


7-2-2018

Reassigning Cases on Remand in the Interests of Justice, for the Enforcement of Appellate Decisions, and for Other Reasons That Remain Unclear

Jonathan D. Colan

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Recommended Citation

Jonathan D. Colan, *Reassigning Cases on Remand in the Interests of Justice, for the Enforcement of Appellate Decisions, and for Other Reasons That Remain Unclear*, 72 U. Miami L. Rev. 1092 ()

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Reassigning Cases on Remand in the Interests of Justice, for the Enforcement of Appellate Decisions, and for Other Reasons That Remain Unclear

JONATHAN D. COLAN*

Federal appellate courts have the authority to order reassignment of cases to different district judges as part of their supervisory authority over the district courts within their circuits. This Article examines the categories of cases in which the Eleventh Circuit has ordered reassignment to different district court judges on remand and explains the rationale underlying reassignment in each category. The more understandable cases address both the appearance and the presence of bias or impropriety by the original trial judge. This Article describes the general principles underlying the Eleventh Circuit's reassignment practices and then questions why reassignment is necessary in cases involving government breaches of plea agreements where none of the usual reasons underlying reassignment seem to exist.

In United States v. Torkington, the Eleventh Circuit extended the principle underlying reassignment beyond cases involving an erroneous refusal of the trial judge to recuse himself or herself. While the Torkington test addresses problems regarding the original trial judge's bias, appearance of bias, recalcitrance, or mis-steps, there is an interesting deviation from these bases for reassignment in cases involving

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breached plea agreements. Relying on the United States Supreme Court's decision in Santobello v. New York, the Eleventh Circuit holds that the available remedies in a case where the prosecution breaches a plea agreement by making sentencing arguments or recommendations it promised not to make are either for the defendant to be allowed to withdraw his guilty plea or for the case to be remanded for resentencing by a different judge. The Eleventh Circuit reasoned that the trial judge who heard the prosecutor's improper sentencing argument cannot un-hear that argument when the case is remanded for resentencing. Yet, trial judges (and even lay jurors) are routinely presumed to be able to disregard improper evidence and arguments.

The rationale for reassignment in breached plea agreement cases remains curiously unexplored and seemingly at odds with the rationales underlying reassignment in other scenarios. This Article suggests that the Eleventh Circuit may wish to consider formalizing its reassignment practices and criteria by local rule.

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I. INTRODUCTION

In addition to the power to “affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review,” a federal appellate court’s power also includes the authority to “remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.”¹ Once it issues its decision in a case, the “findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case.”² If the appellate court’s ruling is binding on the trial court and the appellate court can remand a case and direct the trial court to conduct such further proceedings as the appellate court deems appropriate, one could be forgiven for assuming that any case so remanded would necessarily continue in accordance with the appellate court’s instructions. This must be a faulty assumption, however, because federal appellate courts sometimes include in their remand instructions orders directing that cases be reassigned to different trial court judges than the ones who originally handled the cases.³

Federal appellate courts have the authority to order reassignment of cases to different district judges as part of their supervisory authority over the district courts within their circuits.⁴ “No federal statute or Federal Rule of Appellate Procedure addresses to which trial court judge a case should go following an appellate reversal”⁵ The Eleventh Circuit has cited as the source of its reassignment authority its powers under 28 U.S.C. § 2106 (which include the power to “require such further proceedings [in the lower courts] as may be

¹ 28 U.S.C. § 2106 (2012).

² *Burger King Corp. v. Pilgrim’s Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994) (citations omitted).

³ See discussion *infra* Sections II–IV.

⁴ *Clark v. Coats & Clark, Inc. (Clark III)*, 990 F.2d 1217, 1229 (11th Cir. 1993) (recognizing that power in civil cases); *United States v. Torkington (Torkington II)*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam) (recognizing that power in criminal cases).

⁵ Toby J. Heytens, *Reassignment*, 66 STAN. L. REV. 1, 5 (2014). Only the Seventh Circuit has codified its reassignment practices in a local court rule. See *id.* at 11.

just under the circumstances”⁶ and the Supreme Court’s example of ordering reassignment in *Offutt v. United States*.⁷ In *Offutt*, a case where “the trial judge permitted himself to become personally embroiled with the petitioner,” the Supreme Court stated “that application of the rule pronounced in *Cooke v. United States* is called for,” and it “invite[d] the Chief Judge of the District Court to assign another judge to sit in the second hearing of the charge against the petitioner.”⁸ Previously, in *Cooke*, the Supreme Court had merely noted that under appropriate circumstances, a trial judge him or herself “may, without flinching from his duty, properly ask that one of his fellow judges take his place.”⁹ This Article will show that reassignment is one method that appellate courts use both to preserve the presence and appearance of impartial justice and to maintain authority over the implementation of their decisions in the trial courts.¹⁰ “Every federal circuit asserts a power to order reassignment, and they have exercised that power in pretty much every type of case imaginable.”¹¹

This is not a power, however, that the Eleventh Circuit exercises “lightly.”¹² There “are large variations in reassignment numbers,” among the various federal appellate circuits, “as well as in the types of cases in which reassignment is ordered, the procedures by which various circuits go about ordering it, and the reasons they give for doing so.”¹³ Professor Toby Heytens surveyed 668 unique federal appellate cases ordering reassignment between 1958 and 2012, and broke down the numbers of such cases by circuit.¹⁴ Although reassignment seems to be most utilized in the Seventh Circuit (an outlier circuit reflecting 324 reassignments—more than twice the number

⁶ See *Torkington II*, 874 F.2d at 1446 (citing 28 U.S.C. § 2106).

⁷ See *id.* (citing *Offutt v. United States*, 348 U.S. 11, 17–18 (1954)).

⁸ *Offutt*, 348 U.S. at 17–18 (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)).

⁹ *Cooke*, 267 U.S. at 539.

¹⁰ See generally Heytens, *supra* note 5, at 34–42 (discussing the use of reassignment as a means of “appellate control” over the trial courts).

¹¹ *Id.* at 6.

¹² *Torkington II*, 874 F.2d at 1447.

¹³ Heytens, *supra* note 5, at 6.

¹⁴ See *id.* at 15–18.

of the next circuit), the Eleventh Circuit had an above-average number of reassignments (28), compared to the median number (20) shown in the Fourth Circuit.¹⁵

This Article will examine the categories of cases in which the Eleventh Circuit has ordered reassignment to different district court judges on remand and explain the rationale underlying reassignment in each category. The more understandable cases address both the appearance and the presence of bias or impropriety by the original trial judge.¹⁶ A more curious category of cases triggering reassignment involves neither any apparent nor demonstrated bias or misconduct by the trial judge.¹⁷ This Article will describe the general principles underlying the Eleventh Circuit's reassignment practices in cases of bias or misconduct and then question why reassignment is necessary in cases involving government breaches of plea agreements where none of the usual reasons underlying reassignment seem to exist.

II. THE *TORKINGTON* TEST'S GENERAL RATIONALE FOR REASSIGNMENT

The easy case for reassignment by the appellate court is when the error being raised on appeal is the trial judge's failure to recuse himself or herself from involvement in a case. The federal recusal statute, 28 U.S.C. § 455, provides:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:

¹⁵ *Id.* at 18 tbl.1.

¹⁶ *See* discussion *infra* Sections II–VI.

¹⁷ *See infra* Section VII.

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;
 - (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(v) Is to the judge's knowledge likely to be a material witness in the proceeding.¹⁸

As the court explained in *United States v. Torkington (Torkington II)*, “[i]f the trial judge should have recused himself and the case is remanded, it should be remanded with the direction that it be reassigned to a different district judge.”¹⁹ Interestingly, however, the case the court relied upon for that proposition, *Parker v. Connors Steel Co.*, held that a trial judge's error in failing to grant a recusal motion was subject to harmless error analysis,²⁰ relying on the Supreme Court's then recent decision in *Liljeberg v. Health Services Acquisition Corp.*²¹ Vacatur of the judgment and remand itself was not automatic, let alone reassignment to a different trial judge.²²

In *Liljeberg*, the Supreme Court held that “[a] conclusion that a [violation of the recusal statute] occurred does not . . . end our inquiry.”²³ The Supreme Court explained that “[t]here need not be a draconian remedy for every violation of § 455(a).”²⁴ “As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance.”²⁵ The Supreme Court noted, as an example of the sort of inadvertent recusal failure that should not necessarily result in reversal, cases involving “[l]arge, multidistrict class actions” where trial judges are presented with “unique difficulties in monitoring any potential interest they may have in the litigation.”²⁶ In *Liljeberg*, however, while the Supreme Court accepted lower court findings that the original trial judge did not have “actual knowledge” of the interest of the university (on whose board he sat) in the case, while the case was being tried, he did learn of or should have learned of

¹⁸ 28 U.S.C. § 455 (2012).

¹⁹ *Torkington II*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam).

²⁰ *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525–26 (11th Cir. 1988).

²¹ *Id.* (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988)).

²² *See id.* at 1526.

