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# Foreword

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## FOREWORD

HON. ADALBERTO JORDAN\*

Sometimes numbers are just numbers,<sup>1</sup> but in the Eleventh Circuit numbers begin to tell a story. In the last twenty-five years, the Circuit—like most other federal courts—has become a much busier place. In 1987, litigants filed 3,910 appeals in the Circuit. By 2012, a quarter century later, there were 6,998 appeals, a 79% increase.

Given that the Eleventh Circuit has not increased in size—remaining at twelve active judges since 1981—it is probably not surprising that the Circuit leads the country in some of the metrics used to measure the work of the federal judiciary. For the year ending September 30, 2012, for example, the Circuit led the nation in the number of appeals filed (583) and the number of appeals terminated (540) per authorized judgeship.<sup>2</sup> These numbers, not surprisingly, have had an impact on how the Circuit goes about its core business of deciding appeals. Today the Circuit hears oral argument in only 20% of its cases.

Fortunately, the Eleventh Circuit is a collegial court comprised of experienced judges with varied backgrounds, and its collective knowledge—along with a liberal use of visiting senior judges and district judges sitting by designation—certainly helps in keeping up with the increased workload. Of our seventeen current judges—ten who are active (we have two vacancies) and seven who are senior—ten joined the federal judiciary as district judges, five served as state judges, fifteen

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1. See, e.g., John Keefe, *Dow 10,000: Sometimes a Number is Just a Number*, CBS MONEYWATCH, Oct. 15, 2009, [www.cbsnews.com/8301-505123\\_162-36741119/dow-1000058-sometimes-a-number-is-just-a-number/](http://www.cbsnews.com/8301-505123_162-36741119/dow-1000058-sometimes-a-number-is-just-a-number/).

2. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR Table B-1 (2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B01Sep12.pdf>.

were in private practice, two worked as magistrate judges, two were appointed as U.S. Attorneys, and three were in state government, one as attorney general and the others as assistant attorneys general. As these numbers indicate, many of our judges, moreover, held multiple positions (e.g., private practice and government practice, private practice and state judiciary) before coming to the Circuit.

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Numbers alone, of course, do not tell the whole story about the Eleventh Circuit. One of the great things about practicing (and, for that matter, judging) in the Circuit is its breadth of cases, from admiralty to securities to insurance to civil rights to arbitration on the civil side, and from federal criminal prosecutions to extradition to habeas corpus on the criminal side. That broad subject matter means that a lot of new legal territory is covered every year, and we, as judges, are grateful for any help we can get, including the scholarly analysis that we find in academic publications. Fortunately for us, since 2008 the *University of Miami Law Review* has graciously devoted an issue to the work of the Circuit. It is an honor for me, as a graduate of Miami Law, to write the foreword for this year's issue and provide a preview of what you will find in the pages that follow.

Two articles deal with recurring and important themes in our habeas corpus cases. In the first of these, Andrew Adler tackles an issue that has split the federal courts and which the Eleventh Circuit left unresolved in 2011: whether the deferential standard of review normally applied by federal courts to state court decisions on federal habeas under 28 U.S.C. § 2254(d)(1) can be waived by the parties.<sup>3</sup> The second article, by Professor Rebecca Sharpless and Andrew Stanton, deals with a matter of retroactivity, specifically whether the Supreme Court's decision in *Padilla v. Kentucky*<sup>4</sup> should be applied to post-conviction proceedings in which ineffective assistance claims are raised for the first time.

Florida, it seems, is often ground zero for issues that are the subject of national debate, and so it is that the shooting of Trayvon Martin has brought to the fore so-called "stand your ground" laws. In her essay, Professor Tamara Rice Lave takes an operational and empirical look at these laws. She employs an interesting philosophical bent, asking whether such laws would have been endorsed by citizens had they been

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3. See *Childers v. Floyd*, *Childers v. Floyd*, 642 F.3d 953, 967 n. 15 (11th Cir. 2011) (en banc), cert. petition granted, judgment vacated, and case remanded, \_\_\_ S. Ct. \_\_\_, 2013 WL 656034 (Feb. 25, 2013).

4. 559 U.S. 356 (2010).

operating behind John Rawls' veil of ignorance in the original position.<sup>5</sup>

There are, finally, several well-written student pieces on diverse subjects of importance to the work of the Eleventh Circuit. Sam Wardle discusses the effect of Florida's advance directive laws<sup>6</sup> on patient autonomy in end-of-life decisions. Caitlin Burke addresses recent arbitration decisions in the Eleventh Circuit in cases brought by foreign seamen asserting federal statutory claims.<sup>7</sup> For Brendan Ryan, the topic is the possibility that Florida's capital sentencing scheme—in which the jury only renders an advisory sentencing verdict to the trial judge—may run afoul of the Supreme Court's Sixth Amendment jurisprudence.<sup>8</sup> Kathryn Yankowski's focus is on a recent Supreme Court case arising out of Florida and holding that a floating home with certain features is not a "vessel" under federal law, thereby precluding the exercise of admiralty jurisdiction.<sup>9</sup> Keeping with the admiralty theme, Dave Werner writes about an Eleventh Circuit case involving the many legal issues arising from the salvage of a Spanish frigate which, while transporting treasure from Peru, sank off Gibraltar during a battle in 1804.<sup>10</sup> The issue closes with an examination by Lacey Stutz of the ability of a pregnant woman in Florida to refuse medical treatment when a medical professional and the state assert that such treatment is necessary to prevent harm to the fetus.<sup>11</sup>

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Some judges have opined that much of what appears in law reviews these days is either inaccessible to or unusable by the bench and bar.<sup>12</sup> Though such a view is far from unanimous and has been criticized as narrow-minded,<sup>13</sup> it appears that at the Supreme Court law review arti-

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5. See JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (Harvard Univ. Press 1971).

6. See, e.g., Fla. Stat. §§ 765.101, 765.401 (2012).

7. See, e.g., *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011).

8. See generally *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1255–65 (11th Cir. 2012).

9. See *Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013).

10. See *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011).

11. See, e.g., *Burton v. State*, 49 So. 3d 263 (Fla. Dist. Ct. App. 2010).

12. See, e.g., Interview with Chief Justice John G. Roberts, Jr., 13 *SCRIBES J. LEGAL WRITING* 5, 37 (2010); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34, 42–57 (1992).

13. See, e.g., Danielle Citron, *Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, *CONCURRING OPINIONS BLOG* (July 1, 2011, 4:06 PM), <http://www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html>.

cles are being cited less today than they were in the 1970s and 1980s.<sup>14</sup> Fewer citations in opinions, of course, do not mean that law review writing has become unhelpful, but statistics—despite what Benjamin Disraeli said about them<sup>15</sup>—can help to identify trends, and it is generally not beneficial if the academy is too far removed from the trenches. The good news is that the submissions in this year's Eleventh Circuit issue contain a judicious mix of the theoretical, the analytical, and the practical. And if experience is any guide, it is this type of writing which stands the best chance of making an impact on the symbiotic businesses of lawyering and judging.

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14. See Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404 (2012).

15. "Lies, damned lies, and statistics" is the oft-quoted phrase attributed to the British statesman. See FRED SHAPIRO, *THE YALE BOOK OF QUOTATIONS* 208 (2006). (statement attributed to Mr. Disraeli in *Times* (London), July 27, 1895)).