2017 Federal Decisions of Note – Year to Date
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RECENT CIVIL DECISIONS

FROM THE UNITED STATES SUPREME COURT

QUALIFIED IMMUNITY
White v. Pauly, No. 16-67 (U.S. Jan. 9, 2017): In excessive force case, officer who, having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers, shot and killed an armed occupant of the house without first giving a warning, was entitled to qualified immunity for the actions. Ninth Circuit "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment."

FEDERAL JURISDICTION
Lightfoot v. Cendant Mortgage Corp., No. 14-1055 (U.S. Jan. 18, 2017): FNMA's statutory power "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal," 12 U. S. C. §1723a(a), does not confer an independent basis of federal jurisdiction (and thus allow FNMA to remove a case asserting solely state-law claims).

IDEA
Fry v. Napolean Community Schools, No. 15-497 (U.S. Feb. 20, 2017): IDEA's administrative procedures and the exhaustion requirement apply only to those claims based upon the failure to provide a free and appropriate public education ("FAPE"), and does not extend to claims under Section 504 of the Rehabilitation Act and related provisions (in this case, concerning school's failure to allow use of a service dog).

PATENT
Life Technologies, Inc. v. Promega, No. 14-1538 (U.S. Feb. 20, 2017): Section 271(f)(1) of the Patent Act prohibits the supply from the United States of "all or a substantial portion of the components of a patented invention" for combination abroad. Held: The supply of a single component of a multicomponent invention for manufacture abroad does not give rise to §271(f)(1) liability.

VOTING RIGHTS
Bethune-Hill v. Virginia State Bd. of Elections, No. 15-680 (U.S. March 1, 2017): As to 11 legislative districts where race was deemed not to predominate, the district court's legal standard was incorrect, because (1) In drawing legislative district lines, race can predominate either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, and (2) race may predominate even when a plan respects traditional principles. However, the district court's analysis of one unlawful district, requiring narrow tailoring, was consistent with Supreme Court precedent and was supported by the evidence.

PRESIDENTIAL APPOINTMENTS
NLRB v. SW General, Inc., No. 15-1251 (U.S. March 21, 2017): Subsection (b)(1) of the Federal Vacancies Reform Act of 1998 (FVRA) prevents a person who has been nominated to fill a vacant executive-branch office requiring Senate advice-and-consent from performing the duties of that office in an acting capacity.

FOURTH AMENDMENT
Manuel v. City of Joliet, No. 14-9496 (U.S. March 21, 2017): Pretrial detention following the start of legal process (here, the judge's probable-cause determination purportedly based on fabricated evidence) can give rise to a Fourth Amendment claim. Pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process.

IDEA
Endrew F. v. Douglas County School Dist., No. 15-827 (U.S. March 22, 2017): School Board may be required to pay private-school tuition for autistic child where IEP simply repeated standards from one year to another; to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, which is more than a *de minimis* requirement.

BANKRUPTCY
Czyzewski v. Jevic Holding Corp., No. 15-649 (U.S. March 22, 2017): Bankruptcy courts may not approve structured dismissals providing distributions not following ordinary priority rules without consent of affected creditors.

FIRST AMENDMENT
Expressions Hair Design, Inc. v. Schneidermann, No. 15-1391 (U.S. March 29, 2017): New York General Business Law §518 provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Petitioners, five New York businesses and their owners who wish to impose surcharges for credit card use, filed suit against state officials, arguing that the law violates the First Amendment by regulating how they communicate their prices, and that it is unconstitutionally vague. The District Court ruled in favor of the merchants, but the Court of Appeals vacated the judgment with instructions to dismiss, concluding that single-sticker pricing was price regulation alone, which under prior precedent regulates conduct, not speech. The Supreme Court vacated, holding that the law regulates speech and instructing the Court of Appeals to analyze it as speech regulation on remand. The Court also rejected the vagueness challenge to the law.

