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Foreword

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FOREWORD

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I am truly honored to have been asked by the *University of Miami Law Review* to introduce the Eleventh Circuit Issue this year. Looking back at the introductions to prior Issues, I am humbled to be in the company of those who have done so before me. As they did, I use this opportunity to pay tribute to our Circuit, to highlight some of last year's notable moments, and to recognize the strength of our legal community,[1] which leads me finally to introduce the authors and articles that contribute to this Issue.

Inescapably, any summary of the last year includes a description of the COVID-19 pandemic and its impact on, well, everything. Courts throughout the nation closed physically last March. The majority of the Eleventh Circuit Court of Appeals's employees began working remotely. Yet the work of the Eleventh Circuit marched on, largely without disruption by the pandemic. Even oral argument continued (virtually) with the Eleventh Circuit adopting the Supreme Court's procedure for serial questioning regarding en banc hearings. On par with prior years, the judges of the Eleventh Circuit terminated more cases than were filed, issuing more than 3,200 opinions on the merits. Appeals filed in the Eleventh Circuit were resolved on average within seven and a half months of filing, making ours the third fastest circuit nationwide. We can credit this, at least in part, to our full complement of active judges, as well as the senior judges who contribute to the court's work, and assistance from the district court judges who sit by designation.

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[1] On that note, I must acknowledge the indispensable efforts of my current and former law clerks, who tirelessly rise to every challenge I place before them, including assisting me in the preparation of this Foreword. Andrea Guzman, Daniel Humphrey, and Emilia Brunello have all contributed here.

The Eleventh Circuit has a new Chief Judge: William H. Pryor, Jr., who assumed the post on June 3, 2020.[2] As a Circuit, we did not have the opportunity to recognize either the end of Chief Judge Ed Carnes's tenure or Chief Judge Pryor's ascension because, like so many events last year, the Eleventh Circuit's biannual conference was cancelled due to the pandemic.

If last year had brought only the COVID-19 pandemic, that would have been enough. The Eleventh Circuit, ever timely, grappled again with the challenge of applying qualified immunity in a civil suit to law enforcement officers accused of using excessive force. In *Helm v. Rainbow City*,[3] a police officer was accused in a civil suit of using his taser on a teenage girl who suffered a series of seizures while attending a concert.[4] His colleagues were joined as co-defendants for failing to intervene.[5] The court found both that the claims established a violation of the child's constitutional rights, which were clearly established at the time,[6] and that, even if no preexisting case fit the facts of this one squarely, the officer's actions fell within a narrow exception of "obvious clarity."[7] Regarding this exception, courts must "inquire[] whether th[e] conduct 'lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent.'"[8] A second decision on qualified immunity, *Laskar v. Hurd*,[9] similarly remanded a case for consideration on the merits,[10] finding the plaintiff alleged a violation of clearly established right;[11] the Supreme Court may yet weigh in, as a petition for certiorari has been filed.

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[2] I would like to additionally recognize and thank Chief Judge Pryor for contributing here information about the Eleventh Circuit's workload and procedures.

[3] Helm v. Rainbow City, 989 F.3d 1265 (11th Cir. 2021).

[4] *Id.* at 1269.

[5] *Id.* at 1270.

[6] *See id.* at 1272, 1275–76, 1278.

[7] *Id.* at 1276.

[8] *Id.* (quoting Fils v. City of Aventura, 647 F.3d 1272, 1291 (11th Cir. 2011)).

[9] Laskar v. Hurd, 972 F.3d 1278 (11th Cir. 2020).

[10] *Id.* at 1282.

[11] *Id.* at 1297.

Last year also concluded with a presidential election and the first challenge to Amendment 4 to the Florida State Constitution, also known as the Voting Rights Restoration for Felons Initiative.[12] The Amendment, which served to restore the voting rights of individuals with felony convictions after they complete all the terms of their sentence,[13] was implemented by Florida Statute.[14] That statute defined "[c]ompletion of all terms of the sentence" to include satisfaction of any financial portion of the sentence, including fines and restitution.[15] The constitutionality of requiring felons to pay all financial terms of their sentence before voting was quickly challenged.[16] On appeal from the trial court, the Eleventh Circuit took the unusual procedural step of hearing the case en banc, without a prior panel decision and considering the importance and timeliness of the decision in advance of the November election.[17] The resulting opinion, *Jones v. Governor of Florida*, upheld the constitutionality of the Florida law,[18] which may serve as a guidepost for other felon voting rights cases and issues nationwide.

Florida has been on the forefront of legal change before, particularly on issues arising out of criminal convictions and consequences. With the readers' indulgence, this is where I now recognize the strength of our legal community by paying tribute to one particular great lawyer who is no longer among us. Two years before the U.S. Supreme Court decided in *Batson v. Kentucky*[19] that "a defendant may establish a prima facie case of purposeful discrimination . . . solely on evidence concerning the prosecutor's

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[12] *Amendment 4: Voting Rights Restoration for Felons Initiative*, FLA. ASS'N OF CNTYS., https://www.fl-counties.com/amendment-4 (last visited May 25, 2021).

[13] Jones v. Governor of Fla., 975 F.3d 1016, 1025 (11th Cir. 2020).

[14] *Id.* at 1026 (referring to the statute as "Senate Bill 7066"); *see* FLA. STAT. § 98.0751(2)(a)(5) (2019).