²³ *Liljeberg*, 486 U.S. at 862.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 862, 862 n.9.

facts prior to his entry of judgment that should have caused him to recuse himself.²⁷

The Supreme Court nevertheless recognized that while § 455 “defines the circumstances that mandate disqualification of federal judges, it neither prescribes nor prohibits any particular remedy for a violation of that duty.”²⁸ “Congress has wisely delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.”²⁹ In deciding whether a judgment should be vacated and remanded for new proceedings based on the original judge’s failure to recuse him or herself, the Supreme Court instructed the appellate courts to consider “the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.”³⁰ The Eleventh Circuit continues to apply *Liljeberg* in cases reviewing the decision of the trial judge not to recuse him or herself.³¹

In *Torkington II*, the Eleventh Circuit extended the principle underlying reassignment in cases of an erroneous refusal of the trial judge to recuse himself or herself based on “circumstances *existing prior* to or at the time of the judge’s participation in a case” to cases involving “the judge’s own conduct *during his participation in a case*.”³²

Although the events that make it necessary to terminate a judge’s participation in a case differ in the two situations, the reason the judge should not participate is the same: the judicial system has the obligation of preserving public confidence in the impartial and fair administration of justice.³³

²⁷ *Id.* at 865–68.

²⁸ *Id.* at 862.

²⁹ *Id.*

³⁰ *Id.* at 863.

³¹ *See, e.g., In re Moody*, 755 F.3d 891, 894 (11th Cir. 2014) (quoting *Liljeberg*, 486 U.S. at 865); *Horne v. Horne*, 630 F. App’x 908, 910 (11th Cir. 2015) (citing *Liljeberg*, 486 U.S. at 847).

³² *Torkington II*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam) (emphasis added).

³³ *Id.*

Earlier, in *United States v. White*,³⁴ the court had held that “where a reasonable person would question the trial judge’s impartiality, reassignment is appropriate.”³⁵ In *Torkington II*, the court stated that “[r]eassignment may be appropriate . . . if a judge conducts a trial in a manner that creates the appearance that he is or may be unable to perform his role in an unbiased manner.”³⁶

The court did not limit reassignment to only cases involving demonstrated bias, however. The court listed “three elements” that it should consider to determine whether reassignment on remand was required even “where there is no indication of actual bias”:

- (1) whether the original judge would have difficulty putting his previous views and findings aside;
- (2) whether reassignment is appropriate to preserve the appearance of justice;
- (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment.³⁷

The Eleventh Circuit found these factors to be present in *Torkington II*.³⁸

The court examined the trial judge’s actions, and while expressly “not question[ing] the district judge’s actual ability, integrity, and impartiality,” the court nevertheless concluded that reassignment was necessary to “preserve not only the reality but also the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice.”³⁹ The court noted that after it had previously reversed the trial court’s dismissal of the indictment,⁴⁰ the trial court on remand “dismissed the case at the first opportunity by construing a motion for mistrial as a motion for entry of judgment of acquittal.”⁴¹ The court also noted that the trial judge had questioned “from the bench . . . the wisdom of the substantive law he had to

³⁴ *United States v. White*, 846 F.2d 678 (11th Cir. 1988).

³⁵ *Id.* at 695 (citing *United States v. Holland*, 655 F.2d 44, 47 (5th Cir. Unit B Aug. 1981)).

³⁶ *Torkington II*, 874 F.2d at 1446.

³⁷ *Id.* at 1447.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See United States v. Torkington (Torkington I)*, 812 F.2d 1347, 1355 (11th Cir. 1987).

⁴¹ *Torkington II*, 874 F.2d at 1447.

apply and challenged the government's decision to prosecute *Torkington*.⁴² The trial judge had called the prosecution "'silly[]' and . . . a waste of the taxpayers' money."⁴³ Addressing the first criterion weighing in favor of reassignment, the appellate court concluded that the trial judge had "demonstrated great difficulty in putting aside his prior conclusions about the merits of this prosecution."⁴⁴ The appellate court also determined that the second criterion was satisfied and that "reassignment is necessary to preserve the appearance of impartiality."⁴⁵ The third criterion "d[id] not work against reassignment in this case," because it was "a simple case with which a different judge could quickly become familiar, and the district judge terminated the trial shortly after it began."⁴⁶ The court thus ordered that the case be remanded for further proceedings and reassigned to a different trial judge to "respond to the appearance of a lack of neutrality and . . . to preserve in the public mind the image of absolute impartiality and fairness of the judiciary."⁴⁷

The "*Torkington* test" has become the standard in the Eleventh Circuit.⁴⁸ As of the writing of this Article, it has been cited by name in more than two dozen subsequent cases.⁴⁹

III. REASSIGNMENT TO REMEDY THE APPEARANCE OF BIAS

The Eleventh Circuit's application of the *Torkington* test has led to reassignment in various cases involving an appearance of bias by the trial judge. Not long after *Torkington II*, in *United States v. Taylor*,⁵⁰ the court stated that its "review of the record in this case, and

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See, e.g., United States v. Yesil*, 991 F.2d 1527, 1533 n.7 (11th Cir. 1992) (applying the so-dubbed "*Torkington* test").

⁴⁹ A Westlaw search on April 9, 2018, using the terms "Torkington /p reassign!" resulted in 29 cases. Three other cases appear to use the language of the *Torkington* test while citing subsequent cases as supporting authority for the test. *See, e.g., Stargel v. SunTrust Banks, Inc.*, 791 F.3d 1309, 1311–12 (11th Cir. 2015) (citing *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997) as authority for the reassignment criteria).

⁵⁰ *United States v. Taylor*, 972 F.2d 1247 (11th Cir. 1992).

the factors set forth by this circuit in [*Torkington II*], lead us to conclude that reassignment is appropriate.”⁵¹ The court explained that “statements made by the trial judge indicat[ed] a perceived predisposition regarding sentencing.”⁵²

In *Chudasama v. Mazda Motor Corp.*,⁵³ the Eleventh Circuit described at length the trial judge’s “utter failure” to manage the case through repeated discovery disputes, leading to the judge’s imposition of severe sanctions against the defendant corporation.⁵⁴ After concluding that the district court abused its discretion in imposing the sanctions against Mazda, the appellate court considered Mazda’s “[u]nderstandabl[e]” request to have the case reassigned on remand.⁵⁵ The court recited the three-part *Torkington* test and observed that “[w]hile the strong language employed in both the compel order and the sanctions order suggest that the district judge may have trouble putting aside his previous views, we find the second factor the most telling.”⁵⁶ The court cited not only the “[t]he extent of the judge’s abuse of discretion,” but also “the partiality of the practices constituting that abuse [that] would have a significant effect on the appearance of justice should he remain assigned to this case.”⁵⁷ The court noted that “the judge’s practice of delegating the task of drafting sensitive, dispositive orders to plaintiffs’ counsel, and then uncritically adopting his proposed orders nearly verbatim, would belie the appearance of justice to the average observer.”⁵⁸ As to the final *Torkington* factor, the court stated that “although significant time has already been spent on this case under his direction, the judge’s failure to manage the case removes any concerns involving waste or duplication.”⁵⁹ The court had “confidence that a new judge who properly manages this case will need little time to ‘get up to speed’” and that “[t]he gains to be realized from reassignment will far outweigh the costs.”⁶⁰

⁵¹ *Id.* at 1252 (citing *Torkington II*, 874 F.2d at 1447).

⁵² *Id.*

⁵³ *Chudasama*, 123 F.3d at 1353.

⁵⁴ *See id.* at 1358–64, 1371–72.

⁵⁵ *Id.* at 1373.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1374.

⁶⁰ *Id.*

As of this Article's writing, the Eleventh Circuit's most recent published decision applying *Torkington II* is *United States v. Plate*.⁶¹ In *Plate*, at the defendant's first sentencing hearing, the district judge had conditioned his decision to impose a prison term, instead of probation, on the defendant's failure up to that time to pay sufficient restitution to her victims.⁶² Contrary to his actual authority, the trial judge promised to convert her sentence when, and if, she paid restitution.⁶³ When the appellate court initially remanded the case for the sole purpose of having the trial judge issue an order explaining the basis for his original rulings, the trial judge again cited the "substantial outstanding restitution Plate had yet to repay" and described her appeal as "frivolous."⁶⁴ When the case came back to the Eleventh Circuit, the appellate court vacated the district court's erroneous judgment and remanded the matter for resentencing.⁶⁵ The appellate court determined that reassignment to a new trial judge was necessary "[b]ecause the district judge confirmed and reiterated his consideration of Plate's inability to pay restitution as a factor in his order on remand . . . [and] stated [his] belief that Plate's arguments on appeal were 'frivolous,' even after having the benefit of reviewing those arguments."⁶⁶ These circumstances led the appellate court to conclude, under *Torkington II*, that "the district court may be unable to disregard its improper consideration of [the defendant's restitution payments] or, at least, that it may appear so."⁶⁷

⁶¹ *United States v. Plate*, 839 F.3d 950, 958 (11th Cir. 2016). The Eleventh Circuit has recently issued an unpublished decision, applying *Torkington II*, ordering reassignment in a case where the district judge had announced that notwithstanding any errors in his sentencing guideline calculations, he would still have imposed an "identical" sentence "as a reasonable sentence." *United States v. Killen*, __ F.App'x __, 2018 WL 1560050, *11 (11th Cir. March 29, 2018) (unpublished).

⁶² *Id.* at 954–55.

⁶³ *Id.*

⁶⁴ *Id.* at 955.

⁶⁵ *Id.* at 958.

⁶⁶ *Id.*

⁶⁷ *Id.* (citing *Torkington II*, 874 F.2d 1441, 1446–47 (11th Cir. 1989) (per curiam)).

