prefers a federal forum. The case may stay in federal court, however, only if the more stringent federal standards for standing can be satisfied... The district court held that Thornley has alleged only a bare statutory violation, not the kind of concrete and particularized harm that would support standing, and thus ordered the action remanded to the state court. Because the case meets the criteria of the Class Action Fairness Act, 28 U.S.C. § 1332(d), Clearview sought permission to appeal from that order. See 28 U.S.C. § 1453(c). We agreed to take the appeal, § 1453(c)(1), and we now affirm the decision of the district court.

Michael Zellweger v. Andrew Saul No. 19-2472

Argued May 20, 2020 — Decided January 14, 2021

Case Type: Civil

Northern District of Illinois, Western Division. No. 17 CV 50195 — **Iain D. Johnston**, *Magistrate Judge*.

Before SYKES, *Chief Judge*, and RIPPLE and KANNE, *Circuit Judges*.

SYKES, *Chief Judge*. Michael Zellweger applied for Social Security disability benefits, claiming that he suffered from a spinal disorder equivalent to Listing 1.04 in the agency's Listing of Impairments. The Listings describe impairments that are considered so severe as to be per se disabling. An administrative law judge ("ALJ") denied his claim, concluding that the medical evidence did not meet the criteria for Listing 1.04 and that Zellweger could perform light work. Zellweger sought judicial review. A magistrate judge reversed, ruling that the ALJ's discussion was too cursory at step three of the sequential analysis prescribed in the agency regulations... Although the ALJ explained his reasoning more thoroughly later in his decision, the magistrate judge refused to consider that discussion. He thought the *Chenery* doctrine barred him from doing so. See *SEC v. Chenery*, 318 U.S. 80 (1943). The magistrate judge was mistaken... The magistrate judge's misapplication of *Chenery* requires reversal of the judgment below. Because Zellweger identifies no other error in the ALJ's decision, on remand the court should enter judgment for the Commissioner.

Priscilla Conners v. Robert Wilkie No. 19-2426

Argued February 14, 2020 — Decided January 14, 2021

Case Type: Civil

Northern District of Illinois, Eastern Division. No. 15-CV-5623 — **John J. Tharp, Jr., Judge.**

Before SYKES, *Chief Judge*, and RIPPLE and SCUDDER, *Circuit Judges*.

SYKES, *Chief Judge*. Priscilla Conners worked as a licensed practical nurse (“LPN”) at a healthcare center operated by the U.S. Department of Veterans Affairs... In October 2011 she was hit by a car and suffered severe injuries that seriously impeded her ability to perform most of her nursing duties. Her supervisor initially permitted her to retain her LPN position but radically reduced her responsibilities to only teaching and paperwork. After more than two years in that status, the VA concluded that Conners could not perform the essential duties of an LPN even with reasonable accommodations and attempted to work with her on an acceptable reassignment. Those efforts failed. In January 2014 the VA terminated her employment. Conners sued the Secretary of the VA alleging that the agency violated her rights under the Rehabilitation Act by failing to accommodate her disability, retaliating against her, and subjecting her to a hostile work environment based on her disability. On cross-motions for summary judgment, the district court entered judgment for the Secretary on all claims. Only the accommodation claim is at issue on appeal. The threshold element requires Conners to prove that she was a “qualified individual with a disability” when she was fired—that is, that she was capable of performing the essential functions of an LPN with or without a reasonable accommodation. The evidence does not support a finding in her favor on that element. We affirm the judgment.

Dustin Higgs v. T.J. Watson No. 21-1073

Submitted January 13, 2021 — Decided January 15, 2021

Case Type: Prisoner

Southern District of Indiana, Terre Haute Division. No. 2:20-cv-665 — **James P. Hanlon, Judge.**

Before DIANE P. WOOD, *Circuit Judge*; MICHAEL B. BRENNAN, *Circuit Judge*; MICHAEL Y.

SCUDDER, *Circuit Judge*.