[15] *See Jones*, 975 F.3d at 1026; § 98.0751(2)(a)(5).

[16] *See* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1289–90, 1300–05, 1310–11 (N.D. Fla. 2019), *aff'd sub nom.* Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020).

[17] *See Jones*, 975 F.3d at 1028.

[18] *See id.* at 1034–35.

[19] Batson v. Kentucky, 476 U.S. 79 (1986), *holding modified by* Powers v. Ohio, 499 U.S. 400 (1991).

exercise of peremptory challenges at the defendant's trial,"[20] the Supreme Court of Florida in *State v. Neil*[21] rejected the stringent "*Swain* test,"[22] which required a defendant to evidence systemic discrimination by a prosecutor to support a claim of discriminatory use of peremptory challenges to strike black jurors.[23] In *Neil*, counsel for the defendant secured a new trial for his client[24] and a new test for all trial courts in the State of Florida to apply to objections to the state's use of peremptory challenges.[25] In keeping with United States Magistrate Judge Torres's practice of honoring legal legends in our community, it bears noting that the lead attorney for the defendant at trial and on appeal, Paul A. Louis, was a graduate of the University of Miami School of Law, a World War II bomber pilot, a prisoner of war, and my husband's father.

By honoring one lawyer who shaped the legal landscape for decades in Florida, I by no means intend to diminish the contributions of so many others. Similarly, by selecting a few decisions from our Circuit, I do not mean to minimize the significance of the thousands of others, each of which carries ripples of impact into the legal landscape. There is one final decision I include here, which, like the others I have summarized above, arises from questions regarding criminal justice reform. In *United States v. Jones*,[26] the court last year considered, as a matter of first impression, the sentencing court's authority to reduce a sentence under the First Step Act of 2018.[27] In a consolidated appeal brought by four individuals serving sentences imposed before the passage of the Fair Sentencing Act of 2010,[28] which was intended to remedy the sentence disparity for crimes involving crack cocaine,[29] the court provided guidance on which individuals were eligible for relief under

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[20] *Id.* at 96.
[21] 457 So. 2d 481 (Fla. 1984).
[22] *Id.* at 486.
[23] *Id.* at 483.
[24] *Id.* at 487.
[25] *Id.* at 486–87.
[26] United States v. Jones, 962 F.3d 1290 (11th Cir. 2020).
[27] *Id.* at 1293.
[28] *Id.*
[29] *See id.* at 1296–97.

the First Step Act and the scope of the re-sentencing court's authority to reduce a sentence.[30]

Looking now to what lies ahead, we focus on the brighter points left by last year. Under Chief Judge Pryor, the Eleventh Circuit has renovated its website to increase search functionality. Chief Judge Pryor credits the pandemic, if for nothing else, with forcing us collectively to speed up our reliance on and proficiency with technology. Undeniably, virtual proceedings have become the norm, ranging from remote discovery proceedings to appellate oral argument.

This leads us to the first of the articles prepared for this edition of the Eleventh Circuit Issue, in which author Latoya Brown examines a pre-pandemic decision holding the Federal Arbitration Act limits an arbitrator's authority to compel appearance to *physical* appearances. The article provides a comprehensive review of courts' varying applications of Section 7 of the Federal Arbitration Act and thoughtfully examines whether a textual interpretation of the Act supports a different result than that reached by the Eleventh Circuit in *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc*.[31]

This Eleventh Circuit Issue features articles that are uniquely tied to Miami or Florida, yet also provide comprehensive review of a legal issue of general interest. Professor John F. Coyle examines foreign forum selection clauses commonly appearing in cruise contracts and critiques the Eleventh Circuit's approach in their enforcement in *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*[32] Professor Coyle in the past has examined the judicial canons of constructions used to construe forum selection clauses, focusing previously on the interpretation of ambiguous clauses. In his article for this Eleventh Circuit Issue, Professor Coyle focuses on the enforceability of these forum selection clauses, specifically where enforcement would, he argues, conflict with the statutory prohibi-

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[30] *See id.* at 1297–1304.

[31] Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.939 F.3d 1145 (11th Cir. 2019).

[32] Estate of Myhra v. Royal Caribbean Cruises, Ltd, 695 F.3d 1233 (11th Cir. 2012).

tion on utilizing contract provisions to limit the liability of the cruise line.

Another article included in this Issue considers aviation lien laws under Florida's statutory scheme, having been recently revised to clarify that a lienholder is not required to establish possession of the aircraft to assert her lien. Professor Timothy M. Ravich analyses lien laws in Florida and nationwide, and while he recognizes the greatest interest may be focused on practitioners in Florida and the Eleventh Circuit, his article provides guidance more broadly for the interpretation and application of lien laws to analogous commercial transactions.

And finally, authors Elizabeth Montano and Edward F. Ramos advance an argument that misrepresentations of U.S. citizenship, if used to determine admissibility or deportability, implicitly contain a materiality element. Their interpretation of the text of the Immigration and Nationality Act challenges the court's recent en banc decision in *Patel v. United States Attorney General*[33] in which the court denied the petition to review the decision of the Board of Immigration Appeals by an immigrant facing removal because his false claim of citizenship on an application for a driver's license rendered him inadmissible.

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[33] Patel v. U.S. Att'y Gen., 971 F.3d 1258 (11th Cir. 2020).