IV. DENYING REASSIGNMENT WHERE THE APPELLATE COURT RETAINS CONFIDENCE IN THE TRIAL JUDGE

This same analysis has led the court to deny requests that cases be reassigned when the *Torkington* factors weighed against it. In *Sierra Club v. Van Antwerp*,⁶⁸ the court vacated the district court's grant of summary judgment in favor of the plaintiff environmental groups challenging the Army Corps of Engineers' grant of mining permits and "remand[ed] [the] case to the district court to apply the proper [Administrative Procedure Act] standard of review to the Corps's environmental analysis."⁶⁹ The appellate court stated, however, that despite the mining companies' request for reassignment of the case to a different judge, it had "no reason to believe that the well-respected district judge to whom this case is assigned will not be able to apply the proper standard of review on remand."⁷⁰ Applying *Torkington II*, the court reasoned that "reassignment would entail substantial waste and duplication because another judge would need to become familiar with the massive record."⁷¹

In *United States v. Shaygan*,⁷² after concluding that the trial judge violated the due process rights of two attorneys he publicly reprimanded for their actions in the case, the court remanded the case for further proceedings but expressed confidence in the trial judge's continued handling of the case.⁷³ While it acknowledged that it might be "unreasonable" to expect a trial judge to put aside his previous views in cases involving multiple appeals and remands, the court believed that, in the case before it, the trial judge was capable of doing so in the circumstance of a first remand.⁷⁴ Moreover, weighing the *Torkington* factors, the appellate court concluded that "reassignment [was] unnecessary to preserve the appearance of justice and would require undue duplication of effort."⁷⁵

Despite its explanation in *Shaygan* that a trial judge might lose the confidence of the appellate court after multiple remands, the

⁶⁸ *Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008).

⁶⁹ *Id.* at 1356.

⁷⁰ *Id.* at 1364 n.9.

⁷¹ *Id.*

⁷² *United States v. Shaygan*, 652 F.3d 1297 (11th Cir. 2011).

⁷³ *Id.* at 1318–19.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1318–19.

Eleventh Circuit refused to order reassignment on remand in *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Florida Priory of the Knights Hospitallers of the Sovereign Order of Saint John of Jerusalem (Sovereign Military Hospital Order II)*,⁷⁶ even after having earlier refused to reassign the case after a previous appeal.⁷⁷ Although the court reiterated that “[r]eassignment can become warranted on the second or third appeal, even [when] it was not warranted on the first or second appeal,” it did not fault the district court for its handling of the case after the previous appeal.⁷⁸ The court accepted that “[t]he district court could have read our earlier decision—mistakenly, but reasonably.”⁷⁹ The court explained that while it agreed that “the district judge’s adherence to his previous finding of fraud and his continued reliance on [disputed] testimony suggest he may have difficulty putting his previous views and findings aside . . . , his most recent missteps seem more akin to garden-variety errors of law than the kind of direct defiance or stalemated posture that requires reassignment.”⁸⁰ The appellate court acknowledged, however, that “the district judge’s repeated impugning of the parties’ motives in written opinions and public hearings [was] cause for concern.”⁸¹ Nevertheless, the court saw “no evidence that his remarks played any role in his ultimate decision,” and it was “still convinced that reassignment [would] entail waste and duplication out of proportion to the gains.”⁸² Because the trial judge had “a unique familiarity with this complex, fact-intensive case,” the court denied reassignment and expressed its continued “expectation” that, “on remand, both parties will be treated with the respect they deserve and that the district

⁷⁶ *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of Saint John of Jerusalem (Sovereign Military Hospitaller Order II)*, 809 F.3d 1171, 1193–94 (11th Cir. 2015).

⁷⁷ *Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes & of Malta v. Fla. Priory of the Knights Hospitallers of the Sovereign Order of Saint John of Jerusalem (Sovereign Military Hospitaller Order I)*, 702 F.3d 1279, 1297 (11th Cir. 2012).

⁷⁸ *Sovereign Military Hospitaller Order II*, 809 F.3d at 1193–94.

⁷⁹ *Id.* at 1194.

⁸⁰ *Id.* at 1193 (internal quotations and citations omitted).

⁸¹ *Id.* at 1194.

⁸² *Id.* (internal quotations and citations omitted).

court will be able to freshly consider the remanded claims notwithstanding its previously expressed views,” as the court had similarly instructed after the first appeal.⁸³

Recently, the Eleventh Circuit relied on *Torkington II* in *Cooper v. United States*, where the court denied the defendant’s request for reassignment to a different judge on remand.⁸⁴ Although the trial judge had “entered an order that was contrary to the parties’ agreement and to their stipulated facts,” the court noted that “this is the first appeal on Cooper’s motion to vacate,” referring to its rationale in *Shaygan*, “and we normally expect the district court to put his previous views and findings aside on remand.”⁸⁵

V. REASSIGNING CASES FROM JUDGES WHO REFUSE TO CARRY OUT THE APPELLATE COURT’S INSTRUCTIONS

Despite the court’s confidence that district judges will abide by its instructions on remand,⁸⁶ the Eleventh Circuit has ordered cases reassigned on remand in circumstances where the district judges failed or refused to carry out the appellate court’s instructions.⁸⁷

In *Clark v. Coats & Clark, Inc. (Clark III)*,⁸⁸ the Eleventh Circuit reassigned the case to be heard by a different trial judge after it vacated the trial judge’s third rejection of the plaintiffs’ claims in whole or in part.⁸⁹ The plaintiffs had not sought reassignment after their first appeal (*Clark I*), when the appellate court reinstated some of their dismissed claims.⁹⁰ When they subsequently appealed the

⁸³ *Id.* (quoting *Sovereign Military Hospitaller Order I*, 702 F.3d at 1297).

⁸⁴ *Cooper v. United States*, 660 F. App’x 730, 737 (11th Cir. 2016) (per curiam).

⁸⁵ *Id.* (citing *United States v. Shaygan*, 652 F.3d 1297, 1318–19 (11th Cir. 2011)).

⁸⁶ *E.g.*, *Stansell v. Revolutionary Armed Forces of Colom.*, 771 F.3d 713, 735 (11th Cir. 2014) (stating that its “remand includes specific instructions that give the district court little discretion,” and expressing its “confiden[ce] that [the trial judge] will be fair and just”).

⁸⁷ *See, e.g.*, *Clark III*, 990 F.2d 1217, 1229–30 (11th Cir. 1993); *United States v. Remillong (Remillong III)*, 55 F.3d 572, 577 (11th Cir. 1995); *United States v. Martin (Martin II)*, 455 F.3d 1227, 1242 (11th Cir. 2006).

⁸⁸ *Clark III*, 990 F.2d 1217 (11th Cir. 1993).

⁸⁹ *Id.* at 1229–31.

⁹⁰ *Clark v. Coats & Clark, Inc. (Clark I)*, 865 F.2d 1237, 1245 (11th Cir. 1989).

trial judge's grant of summary judgment against their claims on remand (*Clark II*),⁹¹ the plaintiffs attached to their appellate brief an affidavit from a law professor, who had conducted a statistical analysis of the trial judge's rulings, purporting to demonstrate a bias against certain civil rights claimants.⁹² Although the appellate court recognized its authority to reassign the case under *Torkington II*,⁹³ it could not consider information outside the record on appeal.⁹⁴ Absent the affidavit, the appellate court explained that "the plaintiffs are left with nothing upon which to base their argument for reassignment."⁹⁵ When the case was remanded a second time for further consideration of the plaintiffs' claims, the trial judge's order granting summary judgment against the plaintiffs' claims again "contained strong language expressing dissatisfaction with [the appellate] court's decision."⁹⁶ The appellate court concluded that, "in the language of *Torkington [III]*, 'the original judge would have difficulty putting his previous views and findings aside,'" and ordered the case reassigned on remand.⁹⁷

Similarly, in *United States v. Remillong (Remillong III)*,⁹⁸ the court ordered the case reassigned after the trial judge twice resisted the appellate court's instructions.⁹⁹ In the first appeal,¹⁰⁰ the appellate court ruled that the trial judge had "clearly erred in [both] finding that the defendant made an express death threat," in the commission of a bank robbery, and by enhancing the defendant's sentence on the basis of this error.¹⁰¹ In *Remillong III*, the appellate court noted that in the first resentencing remand, the trial judge "deleted the two-level, express-threat-of-death enhancement in accordance

⁹¹ *Clark v. Coats & Clark, Inc. (Clark II)*, 929 F.2d 604, 606 (11th Cir. 1991).

⁹² *Id.* at 609.

⁹³ *Id.* at 609 n.10 (citing *Torkington II*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam).

⁹⁴ *Id.* at 609–10.

⁹⁵ *Id.* at 610.

⁹⁶ *Clark III*, 990 F.2d 1217, 1229 (11th Cir. 1993).

⁹⁷ *Id.* at 1230 (citing *Torkington II*, 874 F.2d at 1447).

⁹⁸ *Remillong III*, 55 F.3d 572 (11th Cir. 1995).

⁹⁹ *Id.* at 577.

¹⁰⁰ *United States v. Canzater (Remillong I)*, 994 F.2d 773, 774 (11th Cir. 1993) (deciding a consolidated appeal with Remillong's co-defendant Darryl L. Canzater).