LABOR & EMPLOYMENT
McLane Corp. v. EEOC, No. 15-1248 (U.S. April 3, 2017): In investigating McLane on a sex discrimination charge and commenced its own investigation on potential age discrimination, the EEOC issued certain

subpoenas to McLane, to which it objected based on lack of relevance and refused to comply. The EEOC commenced an action to require compliance with the subpoenas. The district court declined to enforce the subpoenas, finding that the pedigree information was not relevant to the charges, but the Ninth Circuit reversed. Reviewing the District Court's decision to quash the subpoena de novo, the court concluded that the lower court erred in finding the pedigree information irrelevant. Held: A district court's decision whether to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion, not de novo.

SANCTIONS

Goodyear Tire & Rubber Co. v. Haeger, No. 15-1406 (U.S. April 18, 2017): When a federal court exercises its inherent authority to sanction bad-faith conduct by ordering a litigant to pay the other side's legal fees, the award is limited to the fees the innocent party incurred solely because of the misconduct - or put another way, to the fees that party would not have incurred but for the bad faith.

PREEMPTION

Coventry Health Care of Missouri, Inc. v. Nevils, No. 16-149 (U.S. April 18, 2017): Federal Employees Health Benefits Act of 1959 (FEHBA) authorizes the Office of Personnel Management (OPM) to contract with private carriers for federal employees' health insurance. 5 U. S. C. § 8902(a), (d). FEHBA contains an express-preemption provision,§ 8902(m)(1), which states that the "terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law . . . which relates to health insurance or plans." In this case, employees filed a putative class action, alleging that Missouri law prohibited subrogation recovery. The Supreme Court held that FEHBA preempted Missouri law.

FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

SUMMARY JUDGMENT PROCEDURE

Furcron v. Mail Centers Plus, Inc., No. 15-14595 (11th Cir. Dec. 16, 2016): District court was within its discretion in striking portions of declaration under "Sham Affidavit" principles, though the alleged inconsistencies were such that the district court stretched the outer bounds of the Sham Affidavit rule.

SECURITIES

In Re: Galectin Therapeutics, Inc. Secs. Lit., No. 16-10324 (11th Cir. Dec. 15, 2016): Securities issuer's omission of alleged material fact (that Gallectin paid promotional firms to tout Galectin stock) was not actionable and Rule 12 motion was properly granted; "the omission of facts is actionable only to the extent that the absence of those facts would, under the circumstances, render another reported statement misleading to the "reasonable investor, in the exercise of due care."

FORUM SELECTION

Feggestad v. Kerzner Int'l Bahamas Ltd., No. 15-11773 (11th Cir. Dec. 13, 2016): District court properly dismissed complaint filed in violation of forum selection clause regarding Feggestads' stay in the Bahamas at the Atlantis. Feggestads were not prevented from meaningfully reviewing and understanding agreement they signed at check-in under the "reasonable communicativeness" test applicable to such clauses.

EMPLOYMENT

EEOC v. Catastrophe Management Solutions, Inc., No. 14-13482 (11th Cir. Dec. 13, 2016): EEOC sued on behalf of Chastity Jones, a black job applicant whose offer of employment was rescinded by Catastrophe

Management Solutions pursuant to its race-neutral grooming policy when she refused to cut off her dreadlocks. The district court dismissed under Rule 12 and denied leave to amend. The Eleventh Circuit affirmed, holding (1) proposed amendment improperly conflated distinct Title VII theories of disparate treatment (the sole theory on which it is proceeding) and disparate impact (the theory it has expressly disclaimed), and (2) Title VII prohibits discrimination based on immutable traits, and dreadlocks, though culturally associated with race, are not an immutable characteristic of black persons.