ORDER

For his role in the kidnapping and murder of three young women on federal property in 1996, Dustin Higgs received nine death sentences and a 45-year consecutive prison term. The government has scheduled his execution for today, January 15, 2021. Late last year, while confined in the U.S. Penitentiary in Terre Haute, Indiana, Higgs filed a pro se § 2241 petition in the Southern District of Indiana. He then filed a second amended petition with the assistance of counsel, alleging that the government suppressed evidence during his trial in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Higgs accompanied his petition with a motion for a stay of execution. The district court denied the stay request on January 12, 2021, and Higgs now appeals. We affirm.

Victor Meraz-Saucedo v. Jeffrey A. Rosen No. 20-1438

Argued November 6, 2020 — Decided January 15, 2021

Case Type: Agency

Petition for Review of an Order of the Board of Immigration Appeals. No. A205-154-483.

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

ST. EVE, *Circuit Judge*. Victor Meraz-Saucedo seeks asylum, withholding of removal, and protection under the Immigration and Nationality Act and the Convention Against Torture (“CAT”). He petitions for review of the order of the Board of Immigration Appeals (“Board”) and requests we remand his case for additional proceedings before the Immigration Court. We deny his petition. We find the Board did not abuse its discretion in denying Meraz-Saucedo’s motion to remand to apply for cancellation of removal. We also find the Board’s decision affirming the denial of Meraz-Saucedo’s asylum, withholding of removal, and protection under the CAT claims was supported by substantial evidence.

Hector Zelaya Diaz v. Jeffrey A. Rosen No. 20-1304

Argued November 5, 2020 — Decided January 15, 2021

Case Type: Agency

Petition for Review of a Decision of the Board of Immigration Appeals. No. A073-755-354.

Before SYKES, *Chief Judge*, and HAMILTON and SCUDDER, *Circuit Judges*.

HAMILTON, *Circuit Judge*. This petition for judicial review of an immigration decision focuses on the power of an immigration judge to close a removal or deportation case administratively while the non-citizen pursues other relief. The Board of Immigration Appeals denied relief in this case by following a directive of the Attorney General that sharply limited the power of immigration judges to close a case administratively. Earlier this year, however, we held that the Attorney General's directive was contrary to law. *Meza Morales v. Barr*, 973 F.3d 656, 667 (7th Cir. 2020). The Board of Immigration Appeals simply did not exercise its discretion according to law in this case. We therefore grant the petition for review and remand for a proper exercise of discretion under the Board's precedents in *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012), and *Matter of W-Y-U*, 27 I&N Dec. 17 (BIA 2017).

USA v. Fred McGee No. 19-3312

Argued October 1, 2020 — Decided January 15, 2021

Case Type: Criminal

Western District of Wisconsin. No. 3:18CR00118-001 — **William M. Conley**, *Judge*.

Before EASTERBROOK, MANION, and ROVNER, *Circuit Judges*.

MANION, *Circuit Judge*. Fred McGee pleaded guilty to possession with intent to distribute 100 grams or more of heroin and fentanyl, in violation of 21 U.S.C. § 841(a)(1). He was sentenced to 84 months' imprisonment, followed by a four-year term of supervised release. On appeal, he argues the district court erred in (1) imposing a leadership enhancement, (2) failing to afford him a meaningful opportunity to allocute, and (3) calculating his criminal history points. Because we find the court erred, we remand for resentencing.

USA v. Lance Wehrle No. 19-2853

Argued September 25, 2020 — Decided January 15, 2021

Case Type: Criminal

Southern District of Illinois. No. 17-CR-30074-NJR — **Nancy J. Rosenstengel**, *Chief Judge*.

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

ST. EVE, *Circuit Judge*, concurring in part.

BRENNAN, *Circuit Judge*. After detecting an internet protocol address downloading child pornography, police executed a warrant to search Lance Wehrle's home. They seized hard drives and digital devices that contained over one million photos and videos of child pornography. The search also turned up lascivious photos taken in his home depicting the seven-year-old nephew of Wehrle's friend. Wehrle was indicted for producing and possessing child pornography. Following a bench trial he was convicted and sentenced to 40 years' imprisonment. On appeal Wehrle challenges various district court rulings underlying his conviction and sentence. We affirm in all respects.