¹⁰¹ *Id.* at 775.

with this court's mandate . . . but then enhanced Remillong's sentence by *three levels* . . . for the possession of a dangerous weapon during the bank robberies, when no weapon was involved."¹⁰² The appellate court considered the trial judge's enhancement during the resentencing remand to be an "attempt to circumvent [the] court's direction in [*Remillong I*], where [it] explained that '[t]he statement, "I have a gun"' may only be a bald threat, which does not mean necessarily that a gun was present during the commission of the robbery."¹⁰³ In Remillong's second appeal (*Remillong II*),¹⁰⁴ the Eleventh Circuit vacated his sentence and a restitution order, and it ordered the trial judge to resentence Remillong without the enhancement—in accordance with its ruling in *Remillong I*—and to re-examine the restitution order with a consideration for Remillong's ability to pay.¹⁰⁵ In the third appeal, the Eleventh Circuit noted that it had previously "explicitly explained" to the trial judge that a defendant's financial condition and ability to pay "must be fully considered," in accordance with the relevant restitution statute.¹⁰⁶ In the ensuing second remand for resentencing, the trial judge "however, refused to eliminate the restitution order," and "[i]nstead, . . . handwrote across the top of Remillong's motion to correct his sentence: 'Because this case involves a bank robbery and defendant had physical possession of the money, restitution of \$29,251.00 is appropriate.'"¹⁰⁷ In Remillong's third appeal, the Eleventh Circuit stated: "After specifically being instructed by this court in *Remillong II* to assess on remand Remillong's financial capability to pay restitution pursuant to section 3664(a), [the trial judge's] cryptic handwritten notation that Remillong owes full restitution because he once had physical possession of the money is more than irresponsible, it is defiant."¹⁰⁸

¹⁰² *Remillong III*, 55 F.3d at 573 n.1.

¹⁰³ *Id.* (quoting *Remillong I*, 994 F.2d at 775).

¹⁰⁴ *United States v. Remillong (Remillong II)*, 20 F.3d 1174 (11th Cir. 1994) (unpublished memorandum decision).

¹⁰⁵ *See Remillong III*, 55 F.3d at 573 n.1.

¹⁰⁶ *Id.* at 573–74 (quoting *Remillong II*, No. 93-3034, slip op. at 3–4 (11th Cir. April 12, 1994) (quoting 18 U.S.C. § 3664(a) (1996)).

¹⁰⁷ *Id.* at 574.

¹⁰⁸ *Id.* at 576.

This time, the court held that reassignment to a new judge was necessary on remand.¹⁰⁹ The court stated that the trial judge's behavior in this case was "not an aberration."¹¹⁰ It noted that it had "previously . . . reversed and/or remanded cases to [the judge] for failing to provide factual and legal explanations for his rulings."¹¹¹ It recounted the time it "gently chided [the judge] for his failure to provide reasoning for dismissing a claim,"¹¹² the occasion it was forced to employ "the severe remedy of reassigning a case when [the judge] abused his discretion by refusing to grant an evidentiary hearing,"¹¹³ and its previous need to "specifically . . . address[]" the problem with the judge's "handwritten notations . . . failing to give reasons for dispositive orders."¹¹⁴ The court stated that it was "greatly troubled that [this judge] continue[d] to ignore or to circumvent specific directives and mandates from this court in his adjudication of cases before him."¹¹⁵ The fact that this was the third appeal resulting from the trial judge's actions "exemplifie[d] the judicial inefficiency that results from such obstinate conduct."¹¹⁶ The court resolved that "the only way . . . [to] obtain compliance" from this trial judge was to "reverse or vacate his rulings outright with the instruction that he *cannot* rule a particular way," because when allowed "the opportunity to exercise discretion," he "stubbornly persisted" in his erroneous behavior.¹¹⁷

Yet, despite noting its power to remand the case with explicit instructions, leaving the trial judge without discretion to deviate, the court decided that reassignment was necessary.¹¹⁸ Because of the

¹⁰⁹ *Id.* at 577.

¹¹⁰ *Id.* at 576.

¹¹¹ *Id.*

¹¹² *Id.* at 577 (citing *Grant v. County of Seminole*, 817 F.2d 731, 732 (11th Cir. 1987) (per curiam)).

¹¹³ *Id.* (citing *United States v. Yesil*, 991 F.2d 1527, 1533 (11th Cir. 1992)).

¹¹⁴ *Id.* (citing *Seamon v. Vaughan*, 921 F.2d 1217, 1220 (11th Cir. 1991) (per curiam)).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

“two prior remands in this case,” the appellate court had “no confidence that [the trial judge would] perform the appropriate evaluation” on remand.¹¹⁹

Sometimes, however, the line between straight-out defying the appellate court’s instructions and simply adhering to previous views is a fine one. In *United States v. Martin (Martin II)*,¹²⁰ the district court had originally sentenced a corporate executive, who had pled guilty to conspiracy to commit securities fraud and mail fraud and to falsifying books and records, to serve a term only of 60 months’ probation.¹²¹ His calculated guideline sentencing range was 108 to 135 months’ imprisonment, and the government had requested a sentence of 62 months’ imprisonment.¹²² In *Martin*’s first appeal, the Eleventh Circuit noted the trial judge’s “broad discretion in determining the extent of a downward departure,” but it held that the trial court had failed to offer sufficient reasons for its sentence on the record to allow “meaningful appellate review.”¹²³ The court instructed that a sentencing judge “must, at a minimum, give some indication of the [U.S.S.G.] § 5K1.1 factors upon which it relies and the reasons for the extent of the departure.”¹²⁴ The court then remanded the case to the trial judge “for resentencing consistent with this opinion.”¹²⁵ At the remanded resentencing hearing, the government asked the district court to balance *Martin*’s cooperation with the seriousness of his offense.¹²⁶ It ultimately requested a 42-month imprisonment term, representing “a reduction in excess of 60 percent from the low end of *Martin*’s pre-departure 108–135-month guideline range.”¹²⁷ The trial judge, however, granted an even more significant departure, resulting in a guideline imprisonment range of zero to six months, and then imposed a sentence of seven days’ imprisonment.¹²⁸

¹¹⁹ *Id.*

¹²⁰ *Martin II*, 455 F.3d 1227 (11th Cir. 2006).

¹²¹ *Id.* at 1231–32; *United States v. Martin (Martin I)*, 135 F. App’x 411, 411–12 (11th Cir. 2005).

¹²² *Martin II*, 455 F.3d at 1229–30, 1232; *Martin I*, 135 F. App’x at 411–12.

¹²³ *Martin I*, 135 F. App’x at 415–16.

¹²⁴ *Id.* at 415.

¹²⁵ *Id.* at 416.

¹²⁶ *Martin II*, 455 F.3d at 1233.

¹²⁷ *Id.*

¹²⁸ *Id.*

On appeal back to the Eleventh Circuit, the court took pains to note that this was “the second appeal in Martin’s case and the second time we have had to reverse the sentence.”¹²⁹ The court’s opinion in *Martin II* spells out the appellate court’s problems with the approach taken by the district court in applying the relevant sentencing factors.¹³⁰ Importantly, for this Article’s purposes, the appellate court emphasized that “Martin’s crimes and the district court’s punishment are so wildly disproportionate that we readily conclude that the district court’s 7–day sentence is . . . unreasonable and must be vacated . . . for the second time.”¹³¹ The court concluded:

In light of the two reversals in this case and three other appeals in which we have reversed the same judge for extraordinary downward departures that were without a valid basis in the record, we find it likely that “the original judge would have difficulty putting his previous views and findings aside.”¹³²

Interestingly—despite the court’s “settled practice” of remanding with instructions for the chief judge of the district to reassign the case to a new judge—because the original judge in *Martin* was himself the chief judge of the district, the appellate court had to instruct that the case be “reassigned by the most senior active judge” of the district.¹³³

In *United States v. Gupta (Gupta III)*,¹³⁴ the court dealt with the third appeal of the district court’s sentencing of the defendant and the government’s second request that the case be reassigned on remand for resentencing.¹³⁵ The government had filed the first appeal in this case after the district court, “some thirty-three months after denying” the defendants’ original post-trial motions, granted what were termed “motions to reconsider” or “renewed” motions for judgments of acquittal or a new trial, which were filed a year after

¹²⁹ *Id.* at 1242.

¹³⁰ *See id.* at 1237–42.

¹³¹ *Id.* at 1239.

¹³² *Id.* at 1242 (quoting *Torkington II*, 874 F.2d 1441, 1447 (11th Cir. 1989) (per curiam)).

¹³³ *Id.*

¹³⁴ *United States v. Gupta (Gupta III)*, 572 F.3d 878 (11th Cir. 2009).

¹³⁵ *See id.* at 880–81.

the denial of their original motions.¹³⁶ In *Gupta I*, the Eleventh Circuit vacated the district court's order because the district court "plainly lacked jurisdiction to entertain these post-verdict motions," but it denied the government's reassignment request, stating that it saw no appearance of bias against the government from a judge who had denied the defendant's original post-trial motions.¹³⁷ As to the government's fear that the judge would adhere to the light sentence he had suggested he was considering at an earlier sentencing hearing, the appellate court remarked that "it seems strange to claim that the trial judge is likely to rule in an ominously predictable manner when he has already demonstrated his willingness to reconsider his previous rulings."¹³⁸

Yet, in *Gupta II*,¹³⁹ the appellate court affirmed the defendants' convictions but vacated their sentences in a government cross-appeal, holding that the district court had misapplied the federal Sentencing Guidelines when the case was remanded for resentencing.¹⁴⁰ The appellate court noted the trial judge's statement during sentencing proceedings that while "it may be that the [Eleventh] Circuit will decide that a crime has been committed[,] . . . it's amazing to me that somebody could be convicted of a felony based upon a bureaucratic regulation."¹⁴¹ The appellate court then held that the trial judge had clearly erred both in denying a role enhancement and in calculating the amount of loss while determining the defendant's guideline sentencing range.¹⁴² The Eleventh Circuit vacated the defendants' sentences of three years' probation and remanded the case for resentencing.¹⁴³ On remand, the district court "reiterated its belief that Gupta's criminal activity had been overstated," and re-imposed its previous sentence of three years' probation.¹⁴⁴

In the third appeal, the Eleventh Circuit vacated the defendants' sentences again, and this time it ordered that the case be reassigned

¹³⁶ See *United States v. Gupta (Gupta I)*, 363 F.3d 1169, 1172 (11th Cir. 2004).