BANKRUPTCY; APPELLATE JURISDICTION

Wortley v. Bakst, No. 15-11923 (11th Cir. Jan. 5, 2017): State-court action was removed to federal bankruptcy court on "related to" jurisdiction grounds; the bankruptcy court ultimately entered a dismissal order on the merits and certified the order for direct appeal under 28 U.S.C. § 158(d)(2)(A). The Eleventh Circuit dismissed the appeal for lack of appellate jurisdiction, holding that because the bankruptcy court had only "related to" jurisdiction, it had no power to enter a final order on the merits, which in turn destroyed appellate jurisdiction under section 158(d)(2)(A) because that section allows appeals only from a "judgment, order, or decree" of the bankruptcy court.

STATUTES OF LIMITATION; EQUITABLE TOLLING

Foudy v. Indian River County Sheriff's Office, No. 15-14646 (11th Cir. Jan. 9, 2017): (1) section 1983 claim premised upon a violation of the Drivers Privacy Protection Act (DPPA) (which, if prosecuted under the DPPA itself, is subject to a four-year occurrence and non-discovery based statute of limitations under the general federal limitations period of 28 U.S.C. § 1658) is subject to an occurrence-based accrual rule rather than the usual section 1983 discovery-based model; (2) illegal and unauthorized database access was not a self-concealing wrong entitling plaintiffs to equitable tolling of statutes of limitation.

FEDERAL OFFICER REMOVAL; ELECTRIC COOPERATIVES

Caver v. Central Alabama Elec. Coop., No. 15-15207 (11th Cir. Jan. 12, 2017): Given both the extensive regulatory control over the field of rural electrification for those cooperatives which obtain loans from the Rural Utilities Service (a part of the U.S. Department of Agriculture) and Congress' desire to promote rural electrification through RUS activity, electric cooperative which obtained such a loan was a "federal officer" for purposes of removal jurisdiction (under 28 U.S.C. § 1442) once it asserted a "colorable federal defense" to state-law claims. On the merits, the district court properly dismissed putative class-action against cooperative brought under *Ala. Code* § 37-6-20 for failure to distribute "excess revenues", because the statute did not prohibit distributions via the use of capital credits booked as long-term liabilities owed to members, which was the method of distributions purportedly authorized by by-laws of cooperative.

ARBITRATION; NON-SIGNATORY ENFORCEMENT

Kroma Makeup EU, LLC v. Kardashian, No. 15-15060 (11th Cir. Jan. 18, 2017): Under Florida law (the applicable law for contract formation), non-signatory cannot invoke the doctrine to compel arbitration of claims that are not within the scope of the arbitration clause. Equitable estoppel does not allow a non-signatory to an agreement to alter and expand an arbitration clause that would not otherwise cover the claims asserted. (Ed. - this is consistent with Alabama's law concerning non-signatory enforcement under equitable estoppel principles).

QUALIFIED IMMUNITY

May v. City of Nahunta, No. 15-11749 (11th Cir. Nov. 15, 2016, on rehearing Jan. 19, 2017): Police officer was entitled to qualified immunity for initial decision to seize plaintiff for purpose of detaining her for mental health evaluation at hospital, given EMT's reports of her self-injury and behavior. However, officer was not entitled to qualified immunity for manner of seizure, where plaintiff offered substantial evidence

that officer detained her in a closet for 20 minutes and forced her to disrobe in front of him - the Court noted that officer's alleged use of forcible language coupled with the threat of deadly force, the prolonged duration of the seizure, and the inappropriateness inherent in forcing a disrobing, took the case well beyond the "hazy border" often separating legal and illegal conduct.

ATTORNEYS' FEES (FEE SHIFTING)
Yellow Pages Photos, Inc. v. Ziplocal, LP, No. 16-11868 (11th Cir. Jan. 24, 2017): Although the district court has discretion to adjust lodestar fee in light of nature and extent of the recovery in the case (for example, by considering potentially needless work or work associated with claims which did not yield any recovery), it was an abuse of discretion to apply wooden percentage-based model for calculating a reduction (reducing the requested fee by percentage of requested recovery which was actually obtained).

