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## Foreword

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# FOREWORD

HON. DARRIN P. GAYLES\*

The United States Court of Appeals for the Eleventh Circuit was created in 1981 when Congress divided the six states (Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas) which formerly comprised the Fifth Circuit.<sup>1</sup> The Eleventh Circuit has jurisdiction over federal cases originating in Florida, Georgia, and Alabama.<sup>2</sup> The Circuit includes nine district courts, with each state divided into Northern, Middle, and Southern Districts.<sup>3</sup>

The Eleventh Circuit serves a population as richly diverse as the cases which come before it. According to the U.S. Census Bureau, approximately 35,345,111 people live within the Eleventh Circuit's territory of Florida (20,271,272), Georgia (10,214,860), and Alabama (4,858,979).<sup>4</sup> Its territory comprises the highest percentage of Blacks—approximately twenty-five percent—of any federal judicial circuit in the country.<sup>5</sup> The Circuit's territory also includes a

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<sup>1</sup> Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. § 41 (2012)).

<sup>2</sup> *Id.*

<sup>3</sup> *About the Court*, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, <http://www.ca11.uscourts.gov/about-court> (last visited Feb. 26, 2016).

<sup>4</sup> *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*, U.S. CENSUS BUREAU (Dec. 2015), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2015\\_PEPANNRES&src=pt](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPANNRES&src=pt) [hereinafter *Annual Estimates*].

<sup>5</sup> Andrew Cohen, *Why Aren't there More Black Federal Judges in Alabama, Florida, and Georgia*, ATLANTIC (Nov. 12, 2013), <http://www.theatlantic.com/national/archive/2013/11/why-arent-there-more-black-federal-judges-in-alabama-florida-and-georgia/281322>; Leslie Proll, *Blacks Lack Presence on Federal Appellate Court*, MIAMI HERALD (Oct. 9, 2013), <http://infoweb.newsbank.com/resources/doc/nb/news/149556DA00C00C10?p=AWNB>. This fluctuating percentage closely resembles the significant Black population in the territory of the Fourth Circuit Court of Appeals which covers Maryland, Virginia, West

high percentage of Hispanics (approximately seventeen percent) and significant numbers of other racial and ethnic minorities.<sup>6</sup> It is also estimated that approximately 900,000 gay, lesbian, bisexual, and transgender individuals reside in Florida, Georgia, and Alabama.<sup>7</sup> Therefore, the Eleventh Circuit's decisions are consequential to its population as a whole and, occasionally, the interests of its minority communities more specifically.

Today, the Eleventh Circuit is comprised of eleven active judges (Chief Judge Ed Carnes, Judge Gerald Bard Tjoflat, Judge Frank M. Hull, Judge Stanley Marcus, Judge Charles R. Wilson, Judge William H. Pryor Jr., Judge Beverly B. Martin, Judge Adalberto Jordan, Judge Robin S. Rosenbaum, Judge Julie E. Carnes, and Judge Jill A. Pryor) and eight senior judges (Judge James C. Hill, Judge Peter T. Fay, Judge Phyllis A. Kravitch, Judge R. Lanier Anderson, Judge J.L. Edmondson, Judge Emmett Ripley Cox, Judge Joel F. Dubina, and Judge Susan H. Black).<sup>8</sup> With only eleven active judges, the Eleventh Circuit remains one of the nation's most productive courts. Over the twelve-month period ending in June 2015, the Eleventh Circuit led all circuits in the number of appeals filed (6140).<sup>9</sup> Of those appeals, the Eleventh Circuit had the nation's highest number of civil prisoner appeals (1874), the fourth highest number of ad-

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Virginia, North Carolina, and South Carolina. *See Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU (June 2015), <https://www.census.gov/popest/data/national/asrh/2014/index.html> [hereinafter Sex, Race, and Hispanic Origin] (follow "Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin: April 1, 2010 to July 1, 2014" hyperlink, then select a year using the "Year" dropdown menu).

<sup>6</sup> *Sex, Race, and Hispanic Origin*, *supra* note 5.

<sup>7</sup> *State Policy Profile—Florida*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality\\_maps/profile\\_state/10](http://www.lgbtmap.org/equality_maps/profile_state/10) (last visited Mar. 29, 2016); *State Policy Profile—Georgia*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality\\_maps/profile\\_state/11](http://www.lgbtmap.org/equality_maps/profile_state/11) (last visited Mar. 29, 2016); *State Policy Profile—Alabama*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality\\_maps/profile\\_state/9](http://www.lgbtmap.org/equality_maps/profile_state/9) (last visited Mar. 29, 2016).

<sup>8</sup> The Eleventh Circuit has twelve authorized active judgeships. *See* 28 U.S.C. §44(a) (2012).

<sup>9</sup> U.S. Courts of Appeals – Judicial Caseload Profile, U.S. COURTS (June 30, 2015), <http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/30>.

ministrative appeals (343), the highest number of all other civil appeals (2551), and the second highest number of criminal appeals (1372).<sup>10</sup> Over the same period of time, the Eleventh Circuit also led all circuits in the number of appeals terminated (6069), including 3561 appeals terminated on the merits.<sup>11</sup> Remarkably, the Court's eleven active judges terminated 82.3% of all appeals decided on the merits in the Eleventh Circuit.<sup>12</sup> And despite its relatively low number of active and senior judges, the Eleventh Circuit ranked fourth among all circuits in the median time from the filing of a notice of appeal to disposition.<sup>13</sup>

The breadth of cases decided by the Eleventh Circuit is noteworthy. The Court regularly issues opinions on matters related to a variety of civil matters, including contract disputes, torts, securities, admiralty, patent and trademark infringement, employment discrimination, bankruptcy, regulatory matters, and accommodations for the disabled. The Court also handles direct appeals from a variety of important criminal cases, including drug trafficking, anti-terrorism, public corruption, child pornography, and health care fraud prosecutions, as well as writs and habeas petitions.