¹³⁷ *Id.* at 1170, 1177.

¹³⁸ *Id.* at 1177.

¹³⁹ *United States v. Gupta (Gupta II)*, 463 F.3d 1182 (11th Cir. 2006).

¹⁴⁰ *Id.* at 1186.

¹⁴¹ *Id.* at 1197.

¹⁴² *Id.* at 1198–1200.

¹⁴³ *Id.* at 1200.

¹⁴⁴ *Gupta III*, 572 F.3d 878, 886–87 (11th Cir. 2009).

to a new judge for resentencing on remand.¹⁴⁵ The various procedural errors the appellate court concluded the trial judge had made¹⁴⁶ are less important to this Article than the appellate court's description of the trial judge's approach as "arbitrary."¹⁴⁷ The court observed (regarding some of the district court's calculations): "The error of the district court is not limited to its failure to make findings about these key issues. The cursory statements of the district court suggest that the district court made no findings about anything at all."¹⁴⁸ This rendered "meaningful appellate review [of these issues] impossible."¹⁴⁹ The appellate court noted that other sentencing determinations simply had no support in the record.¹⁵⁰

Ultimately, in this third appeal, the Eleventh Circuit concluded that reassignment was necessary "because 'the trial judge has demonstrated great difficulty in putting aside his prior conclusions about the merits of this prosecution.'"¹⁵¹ While expressly stating that it did "not question the district judge's actual ability, integrity and impartiality,"¹⁵² the appellate court explained:

At the third sentencing hearing, the district court adhered to its erroneous belief that Gupta's behavior was not criminal, emphasized that other federal prosecutors had declined to prosecute Gupta, disparaged the merits of his prosecution, and committed two basic procedural errors in the most recent proceedings. The error of reducing Gupta's sentence for acceptance of responsibility was obvious and gratuitous, and we had warned the district court about failing to make a calculation of actual or intended loss.¹⁵³

¹⁴⁵ *Id.* at 881.

¹⁴⁶ *See id.* at 888–891.

¹⁴⁷ *Id.* at 889.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 890.

¹⁵¹ *Id.* at 892 (quoting *Torkington II*, 874 F.2d 1441, 1447 (11th Cir. 1989) (per curiam)).

¹⁵² *Id.* (quoting *Torkington II*, 874 F.2d at 1447).

¹⁵³ *Id.*

The appellate court determined that “[a]lthough the district court acknowledged its obligation to follow our mandate, the district court failed to fulfill that obligation,” and it saw “no basis for a belief that the district court will employ a different approach if given another chance.”¹⁵⁴ Applying the substance of the *Torkington* test, without so-describing it, the court determined that “[r]eassignment will not produce excessive duplication,” because of the extensive record and guidance built up over the case’s history in both the trial and appellate court, and that reassignment was “necessary to preserve the appearance of justice.”¹⁵⁵ Significantly for its application to future cases, the Eleventh Circuit in *Gupta III* recognized: “The situation is qualitatively different now than it was in *Gupta I* or *Gupta II*. The refusal of the district court to set aside its feelings is more pronounced after a third appeal and a second request for reassignment, and we see no basis for a belief that the district court will adjust its view if given another chance.”¹⁵⁶

VI. REASSIGNING CASES FROM JUDGES WHO HAVE HELPED TOO MUCH

An appellate court’s supervisory authority over a trial court understandably includes the authority to alleviate a party’s concern about the trial court’s misbehavior. Yet, reassignments can occur even when a trial judge’s partiality or performance is called into question by seemingly helpful behavior.

Rule 11 of the Federal Rules of Criminal Procedure provides that “[a]n attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement,” but “[t]he court must not participate in these discussions.”¹⁵⁷ Although the Supreme Court, in *United States v. Davila* (*Davila II*) has clarified that a trial judge’s violation of this rule does not “itself demand vacatur,” and that the violation itself is subject to harmless or plain error analysis,¹⁵⁸ when such a violation *does* result

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; see *Torkington II*, 874 F.2d at 1447 (describing the factors to be weighed before ordering reassignment on remand).

¹⁵⁶ *Gupta III*, 572 F.3d at 892.

¹⁵⁷ FED. R. CRIM. P. 11(c)(1).

¹⁵⁸ *United States v. Davila* (*Davila II*), 133 S. Ct. 2139, 2148 (2013).

in a vacatur of the defendant's guilty plea, the Eleventh Circuit will order that the case "be reassigned 'as a means to extend the prophylactic scheme established by Rule 11 and to prevent the possible misimpression created by the [district court's] participation.'"¹⁵⁹

In *United States v. Corbitt*,¹⁶⁰ the Eleventh Circuit reaffirmed the Former Fifth Circuit's¹⁶¹ holding in *United States v. Adams*¹⁶² that the prophylactic purpose of Rule 11(c)(1) requires reassignment regardless of any "belief as to the actual impartiality of the district court judge who heard this case, or as to the propriety of the sentence she rendered."¹⁶³ A prophylactic remedy was necessary "in order to protect defendants from the potential (but difficult to prove) effects of judicial participation in plea negotiations."¹⁶⁴ The court explained, in *Corbitt*, that *Adams* thus required reassignment "even if there is no evidence that the judge is vindictive or biased."¹⁶⁵

In *United States v. Casallas*,¹⁶⁶ the Eleventh Circuit emphasized that the triggering Rule 11 violation occurs even when "it is clear that the . . . judge . . . was motivated primarily by the concern that [the defendant] be thoroughly apprised of the situation that he faced."¹⁶⁷ The court had held, in *Corbitt*, that reassignment was required even in cases where the trial judge does "nothing flagrant," but merely indicates that the defendant is likely to receive a heavy sentence and should think carefully about the prosecution's offer.¹⁶⁸

¹⁵⁹ *United States v. Harrell*, 751 F.3d 1235, 1241 (11th Cir. 2014) (quoting *United States v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (per curiam)).

¹⁶⁰ *Corbitt*, 996 F.2d at 1132.

¹⁶¹ See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981). See generally Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994 (splitting the former Fifth Circuit and creating the present Eleventh Circuit).

¹⁶² *United States v. Adams*, 634 F.2d 830, 835-36, 39 (5th Cir. Unit A Jan. 1981), *superseded by regulation*, U.S. SENTENCING GUIDELINES MANUEL (U.S. SENTENCING COMM'N 1984), *as recognized in* *United States v. Diaz*, 138 F.3d 1359 (1998).

¹⁶³ *Id.* at 842; *accord Corbitt*, 996 F.2d at 1134-35.

¹⁶⁴ *Adams*, 634 F.2d at 842-43.

¹⁶⁵ *Corbitt*, 996 F.2d at 1135.

¹⁶⁶ *United States v. Casallas*, 59 F.3d 1173 (11th Cir. 1995).

¹⁶⁷ *Id.* at 1178.

¹⁶⁸ *Corbitt*, 996 F.2d at 1135 (discussing the facts in *United States v. Bruce*, 976 F.2d 552, 554 (9th Cir. 1992)).

In the Eleventh Circuit's initial handling of Davila's appeal, which relied on *Casallas*, it stated that vacatur of the plea, and the resulting reassignment of the case, was necessary even when the trial judge merely "contrasts the sentence a defendant would receive if he pled guilty with the sentence he would receive if he went to trial and was found guilty."¹⁶⁹ The trial judge's motivations, "'however well-intentioned,' will not excuse" the judge's violation of Rule 11(c)(1).¹⁷⁰

Although, in *Davila II*, the Supreme Court overturned the Eleventh Circuit's rule requiring automatic vacatur of a defendant's plea without requiring a showing of prejudice, it did not disturb the automatic reassignment remedy in cases in which vacatur of the plea was necessary.¹⁷¹ In *United States v. Harrell*,¹⁷² the Eleventh Circuit recognized that the Supreme Court's decision in *Davila II* meant that a defendant must show that the trial judge's interference in the plea negotiations "affected his substantial rights, meaning that the entire record must bear out the conclusion that 'it was reasonably probable that, but for the [district court's] exhortations, [the defendant] would have exercised his right to go to trial.'"¹⁷³ The Eleventh Circuit had no difficulty finding that Mr. Harrell had met that burden.¹⁷⁴ The court vacated Harrell's conviction and remanded the case to allow him to withdraw his guilty plea.¹⁷⁵ Its remedial doctrine nevertheless intact, the court also "direct[ed] that the case be reassigned 'as a means to extend the prophylactic scheme established by Rule 11 and to prevent the possible misimpression created by the [district court's] participation.'"¹⁷⁶

¹⁶⁹ *United States v. Davila (Davila I)*, 664 F.3d 1355, 1358 (11th Cir. 2011) (citing the holding of *Casallas*, 59 F.3d at 1177).

¹⁷⁰ *Id.* at 1359 (quoting *Casallas*, 59 F.3d at 1178).

¹⁷¹ *See Davila II*, 133 S. Ct. 2139, 2143 (2013); *United States v. Castro*, 736 F.3d 1308, 1313 (11th Cir. 2013) (recognizing that "the Supreme Court abrogated our rule of automatic vacatur").

¹⁷² *United States v. Harrell*, 751 F.3d 1235 (11th Cir. 2014).

¹⁷³ *Id.* at 1240 (quoting *Davila II*, 133 S. Ct. at 2150).

¹⁷⁴ *See id.* at 1240–41.