QUALIFIED IMMUNITY
Dukes v. Deaton, No. 15-14373 (11th Cir. Jan. 26, 2017): Issue: whether police officer (Deaton) who threw diversionary device, called a "flashbang," into a dark room occupied by two sleeping individuals, without first visually inspecting the room, is entitled to qualified immunity on complaint of excessive force. Held: Deaton used excessive force, but Deaton is entitled to qualified immunity because the violation was not clearly established.

COLLATERAL ESTOPPEL; CHOICE OF LAW
CSX Transp., Inc. v. General Mills, Inc., No. 15-12095 (11th Cir. Jan. 30, 2017): Federal common law adopts the state rule of collateral estoppel to determine the preclusive effect of a judgment of a federal court that exercised diversity jurisdiction.

BANKRUPTCY
In re Appling, No. 16-11911 (11th Cir. Feb. 15, 2017): Debtor cannot discharge any debt incurred by fraud, 11 U.S.C. § 523(a)(2)(A), but a debtor can discharge a debt incurred by a false statement respecting his "financial condition," unless that statement is in writing, id. § 523(a)(2)(B). Held: oral statements about debtor's tax refund did not trigger the exclusion.

BANKRUPTCY
In re Lunsford, No. 16-11578 (11th Cir. Feb. 15, 2017): Debtor ordinarily may discharge debts in bankruptcy, 11 U.S.C. § 727, but not if the debt "is for the violation of . . . securities laws" and results from a court judgment, § 523(a)(19)(A)-(B). Held: (1) bankruptcy court found as fact that Lunsford violated the securities laws, and (2) independently, section 523(a)(19)(A) is not confined to instances where the debtor itself commits the violation.

RELIGIOUS EXPRESSION
Smith v. Owens, No. 14-10981 (11th Cir. Feb. 17, 2017): District court's dismissal of prisoner challenge to prison policy concerning growing of an uncut beard required remand for consideration of *Holt v. Hobbs*, 135 S. Ct. 853 (2015), under which government must demonstrate that policy is the least restrictive means to achieving a compelling governmental interest.

FIRST AMENDMENT
Wollschaeger v. Governor, State of Florida, No. 12-14009 (11th Cir. Feb. 16, 2017) (en banc): Florida's Firearms Owners' Privacy Act (FOPA) regulates speech based on content, restricting (and providing disciplinary sanctions for) speech by doctors and medical professionals regarding firearm ownership. Held: FOPA's content-based restrictions- certain record-keeping, inquiry, and anti-harassment provisions -

violate the First Amendment. FOPA's anti-discrimination provision - as construed to apply to certain conduct by doctors and medical professionals - is not unconstitutional. Unconstitutional provisions of FOPA can be severed from the rest of the Act. The *en banc* decision commanded two separate majority opinions.

RECEIVERSHIP

SEC v. Wells Fargo Bank, No. 16-10942 (11th Cir. Feb. 22, 2017): Following the collapse of a Ponzi scheme, the district court appointed a receiver to administer the affairs, funds, and property of parties who perpetrated that failed scheme. The district court also established a claims administration process by which those who had claims to property administered by the equity receivership could file proofs of claim. The issue in this appeal is whether, in such a circumstance, a district court may extinguish a non-party's pre-existing rights to property under the administration of the equity receivership, if that non-party fails to comply with the court's orders regarding filing of proofs of claim. Held: no.

CAFA; RICO

Blevins v. Aksut, No. 16-11585 (11th Cir. March 1, 2017): CAFA's local-controversy provision, 28 U.S.C. § 1332(d)(4), does not prohibit district courts from exercising federal-question jurisdiction under 28 U.S.C. § 1331. Plaintiffs adequately alleged a cognizable injury to their "business or property" (18 U.S.C. § 1964(c)) recoverable under RICO (in the form of unnecessary medical expenses allegedly incurred as a proximate result of the physician and practice group's ordering unnecessary heart procedures).

