

# University of Miami Law Review

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Volume 62  
Number 4 *Volume 62 Number 4 (July 2008)*  
*Eleventh Circuit Review*

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Article 2

7-1-2008

## Foreword

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### Recommended Citation

Honorable Stanley Marcus, *Foreword*, 62 U. Miami L. Rev. 969 (2008)  
Available at: <https://repository.law.miami.edu/umlr/vol62/iss4/2>

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VOLUME 62

JULY 2008

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## Foreword

HONORABLE STANLEY MARCUS

*United States Court of Appeals for the Eleventh Circuit*

I am delighted that the *University of Miami Law Review* has devoted—and intends to devote each year—an entire issue to the work of the United States Court of Appeals for the Eleventh Circuit. The benefits of subjecting the work of the federal circuit courts of appeals to the criticism and insights of the scholarly community are obvious and substantial. For one thing, the overwhelming majority of federal appeals are finally adjudicated in the circuit courts. Indeed, it is not too much to say that the courts of appeals represent the last stop on the train for virtually all federal litigants. Last year, for instance, the Supreme Court granted certiorari review on only a handful of the more than 7500 appeals terminated by the Eleventh Circuit. Needless to say, arriving at the right answer, and explaining our rulings with clarity and simplicity, are of paramount significance. I welcome the *Review's* efforts to help ensure that we do just that.

The United States Court of Appeals for the Eleventh Circuit was created by an Act of Congress in 1981. The Act carved our court out of the historic Fifth Circuit Court of Appeals,<sup>1</sup> perhaps best-known for its fight against entrenched racial segregation in the South. Today, this Circuit stands as one of the busiest and most diverse appellate courts in the nation. Ranging from rural Georgia and the coal mines of Alabama to the large metropolitan centers of Atlanta and Miami, the Eleventh Circuit encompasses some thirty-two million people and the broadest range of racial, religious, and ethnic communities. Not surprisingly, the volume and nature of our work reflect the explosive growth of our population and the extraordinary diversity of our people.

This maiden issue of the *Eleventh Circuit Review* features several

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1. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

timely articles in the fields of criminal and immigration law, subjects of great significance to the work of our court. In fact, over the past few years we have witnessed profound changes in the framework that governs both.

The nature and scope of criminal sentencing in the United States has undergone radical transformation since the earliest days of the Republic, when a fixed term of imprisonment for each offense was strictly prescribed by the legislature, denuding the trial courts of virtually all sentencing discretion. Some time later, a little over a century ago, the penological theories that formed the foundation for our sentencing regime changed significantly, focusing for the first time on the potential for rehabilitation, rather than just on retribution or incapacitation. A new system of indeterminate sentencing developed, conferring largely unfettered discretion on federal district judges to sentence defendants within a broadly defined range, subject only to the most minimal form of appellate review.

Serious disparities, however, among the sentences of similarly situated defendants were thought a commonplace and deleterious result of this regime, and the notion of rehabilitation as an attainable object of sentencing policy fell into disrepute. Not surprisingly, in 1987 Congress discarded this system of virtually unreviewable sentencing discretion in favor of the United States Sentencing Guidelines, which set forth a mandatory sentencing range determined largely by the nature of the offense and the history and characteristics of the defendant.<sup>2</sup> As is evident from the text of the Sentencing Reform Act, the Guidelines sought to eliminate “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .”<sup>3</sup>

Eighteen years later, however, in *United States v. Booker* and *United States v. Fanfan*,<sup>4</sup> the Supreme Court declared the Guidelines unconstitutional to the extent they required a trial judge to enhance a defendant’s sentence on the basis of facts not found by a jury. To remedy the constitutional violation, the Court, in a separate opinion, struck down a portion of the statute that rendered the Guidelines mandatory, and subjected the ensuing sentences to “reasonableness” review by appellate courts. In the aftermath of *Booker*, *Rita v. United States*,<sup>5</sup> *Gall*

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2. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

3. 28 U.S.C. § 991(b)(1)(B) (2000).

4. 543 U.S. 220 (2005).

5. 127 S. Ct. 2456 (2007).

*v. United States*,<sup>6</sup> and *Kimbrough v. United States*,<sup>7</sup> the circuit courts of appeals have struggled to discern and define the more circumscribed dimensions of appellate review.<sup>8</sup> Lindsay Harrison's article on appellate court discretion and sentencing after *Booker*, therefore, could not be more timely.<sup>9</sup>

Beyond the examination of federal criminal sentencing, the *Review* contains several informative articles on other hot-button issues regularly appearing before our court. Professor Ricardo J. Bascuas, for one, criticizes this Circuit's approach to the procedures governing the pretrial forfeiture of assets in criminal cases.<sup>10</sup> He argues that, rather than relying on a grand jury's finding of probable cause to sustain pretrial asset forfeitures, the Fourth Amendment requires—or, at least, should require—an adversarial pretrial hearing as a necessary predicate to any forfeiture.

Moreover, in the timely and rapidly evolving area of immigration law—a field receiving substantially more attention from the courts of appeals—Tania Galloni suggests that appellate judges ought to proscribe the Board of Immigration Appeals from denying asylum claims solely on the basis of immaterial or extraneous inconsistencies in a petitioner's testimony before the Immigration Judge.<sup>11</sup> Michael Vastine, in still another immigration law article, observes that too often asylum seekers asserting ineffective assistance of counsel claims neglect to present adequately the merits of their asylum claims, without which they cannot begin to establish that they were prejudiced by palpably unreasonable attorney conduct.<sup>12</sup> Finally, Rebecca Sharpless addresses the frequently recurring question of how an Immigration Judge may utilize an alien's prior criminal conviction as a foundation for deportation.<sup>13</sup>

Those who wield the enormous power of the state must be watched. And judges are no exception. Circuit judges work almost exclusively on the basis of written opinions in which we provide detailed and, hopefully, well-reasoned justifications for our decisions. By compiling and outlining much-needed legal, historical, and statistical analyses, quality

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6. 128 S. Ct. 586 (2007).

7. 128 S. Ct. 558 (2007).

8. See generally *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008).

9. See Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115 (2008).

10. See Ricardo J. Bascuas, *Of Defense Lawyers and Pornographers: Pretrial Asset Seizures and the Fourth Amendment*, 62 U. MIAMI L. REV. 1159 (2008).

11. See Tania Galloni, *Keeping It Real: Judicial Review of Asylum Credibility Determinations in the Eleventh Circuit After the REAL ID Act*, 62 U. MIAMI L. REV. 1037 (2008).

12. See Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims of Immigration Matters Arising in the Eleventh Circuit*, 62 U. MIAMI L. REV. 1063 (2008).

13. See Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979 (2008).

legal scholarship is peculiarly important to that process. I look forward to the *Review's* continued exploration of these and other timely topics. I have no doubt that our Court and future litigants will be the better for it.