Chief Judge Carnes continues to guide the Court as it decides some of the most important and contentious issues faced by our nation. Over the past year, the Court has issued important opinions on a wide range of constitutional issues, including the intersection of privacy rights and the needs of law enforcement in today's technological age,<sup>14</sup> whether religious freedoms are unduly burdened by the Affordable Care Act's "contraceptive mandate";<sup>15</sup> the contours of the right to keep and bear arms on public property;<sup>16</sup> and an ongoing debate on the clash between free speech, privacy, and gun rights.<sup>17</sup> In a spirited opinion and dissent, the Court also considered

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *United States v. Davis*, 785 F.3d 498, 500 (11th Cir. 2015).

<sup>15</sup> *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 14-12696, 2016 WL 659222, at \*1 (11th Cir. Feb. 18, 2016).

<sup>16</sup> *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1320 (11th Cir. 2015).

<sup>17</sup> *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014), *vacated and superseded*, 797 F.3d 859 (11th Cir. 2015), *vacated and superseded*, —

whether a sentence is substantively unreasonable in light of the considerable discretion given to district judges post-*Booker*.<sup>18</sup>

The most consequential opinions for thousands of individuals who live in the Eleventh Circuit concern criminal justice issues, including sentencing. According to the Federal Bureau of Investigation, approximately 11.2 million people are arrested every year in the United States.<sup>19</sup> Approximately 2.2 million people are currently serving sentences in our nation's prisons and jails.<sup>20</sup> As noted by Georgetown University Law Center Professor Paul Butler, "[t]he two million Americans in prison represent the most urgent challenge to democratic values since the civil rights era."<sup>21</sup> In the 2014 fiscal year, 6675 people were sentenced by federal judges in the Eleventh Circuit.<sup>22</sup> Given the number and breadth of significant criminal cases in the Eleventh Circuit, the Court will undoubtedly decide more important issues related to sentencing and criminal justice.

For this Eleventh Circuit Issue, the *University of Miami Law Review* has assembled an interesting group of articles that address several topics relevant to this circuit. First, Lindsey Friedman discusses stolen artifact/antiquity law in the Eleventh Circuit and the future landscape of the law related to the \$4 billion worth of artifacts and antiquity coming out of the Middle East due to political conflict.<sup>23</sup>

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F.3d —, 2015 WL 8639875 (11th Cir. Dec. 14, 2015), *vacated on petition for rehearing en banc* (11th Cir. Feb. 3, 2016).

<sup>18</sup> *United States v. Rosales-Bruno*, 789 F.3d 1249, 1278 (11th Cir. 2015) (Wilson, C., dissenting); *see also United States v. Booker*, 543 U.S. 220, 226 (2005).

<sup>19</sup> FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2014, at 2 (2015), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main/persons-arrested.pdf>.

<sup>20</sup> *Incarceration*, Sentencing Project, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Feb. 26, 2016).

<sup>21</sup> PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 26 (2009).

<sup>22</sup> U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2014, ELEVENTH CIRCUIT 8 (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/11c14.pdf>.

<sup>23</sup> *See Lindsey Friedman, Application of the McClain Doctrine to ISIS Stolen Artifacts*, 70 U. MIAMI L. REV. 1068 (2016).

Next, David Markus and Nathan Wesler analyze the Eleventh Circuit's decision in *United States v. Davis*,<sup>24</sup> holding that the production of a cell phone carrier's business records did not constitute a search within the meaning of the Fourth Amendment or, alternatively, was not an unreasonable search.<sup>25</sup> Chance Meyer and Craig Trocino discuss the future of the death penalty in Florida in light of the U.S. Supreme Court's decision in *Hurst v. Florida*,<sup>26</sup> which held that Florida's sentencing scheme for capital cases violated the Sixth Amendment.<sup>27</sup> Christina M. Frohock interprets the debate set forth in *Patterson v. Secretary, Florida Department of Corrections*<sup>28</sup> and the prohibition against successive habeas petitions.<sup>29</sup> And finally, C. Caitlin Giles, an Articles & Comments Editor of the *University of Miami Law Review* and the editor of this Eleventh Circuit edition, addresses in a student note the conflicting pleading standards in the Eleventh Circuit and other circuits for Rule 9(b) of the False Claims Act.<sup>30</sup> These important and timely articles constitute welcomed additions to legal discourse and dialogue within our Circuit.

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<sup>24</sup> *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015).

<sup>25</sup> David Markus & Nathan Wesler, *That '70s Show: Why the 11th Circuit Was Wrong to Rely on Cases from the 1970s to Decide a Cell-Phone Tracking Case*, 70 U. MIAMI L. REV. 1179 (2016).

<sup>26</sup> *Hurst v. Florida*, 136 S. Ct. 616 (2016).

<sup>27</sup> Chance Meyer & Craig Trocino, *Implications of Hurst v. Florida*, 70 U. MIAMI L. REV. \_\_\_\_ (2016).

<sup>28</sup> *Paterson v. Sec'y, Florida Dep't of Corr.*, 812 F.3d 885 (11th Cir. 2016).

<sup>29</sup> Christina M. Frohock, *Sentence Structure: Interpreting the Statutory Prohibition against Successive Habeas Petitions*, 70 U. MIAMI L. REV. 1098 (2016).

<sup>30</sup> C. Caitlin Giles, *Neither Strict nor Nuanced: the Balanced Standard for False Claims Act Pleading in the Eleventh Circuit*, 70 U. MIAMI L. REV. 1212 (2016).