¹⁷⁵ *Id.* at 1241.

¹⁷⁶ *Id.* (quoting *United States v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993)).

VII. THE CURIOUS CATEGORY OF REASSIGNMENTS NOT TRIGGERED BY THE TRIAL JUDGE'S ACTIONS

Each of the previous categories of cases in which the Eleventh Circuit will reassign a case away from the original trial judge involves some action, comment, or circumstance regarding the trial judge him- or herself. The underlying rationale of the *Torkington* test and the cases in which the Eleventh Circuit reassigns proceedings to new judges on remand address problems regarding the original trial judge's bias, appearance of bias, recalcitrance, or missteps.¹⁷⁷ There is, however, an interesting deviation from this rationale in cases where reassignment is not merely an option, but actually required. Tracing back to the United States Supreme Court's decision in *Santobello v. New York*,¹⁷⁸ the Eleventh Circuit holds that the available remedies in a case where the *prosecution* breaches a plea agreement, by making sentencing arguments or recommendations it promised not to make, are either for the defendant to be allowed to withdraw his guilty plea or for the case to be remanded for "resentence[ing] by a different judge."¹⁷⁹

In *Santobello*, the issue presented to the Supreme Court was "whether the State's failure to keep a commitment concerning the sentence recommendation on a guilty plea required a new trial."¹⁸⁰ As part of the plea negotiation, "[t]he prosecutor [had] agreed to make no recommendation as to the [defendant's] sentence."¹⁸¹ Various matters delayed sentencing in the case, until, by the time the matter came before the court for sentencing, "another prosecutor had replaced the prosecutor who had negotiated the plea," and the "new prosecutor recommended the maximum one-year sentence."¹⁸² Defense counsel objected to the prosecutor's recommendation, citing the plea agreement.¹⁸³ In imposing sentence, however, the trial judge assured the defendant that he was "not at all influenced by what the

¹⁷⁷ See *Torkington II*, 874 F.2d 1441, 1446–47 (11th Cir. 1989) (per curiam); *Clark II*, 929 F.2d 604, 609 (11th Cir. 1991); see also 28 U.S.C. §455 (2012).

¹⁷⁸ *Santobello v. New York*, 404 U.S. 257, 262–63 (1971).

¹⁷⁹ *United States v. Nelson*, 837 F.2d 1519, 1525 (11th Cir. 1988) (quoting *Santobello*, 404 U.S. at 263).

¹⁸⁰ *Santobello*, 404 U.S. at 257–58.

¹⁸¹ *Id.* at 258.

¹⁸² *Id.* at 259.

¹⁸³ *Id.*

District Attorney says,” adding that “[i]t doesn’t make a particle of difference what the District Attorney says.”¹⁸⁴ The judge, instead, cited the probation report detailing the defendant’s “long, long serious criminal record” in imposing the maximum one-year sentence.¹⁸⁵ Given the prosecution’s breach of the plea agreement, inadvertent or not, the Supreme Court explained that it “need not reach the question whether the sentencing judge would or would not have been influenced had he known all the details of the negotiations for the plea.”¹⁸⁶ The Supreme Court acknowledged that the sentencing judge “stated that the prosecutor’s recommendation did not influence him and we have no reason to doubt that.”¹⁸⁷ Regardless, “[t]hat the breach of the agreement was inadvertent does not lessen its impact.”¹⁸⁸

As to the appropriate remedy, without referencing any authority circumscribing the available options, the Supreme Court stated:

The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, *in which case petitioner should be resentenced by a different judge*, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, *i.e.*, the opportunity to withdraw his plea of guilty.¹⁸⁹

Even as it called into being the requirement that any resentencing be performed by a new judge, the Supreme Court “emphasize[d] that this is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge.”¹⁹⁰ The Supreme Court offered no explanation, however, for

¹⁸⁴ *Id.* (quoting the sentencing judge from the pre-sentence report).

¹⁸⁵ *Id.* at 259–60.

¹⁸⁶ *Id.* at 262.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 263 (emphasis added).

¹⁹⁰ *Id.*

why resentencing would have to take place in front of a different judge.

Within the Eleventh Circuit—or rather, given the era, the former Fifth Circuit¹⁹¹—the Supreme Court’s *Santobello* reassignment remedy was first applied in *Johnson v. Beto*.¹⁹² In explaining its ordered remedy, the Fifth Circuit stated that it “can do no better than quote the words of *Santobello*,” which it proceeded to do.¹⁹³ The court offered no further rationale beyond the Supreme Court’s holding.

The Fifth Circuit offered more of an explanation in *United States v. Ewing*,¹⁹⁴ a case in which the court held that “Ewing is not entitled to have his plea set aside but must be given the opportunity to submit the same [sentencing] motion to a different judge.”¹⁹⁵ The court explained that “[w]e do it this way ‘both for the judge’s sake and the appearance of justice,’” quoting the First Circuit’s application of *Santobello* in *Mawson v. United States*.¹⁹⁶ In *Mawson*, the First Circuit had stated that the appearance of justice required reassignment, because “[i]t is difficult for a judge, having once made up his mind, to resentence a defendant.”¹⁹⁷

After the Fifth Circuit split,¹⁹⁸ the new Eleventh Circuit first applied *Santobello*’s breached-plea-agreement holding in *In re Arnett*,¹⁹⁹ a case in which the United States Attorney’s Office had sought forfeiture of property it had promised not to go after.²⁰⁰ Citing *Santobello* for the proposition that “[w]here the government has

¹⁹¹ See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, § 10, 94 Stat. 1994, 1995.

¹⁹² *Johnson v. Beto*, 466 F.2d 478, 479–80 (5th Cir. 1972).

¹⁹³ *Id.* (citing *Santobello*, 404 U.S. at 263).

¹⁹⁴ *United States v. Ewing*, 480 F.2d 1141 (5th Cir. 1973).

¹⁹⁵ *Id.* at 1143. In *Santobello*, of course, the Supreme Court directed that the lower courts decide from the circumstances whether the defendant should have “the opportunity to withdraw his plea of guilty.” *Santobello*, 404 U.S. at 263 (“The ultimate relief to which petitioner is entitled we leave to the discretion of the [lower] court.”).

¹⁹⁶ *Ewing*, 480 F.2d at 1143 (quoting *Mawson v. United States*, 463 F.2d 29, 31 (1st Cir. 1972)).

¹⁹⁷ *Mawson*, 463 F.2d at 31.

¹⁹⁸ See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, § 10, 94 Stat. 1994, 1995.

¹⁹⁹ *In re Arnett*, 804 F.2d 1200, 1204 (11th Cir. 1986).

²⁰⁰ *Id.* at 1201–02, 1204.

not honored a plea agreement, the fashioning of an appropriate remedy is left to the sound discretion of the court,” the Eleventh Circuit allowed the United States Attorney’s Office to “cure the breach of the plea bargain by withdrawing the forfeiture action.”²⁰¹ In the event the government did not withdraw its forfeiture action, the district court was directed “to grant Arnett’s motion to vacate his plea.”²⁰² Because resentencing was not at issue, the appellate court did not address the issue of reassigning the matter to a new judge for further proceedings.

The Eleventh Circuit first applied *Santobello*’s reassignment remedy in *United States v. Nelson*.²⁰³ Discussing *Santobello* and noting its discretion to opt between the available remedies, the Eleventh Circuit held that the defendants should not be allowed to withdraw their guilty pleas, and instead “deem[ed] specific performance to be the appropriate remedy.”²⁰⁴ Without further elaboration on *Santobello*, the Eleventh Circuit held “that appellants are entitled to specific performance of their respective plea agreements before a different sentencing judge,” relying on Fifth Circuit precedent.²⁰⁵ In one of those Fifth Circuit cases, the court noted that an “unfortunate problem which cannot help but arise when considering [a defendant’s request for remand for resentencing by a different judge] is that we have no way of knowing the effect, if any, the government’s misconduct had on the sentence imposed by the district court.”²⁰⁶ The Fifth Circuit reiterated that although “the trial judge committed no error, . . . we have no alternative but to grant the relief requested by the defendant and remand the case to the district court for resentencing before a different district judge.”²⁰⁷

The Eleventh Circuit has applied its *Santobello* jurisprudence in many cases involving prosecutorial breach of plea agreements over the years, ordering reassignment to a new judge on remand without

²⁰¹ *Id.* at 1204.

²⁰² *Id.*

²⁰³ *See* *United States v. Nelson*, 837 F.2d 1519, 1525 (11th Cir. 1988).

²⁰⁴ *Id.* Multiple defendants were involved, and there was some difference in the options each defendant had wished to pursue. *See id.* at 1521, 1525.

²⁰⁵ *Id.* at 1525 (citing *United States v. Shanahan*, 574 F.2d 1228, 1231 (5th Cir. 1978); *see* *United States v. Grandinetti*, 564 F.2d 723, 727 (5th Cir. 1977)).

²⁰⁶ *Shanahan*, 574 F.2d at 1231.