ANTITRUST

Feldman v. American Dawn, Inc., No. 16-11663 (11th Cir. March 3, 2017): Employee lacked antitrust standing to challenge a conspiracy directed at his employer, where the alleged conspiracy caused the employee's termination.

SEXUAL ORIENTATION & GENDER STEREOTYPE DISCRIMINATION

Evans v. Georgia Regional Hospital, No. 15-15234 (11th Cir. March 10, 2017): Although sexual orientation discrimination is not actionable under Title VII, discrimination based on the failure to conform to gender stereotypes is a type of "sex" discrimination actionable under Title VII. However, Plaintiff did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions. Therefore, while a dismissal of Evans' gender non-conformity claim would have been appropriate on this basis, these circumstances entitle Evans an opportunity to amend her complaint one time unless doing so would be futile.

RICO

Almanza v. United Airlines, Inc., No. 16-11048 (11th Cir. March 17, 2017): The Court affirmed the district court's dismissal of a putative RICO class action brought on behalf of Mexican nationals against a group of airlines for alleged unlawful collection of a tourism tax purportedly required under Mexican law, even though Defendants knew that, under Mexican law, Plaintiffs were actually exempt from the tax. Defendants kept those improperly collected "taxes" for themselves instead of remitting them to Mexico (to which they were not owed) or back to Plaintiffs (who technically could have utilized an obscure reimbursement procedure to get their money back, if only they knew about it). The Court held that Plaintiffs failed to allege the existence of a RICO "enterprise."

FIRST AMENDMENT; COMMERCIAL SPEECH

Ocheesee Creamery, LLC v. Putnam, No. 16-12049 (11th Cir. March 20, 2017): Creamery had First Amendment right to use term "skim milk" to describe its no-additive, all-natural skim milk even though,

inconsistent with industry and State law standards, skim milk is fortified with Vitamin A because in the skimming process, all Vitamin A is removed.

ATTORNEY SANCTIONS

Purchasing Power, LLC v. Bluestem Brands, Inc., No. 16-11896 (11th Cir. March 20, 2017)

Law firm's misapprehension of salient citizenship of the constituent members of its LLC client, which was based on information from the client but which led to lack of jurisdiction in the district court, did not amount to the type of abuse of judicial process necessary to justify sanctions.

PRODUCTS LIABILITY; JURY DELIBERATIONS

Christiansen v. Wright Medical Technology, Inc., No. 16-12162 (11th Cir. March 20, 2017): This was the first bellwether trial in a multidistrict litigation involving over 500 cases concerning the Wright Medical Conserve "metal-on-metal" hip replacement device. Wright Medical appealed from a judgment of $2.1 million, contending that (1) the district court erred in ordering the jury to continue deliberations after the jury had already begun to deliver its verdict, and (2) the district court erred in its instructions on Utah's products liability law with regard to the unavoidably unsafe product defense in Comment k of Section 402A of the Restatement (Second) of Torts. The Eleventh Circuit affirmed.

SECTION 1981

Flournoy v. CML-GA WB LLC, No. 16-10073 (11th Cir. March 27, 2017): African-American woman who owned and operateed a hair salon sought to expand her salon by applying to lease space in the JB Whites Building. After her lease application was denied, Flournoy brought suit, alleging that the denial infringed her right to freedom from racial discrimination in the making of a contract. The district court granted summary judgment, holding that she failed to rebut landlord's legitimate non-discriminatory reason for the decision not to lease. "Here, Defendants shouldered [their burden] by articulating, by reference to the record, several legitimate, nondiscriminatory reasons for rejecting Ms. Flournoy's lease application. Among them: odors emanating from the salon would disturb the residential tenants on the upper floors, Ms. Flournoy's business would not survive given the number of other salons in the area, a salon would not generate cross-shopping with other commercial tenants of the JB Whites building, Ms. Flournoy's credit score was too low, and Defendants would not break even given the high cost of building out the unit." Noting that Plaintiff was required to rebut each proffered reason, showing that each was so rife with "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions . . . that a reasonable factfinder could find them unworthy of credence," the Court concluded Flournoy failed to meet that burden.