²⁰⁷ *Id.*

elaborating on the reasoning behind the reassignment.²⁰⁸ In *Yesil*, the court cited the *Torkington* test as the basis for determining “whether to reassign the case to a different judge on remand,” including the factor of “whether the original judge would have difficulty putting his previous views and findings aside.”²⁰⁹ In *United States v. Taylor*,²¹⁰ the court exercised its judicial discretion to grant the defendant his choice of withdrawing his guilty plea, instead of specific performance of the plea agreement, in part on the grounds that “[e]ven if we were to remand this case to a different district court judge, [the prosecution’s] breaching statements would still be a part of the record available to the judge on remand and to parole boards in the future.”²¹¹ Other circuits, too, have dutifully followed the Supreme Court’s instructions in *Santobello*.²¹²

²⁰⁸ *E.g.*, *United States v. Johnson*, 132 F.3d 628, 631 (11th Cir. 1998) (“[W]e conclude that Proctor’s sentence should be vacated and that he should be resentenced by a different judge.”); *United States v. Rewis*, 969 F.2d 985, 989 (11th Cir. 1992) (“[W]e vacate Rewis’ sentence and remand this case for resentencing before a different district judge.”); *United States v. Boatner*, 966 F.2d 1575, 1580 (11th Cir. 1992) (“[W]e vacate Boatner’s sentence and remand for resentencing before another judge.”); *United States v. Tobon-Hernandez*, 845 F.2d 277, 281 (11th Cir. 1988) (“The sentences are vacated, and the case is remanded for resentencing by another judge in compliance with the plea agreement.”).

²⁰⁹ *United States v. Yesil*, 991 F.2d 1527, 1533 n.7 (11th Cir. 1992).

²¹⁰ *United States v. Taylor*, 77 F.3d 368 (11th Cir. 1996).

²¹¹ *Id.* at 372.

²¹² *See, e.g.*, *United States v. Warner*, 820 F.3d 678, 680 (4th Cir. 2016) (“[W]e vacate Warner’s sentence and remand for resentencing before a different district judge, as required by *Santobello*”); *United States v. Whitney*, 673 F.3d 965, 976 (9th Cir. 2012) (citing *Santobello v. New York*, 404 U.S. 257, 263 (1971) (“[W]e must remand this matter to a different judge”)); *United States v. Diaz-Jimenez*, 622 F.3d 692, 694 (7th Cir. 2010) (citing *Santobello*, 404 U.S. at 263) (“A breach is actionable, and a minimum remedy is specific performance and resentencing by a different judge.”); *United States v. Cudjoe*, 534 F.3d 1349, 1356–57 (10th Cir. 2008) (citing *Santobello*, 404 U.S. at 263) (“remand[ing] for resentencing by a different judge”); *United States v. Mosley*, 505 F.3d 804, 812 (8th Cir. 2007) (citing *Santobello*, 404 U.S. at 263) (“[T]he case should be remanded to a different judge for resentencing.”); *United States v. Vaval*, 404 F.3d 144, 155 (2d Cir. 2005) (citing *Santobello*, 404 U.S. at 262) (“direct[ing] the case to a different judge”); *United States v. Riggs*, 287 F.3d 221, 226 (1st Cir. 2002) (citing *Santobello*, 404 U.S. at 263) (“[R]esentencing ordinarily ought to be done by a different district judge.”); *United States v. Fitch*, 282 F.3d 364, 368 (6th Cir. 2002) (citing *Santobello*, 404 U.S. at 263) (“remand[ing] for resentencing before a different district court judge”); *United States v. Hayes*, 946 F.2d 230, 236 (3d

The Eleventh Circuit did attempt to further explain the rationale behind reassignment, in *United States v. Foster*.²¹³ Although it recognized *Santobello*'s acknowledgment that "it makes no difference whether the judge was (or was not) influenced by information divulged through the government's breach,"²¹⁴ the Eleventh Circuit stated that "the only available, sufficient remedy for the government's breach in this case is a sentencing determination by a judge who lacks knowledge of the information."²¹⁵ The court continued: "Since, as Judge Edenfield correctly admitted, he could not 'unconsider' the information, we interpret the unique facts and record before us to contain a constructive request for recusal or sentencing by a judge who did not have knowledge of the tainted information."²¹⁶

The court's reassignment remedy has not been applied only in such unique cases, however. The court followed *Foster* in *United States v. Madison*,²¹⁷ where the trial judge had "agreed to strike the Government's filings [in breach of a proffer agreement] but declined to recuse herself, reasoning that she could disregard the inadvertently disclosed information."²¹⁸ The court remanded the case for resentencing "by a district judge who lacks knowledge of Madison's post-conviction statements."²¹⁹

As of the writing of this Article, the Eleventh Circuit's most recent application of *Santobello*'s reassignment remedy was in *United States v. Hunter*.²²⁰ In *Hunter*, the Eleventh Circuit held that the gov-

Cir. 1991) ("If specific performance is elected, Hayes must be resented by a different judge as dictated by the Supreme Court in *Santobello* . . .").

²¹³ *United States v. Foster*, 889 F.2d 1049, 1056, 1056 n.7 (11th Cir. 1989).

²¹⁴ *Id.* at 1056.

²¹⁵ *Id.* at 1056 n.7.

²¹⁶ *Id.*

²¹⁷ *United States v. Madison*, 643 F. App'x 886, 888 (11th Cir. 2016).

²¹⁸ *Id.* (citing *Foster*, 889 F.2d at 1056).

²¹⁹ *Id.*

²²⁰ *United States v. Hunter*, 835 F.3d 1320 (11th Cir. 2016). In the interest of full disclosure, I call to the reader's attention that while I did not represent the government in the district court and neither wrote the appellate brief nor appeared at oral argument in this case, I did assist in the preparation of the government's appellate case. As previously noted, the views expressed herein are my own and do not represent the United States Attorney's Office or the Department of Justice. Moreover, I have no personal interest in the question of whether the original trial judge or a new judge hears any of the sorts of cases discussed in this Article on

ernment breached a plea agreement by opposing an offense-level reduction it had agreed to support and rejected the government's argument that no remand for specific performance was necessary because the trial court had awarded the reduction anyway.²²¹ The court noted

Hunter could not bargain for, and thus was never entitled to, the acceptance-of-responsibility reduction itself. Hunter bargained for the government to stand before the district court and affirmatively *recommend* the reduction on his behalf. What Hunter received instead was the government objecting to the reduction in the district court and arguing against the suggestion that Hunter was entitled to it.²²²

That is, the defendant had not received the benefit of his bargain, even though he ultimately received the offense-level reduction he had hoped to obtain after receiving the benefit of the government's performance of its plea agreement obligations. The specific performance that could be ordered on remand was "the government's recommendation of the reduction on his behalf."²²³ The court stated that reassigning the case to a new judge on remand was "not due to lack of trust in the original sentencing judge's capacity for fairness, but to reestablish the trust between the defendant and the government that is essential to the plea bargaining process."²²⁴

VIII. MEANWHILE, OTHER TRIAL JUDGES ARE TRUSTED TO DISREGARD IMPROPER FACTS OR ARGUMENTS

The rationale for automatically reassigning a case to a new trial judge when a remand is required because the government has breached a plea agreement is that, although the trial judge him- or

remand. My interest in the question of when, and for what reasons, cases are re-assigned on remand is entirely academic as a practitioner and scholar of appellate law.

²²¹ *Id.* at 1323–25, 1330.

²²² *Id.* at 1330.

²²³ *Id.*

²²⁴ *Id.*

herself has done nothing wrong by merely having heard the prosecution's improper argument or information, "we have no way of knowing the effect, if any, the government's misconduct had on the sentence imposed by the district court."²²⁵ In *Yesil*, the court suggested a trial judge in such circumstances may "have difficulty putting his previous views and findings aside."²²⁶ *Foster* stated that "the only available, sufficient remedy . . . is a sentencing determination by a judge who lacks knowledge of the information."²²⁷ The court noted that the trial judge "correctly admitted" that he would not be able to "unconsider" the information.²²⁸

And yet, in other contexts, the Eleventh Circuit has recognized that "[a]ppellate courts routinely accept a trial judge's assurances that, although he has seen evidence, he has not relied upon it."²²⁹ For example, in *Ford v. Strickland*, Chief Judge Godbold recognized that, "in bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions."²³⁰ In *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, the court acknowledged that "it is presumed that the district judge will rely only upon properly admitted and relevant evidence."²³¹ The court again recently, in *Jemison v. Simmons*, described the ability of a trial judge to "exclude from his mind improper inferences drawn from inadmissible evidence in reaching a decision."²³² In fact, in bench trials, the court considers it "relatively easy for the judge as

²²⁵ *United States v. Shanahan*, 574 F.2d 1228, 1231 (5th Cir. 1978); *see also* *United States v. Nelson*, 837 F.2d 1519, 1525 (11th Cir. 1988) (citing *Shanahan*, 574 F.2d at 1231).

²²⁶ *United States v. Yesil*, 991 F.2d 1527, 1533 n.7 (11th Cir. 1992) (citing *Torkington II*, 874 F.2d 1441, 1447 (11th Cir. 1989) (per curiam)).

²²⁷ *United States v. Foster*, 889 F.2d 1049, 1056 n.7 (11th Cir. 1989).

²²⁸ *Id.*

²²⁹ *Ford v. Strickland*, 696 F.2d 804, 821 n.4 (11th Cir. 1983) (Godbold, C.J., dissenting in part and specially concurring in part).

²³⁰ *Id.* (quoting *Harris v. Rivera*, 454 U.S. 339, 346 (1981)).

²³¹ *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1216 (11th Cir. 2003).