CAFA JURISDICTION; NO MINIMAL DIVERSITY

Life of the South Ins. Co. v. Carzell, No. 16-90006 (11th Cir. March 29, 2017): The Court refused to accept an interlocutory appeal from a district court order remanding an action to Fulton County Superior Court on the basis of no CAFA jurisdiction. The Eleventh Circuit denied the petition, holding that there was not even minimal diversity required to establish initial CAFA jurisdiction.

QUALIFIED IMMUNITY

Stephens v. Degiovanni, No. 15-10206 (11th Cir. March 30, 2017): Paul Stephens appealed summary judgment granted to Broward Deputy Sheriff Nick DeGiovanni based on qualified immunity in his 42 U.S.C. § 1983 action, alleging false arrest and excessive force. The Eleventh Circuit affirmed summary judgment granted to Deputy DeGiovanni on the false-arrest claim, but vacated summary judgment on the excessive-force claim, holding that deputy was not entitled to qualified immunity because the force he used in arresting Stephens on misdemeanor charges was excessive under clearly established law.

LABOR

Priexa v. Prestige Cruise Services, LLC, No. 16-13745 (11th Cir. April 14, 2017): Freixa sued Prestige (his former employer) for overtime pay. Federal law required the district court to calculate Freixa's hourly rate of pay on a week-to-week basis to determine whether Freixa was exempt from federal overtime laws. 29 U.S.C. § 207(i). But because part of Freixa's compensation included commission payments computed and earned monthly, the district court concluded that it was "not possible or practicable" to determine exactly how much Freixa earned in commissions in each individual week, 29 C.F.R. § 778.120. So the district court instead divided Freixa's entire remuneration for the year he worked across every hour in every week he worked that year. That calculation produced an average hourly rate above the exemption threshold, so the district court awarded summary judgment in favor of the cruise service. Issue: whether, in calculating an employee's hourly rate of pay to determine if he is exempt from federal overtime laws, a district court may allocate the employee's commissions to hours worked outside the periods in which the commissions were earned. Held: the district court's methodology was erroneous; federal law bars allocating a commission payment across weeks that fall outside the period in which the payment was earned.

INJUNCTIONS

ADT, LLC v. Northstar Alarm Services, No. 16-15351 (11th Cir. April 14, 2017): ADT sued Vision Security for violations of the Lanham Act, 15 U.S.C. § 1125(a). The parties agreed to an injunction that prohibited Vision Security from using certain sales tactics. NorthStar then acquired customer accounts, rental leases, and other assets from Vision Security and hired four senior officers and some of the sales team of Vision Security. When NorthStar allegedly used sales tactics prohibited by the injunction, ADT moved the district court to hold NorthStar in contempt of the injunction. The district court determined that, although NorthStar and Vision Security were not in privity, NorthStar was bound by the injunction as a successor to Vision Security under a state-law theory of de facto merger. The Eleventh Circuit reversed, holding that NorthStar cannot be bound by the injunction when it was not in privity with Vision Security and in the absence of any evidence that it had notice of the injunction, Fed. R. Civ. P. 65(d)(2).

FMLA; EVIDENCE OF PRETEXT

Jones v. Gulf Coast Healthcare, Inc., No. 16-11142 (11th Cir. April 19, 2017): Approximately a month after returning from FMLA leave to have rotator-cuff surgery on his shoulder, Jones was suspended and subsequently fired from his job as Activities Director for GCH (aka Accentia). Jones claimed that, in taking these actions, Accentia interfered with the exercise of his FMLA rights and later retaliated against him for asserting those rights. The district court granted summary judgment in favor of Accentia on both claims. The Eleventh Circuit affirmed Jones's interference claim, but reversed with respect to his retaliation claim, reasoning that "the record indicates a number of inconsistencies and contradictions with respect to Accentia's proffered reasons for terminating Jones." "We have recognized that an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext."