²³² *Jemison v. Simmons*, 518 F. App'x 882, 888 n.6 (11th Cir. 2013) (citing *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. Unit A Jan. 1981)).

factfinder to sort out the hearsay evidence from the admissible evidence before making a factual determination.”²³³

Not only are trial judges usually given the benefit of the assumption that they can disregard inadmissible evidence or improper arguments, even lay jurors are assumed to be capable of doing so. The Eleventh Circuit recognizes that both “[t]he Supreme Court and this [c]ourt have often held that we must presume that juries follow their instructions to disregard specific remarks.”²³⁴ The presumption that juries will follow the trial judge’s instructions and disregard improper material is “almost invariable” and will be “overcome only if there is an overwhelming probability that the jury will be unable to follow the court’s instructions . . . and a strong likelihood that the effect of the evidence would be devastating to the defendant.”²³⁵ This presumption applies not only to inadmissible evidence²³⁶ and improper remarks by a prosecutor,²³⁷ but also to erroneous or improper statements by the trial judge him- or herself.²³⁸

Consider the *Madison* case, where the court reassigned the matter to a new judge on remand for resentencing, even though the original trial judge had assured the parties that she could disregard information improperly disclosed by prosecutors in breach of a proffer agreement.²³⁹ If, during a bench trial, the prosecutor had proffered for admission a defendant’s statements the judge ultimately ruled were inadmissible, the appellate court would “accept a trial judge’s assurances that, although he has seen evidence, he has not relied

²³³ *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1501 (11th Cir. 1992).

²³⁴ *Hammond v. Hall*, 586 F.3d 1289, 1334 (11th Cir. 2009).

²³⁵ *United States v. Stone*, 9 F.3d 934, 938 (11th Cir. 1993) (internal quotations and citations omitted).

²³⁶ *See, e.g., United States v. Mock*, 523 F.3d 1299, 1303 (11th Cir. 2008) (presuming the jury has followed the trial judge’s instruction to disregard inadmissible information).

²³⁷ *See, e.g., United States v. Wilson*, 149 F.3d 1298, 1301–02 (11th Cir. 1998) (presuming the jury has followed the trial judge’s instruction to ignore improper remarks by the prosecutor).

²³⁸ *See, e.g., United States v. Hill*, 643 F.3d 807, 846 (11th Cir. 2011) (presuming the jury followed the trial judge’s instruction to disregard comments he made to counsel during trial); *United States v. Williams*, 526 F.3d 1312, 1321 (11th Cir. 2008) (presuming the jury has followed the trial judge’s instruction to ignore an erroneous example offered by the judge in his closing instructions).

²³⁹ *United States v. Madison*, 643 F. App’x 886, 888 (11th Cir. 2016).

upon it.”²⁴⁰ Yet, as shown in *Foster*, the court’s reassignment jurisprudence takes for granted that same trial judge would be incapable of “unconsidering” the defendant’s statements if proffered by the prosecution in breach of a plea agreement.²⁴¹

If the prosecutor had made an improper argument to the jury during closing, the Eleventh Circuit has stated it would presume, as part of its analysis of the improper argument’s “impact on the jury,”²⁴² that the jury followed any curative instruction to disregard any improper statements.²⁴³ In *Rewis*, however, the court held that the government’s statements during sentencing noting the defendant’s non-cooperation, in breach of its promise only to raise the facts of the defendant’s offense conduct, required resentencing before a different judge.²⁴⁴ In *Hunter*, the court explained that the breach did not depend on whether the judge relied on the improper argument, but on whether the prosecutor acted in accordance with the government’s obligations in making (or not making) certain arguments.²⁴⁵

The Eleventh Circuit explained in *Hunter* why the existence of reversible error from the government’s breach of the plea agreement does not depend on whether the trial judge’s sentencing decision was affected by the breach. Once the defendant is deprived of the government’s promised performance of *its* obligations under the agreement, “[a]ny actions by the district court thereafter are irrelevant to the breach and the remedy; the court can neither moot nor cure the government’s breach.”²⁴⁶ If the judge’s actions are irrelevant to the remedy, however, then the rationale for the reassignment

²⁴⁰ *Ford v. Strickland*, 696 F.2d 804, 821 n.4 (11th Cir. 1983) (Godbold, C.J., dissenting in part and specially concurring in part).

²⁴¹ *See United States v. Foster*, 889 F.2d 1049, 1056 n.7 (11th Cir. 1989).

²⁴² *See United States v. Hernandez*, 145 F.3d 1433, 1438 (11th Cir. 1998).

²⁴³ *See, e.g., United States v. Lopez*, 590 F.3d 1238, 1256–57 (11th Cir. 2009); *see also United States v. Samson*, 540 F. App’x 927, 931 (11th Cir. 2013) (holding that “any prejudice from the government’s remark was remedied by the court’s prompt instruction to disregard the isolated comment”).

²⁴⁴ *United States v. Rewis*, 969 F.2d 985, 988–89 (11th Cir. 1992).

²⁴⁵ *See United States v. Hunter*, 835 F.3d 1320, 1330 (11th Cir. 2016) (“*Hunter* bargained for the government to stand before the district court and affirmatively *recommend* the reduction on his behalf.”).

²⁴⁶ *Id.*

remedy in breached plea agreement cases remains curiously unexplored, and seemingly at odds with the rationales underlying reassignment in other scenarios.²⁴⁷

IX. CONCLUSION

Reassigning cases to different trial judges is an appellate court-created remedy, stemming from the appellate courts' supervisory authority over the lower courts within their jurisdictions.²⁴⁸ The cited statutory basis for ordering "such further proceedings [in the lower courts] . . . as may be just under the circumstances" does not speak directly to the power to reassign a matter to a different trial judge.²⁴⁹ The power seems consistent, however, with the hierarchical nature of our appellate court system.²⁵⁰ If the appellate courts are to issue remand instructions to the trial courts, they must be able to ensure compliance with their orders and remove any real or apparent obstacles to their implementation and be able to safeguard the interests of justice. These rationales, however, fit best within the context of real or perceived problems with the trial judges in question.

The Eleventh Circuit's *Torkington* test and its consideration of the trial judge's "difficulty putting his previous views and findings aside" and of "the appearance of justice" seem to have little bearing on cases involving no bias, appearance of bias, obstinance, or misconduct by trial judges.²⁵¹ In adhering to the rule requiring automatic reassignment in cases involving the prosecution's breach of plea agreements, the Eleventh Circuit is itself complying with the

²⁴⁷ See generally Heytens, *supra* note 5, at 47–49 (noting that "[s]omething strange is going on" in cases premising reassignment on the assumption that "it would be unreasonable or unrealistic to expect a trial court judge to disregard certain evidence or arguments" when "all sorts of features of our legal system are premised on the assumption that judges are capable of doing these things").

²⁴⁸ *Clark III*, 990 F.2d 1217, 1229 (11th Cir. 1993); *Torkington II*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam); see Heytens, *supra* note 5, at 34–36 (discussing "appellate control" over trial courts).

²⁴⁹ 28 U.S.C. § 2106 (2012).

²⁵⁰ See Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 546, 546 n.145 (2016) (citing articles exploring the hierarchical structure of the American appellate court system).

²⁵¹ *Torkington II*, 874 F.2d at 1447.

Supreme Court's holding in *Santobello*.²⁵² The Supreme Court, however, offered no rationale for the requirement of reassignment in such cases.²⁵³

Justice Thurgood Marshall subsequently described *Santobello* as an example of a case where, “notwithstanding the faith typically placed in trial judges to act impartially, fairness may require that resentencing be entrusted to a different judge.”²⁵⁴ Justice Marshall, however, was dissenting from the Supreme Court's denial of certiorari in a case in which a death sentence had been re-imposed by the same judge who had based his original sentencing decision on information not properly disclosed to the defense.²⁵⁵ The Florida Supreme Court had rejected the prisoner's argument that resentencing by the same judge was insufficient to cure the error of his having originally imposed sentence based on improper information.²⁵⁶ The Florida court noted that “[o]ur judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence.”²⁵⁷ The United States Supreme Court let the Florida decision stand and has not revisited or further explained the rationale for the reassignment remedy it set forth in *Santobello*.²⁵⁸

“[R]eassignment is neither a new nor an isolated phenomenon,” and while there are certainly insights to be gained by “further investigation of the tension between the ideal of impartial judging and the reality of a sometimes all-too-human judiciary,”²⁵⁹ the practice itself naturally follows from the appellate courts' supervisory authority

²⁵² See *Santobello v. New York*, 404 U.S. 257, 263 (1971).

²⁵³ See *id.*

²⁵⁴ *Harvard v. Florida*, 459 U.S. 1128, 1135 (1983) (Marshall, J., dissenting).

²⁵⁵ See *id.* at 1128–31.

²⁵⁶ See *Harvard v. State*, 414 So. 2d 1032, 1034 (Fla. 1982), *cert. denied*, 459 U.S. 1128 (1983).

²⁵⁷ *Id.*

²⁵⁸ In *Puckett v. United States*, the Supreme Court limited *Santobello* to cases where the defendant lodges a timely objection to the prosecution's breach and held that cases where the error was not preserved would be subject to plain error analysis. *Puckett v. United States*, 556 U.S. 129, 134–35 (2009). *Puckett* did not re-explore *Santobello*'s reassignment remedy. See *id.* at 140 (noting that a timely objection would allow the district court to “grant an immediate remedy (*e.g.*, withdrawal of the plea or resentencing before a different judge) and thus avoid the delay and expense of a full appeal”).

²⁵⁹ Heytens, *supra* note 5, at 54–55.

over the courts under their hierarchical control. Perhaps, like the Seventh Circuit, the Eleventh Circuit may wish to consider formalizing its reassignment practices and criteria by local rule.²⁶⁰ Even without codification by rule, however, the Eleventh Circuit, the district courts within the circuit, and practitioners and parties alike would benefit from a clearer understanding of the circumstances that give rise to reassignment orders in the Eleventh Circuit.

²⁶⁰ See *id.* at 11.