RECENT CRIMINAL DECISIONS

FROM THE UNITED STATES SUPREME COURT

INEFFECTIVE ASSISTANCE

Buck v. Davis, No. 15-8049 (U.S. Feb. 22, 2017): Defendant's trial counsel offered expert report that defendant's race predisposed him to violent conduct, and during penalty phase, primary issue was defendant's future dangerousness. The Supreme Court, reversing prior denials of habeas relief, held that

ineffective assistance was demonstrated because no competent defense attorney would introduce such evidence.

DEATH PENALTY; LETHAL INJECTION
Arthur v. Dunn, No. 16-602 (U.S. Feb. 21, 2017): The Court denied certiorari review of the defendant's most recent challenge to Alabama's lethal injection method of execution.

JUROR IMPEACHMENT; SIXTH AMENDMENT
Pena-Rodriguez v. Colorado, No. 15-606 (U.S. March 6, 2017): Where juror makes clear statement indicating reliance on racial stereotypes to convict defendant, Sixth Amendment requires no-impeachment rule (typically enshrined in rules of evidence, e.g. Rule 606(b), Fed. and Ala. R. Evid.) give way in order to permit trial court to consider evidence of juror's statement and any resulting denial of jury trial guarantee.

FEDERAL SENTENCING GUIDELINES
Bickles v. U.S., No. 15-8544 (U.S. March 6, 2017): The Sentencing Guidelines are not void for vagueness, but guidelines are not immune from constitutional scrutiny under other due process challenges, the Ex Post Facto clause, or the Eighth Amendment.

JUDICIAL RECUSAL
Rippo v. Baker, No. 16-6316 (U.S. March 6, 2017): During criminal trial, defendant became aware that trial judge was being investigated for federal bribery charges in an investigation in which the prosecuting DA's office was participating. Defendant moved for recusal, which was denied and affirmed on appeal. In this post-conviction proceeding, holding that the Nevada Supreme Court applied the wrong legal standard. The Due Process Clause may demand recusal even when a judge has no actual bias, but where, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

INTELLECTUAL DISABILITY; CAPITAL PUNISHMENT
Moore v. Texas, No. 15-797 (U.S. March 28, 2017): The Texas Court of Criminal Appeals' conclusion that Moore's IQ score (70.66) established that he is not intellectually disabled is irreconcilable with extant precedent, which instructs that, where an IQ score is close to, but above, 70, courts must account for the test's "standard error of measurement." The Texas court also overemphasized Moore's perceived adaptive strengths-living on the streets, mowing lawns, and playing pool for money- when the medical community focuses the adaptive-functioning inquiry on adaptive deficits. The state court also stressed Moore's improved behavior in prison, but clinicians caution against reliance on adaptive strengths developed in controlled settings. And Moore's record of academic failure, along with a history of childhood abuse and suffering, detracted from a determination that his intellectual and adaptive deficits were related. The medical community, however, counts traumatic experiences as risk factors for intellectual disability.

RESTITUTION ORDERS
Nelson v. Colorado, No. 15-1256 (U.S. April 19, 2017): Under Colorado statutory law, a criminal defendant ordered to pay restitution whose conviction is reversed on appeal, without possibility of retrial, cannot recover amounts paid in restitution unless the payor demonstrates his innocence by "clear and convincing" evidence. The Supreme Court held that this scheme violates the due process clause.

FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

SENTENCING APPEALS

McCarthan v. Director of Goodwill Industries - Suncoast, No. 12-14989 (11th Cir. March 14, 2017) (en banc): By statute, a federal prisoner has one opportunity to move to vacate his sentence unless that remedy is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). For almost 20 years, Circuit precedent maintained that a change in case law may trigger an additional round of collateral review. Overruling that precedent, the *en banc* Court held that a change in case law does not make a prior motion to vacate a prisoner's sentence "inadequate or ineffective to test the legality of his detention," 28 U.S.C. § 2255(e).