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In her distinguished career on the Former Fifth and Eleventh Circuit Courts of Appeals, Judge Phyllis A. Kravitch has authored many significant opinions concerning criminal justice.[1] Her views have helped to shape the law on search and seizure and double jeopardy, and have greatly influenced modern thinking on habeas corpus relief and prisoners' rights. Her opinions, widely-regarded as carefully crafted and thoughtfully reasoned, are persuasive in their lucidity.

In *United States v. Garrett*,[2] Judge Kravitch authored an opinion which later was affirmed in what has been described as "the leading United States Supreme Court case dealing with the relationship between a modern compound statute such as the Racketeer Influenced and Corrupt Organizations Act (RICO),[3] the [Continuing Criminal Enterprise statute] CCE,[4] or the [Continuing Financial Crimes Enterprise statute] CFCE[5] and its predicates in a relevant double jeopardy context."[6] The defendant in *Garrett* had been involved in an extensive, multi-state marijuana importation and distribution operation from

1. A prolific writer, since 1979 Judge Kravitch has authored 548 majority opinions, 281 of which have been in the area of criminal justice and prisoners' rights.
2. 727 F.2d 1003 (11th Cir. 1984).
3. 18 U.S.C. §§ 1961-1968 (West Supp. 1996).
4. *Id.* § 848.
5. *Id.* § 225.
6. William Jue, *The Continuing Financial Crimes Enterprise and Its Predicate Offenses: A Prosecutor's Two Bites at the Apple*, 27 PAC. L.J. 1289, 1308 (1996) (footnotes omitted).

1976 to 1981. In 1981, Garrett pleaded guilty in federal court in Washington to importing marijuana. Later that year, Garrett was indicted in Florida for maintaining a continuing criminal enterprise (CCE). Garrett filed a motion to dismiss the Florida indictment on double jeopardy grounds, asserting that his conviction in Washington on the marijuana importation charge barred his subsequent prosecution on the continuing criminal enterprise charge which encompassed, *inter alia*, the Washington importation operation. Judge Kravitch wrote for the majority that a prosecution for continuing criminal enterprise, after an earlier prosecution for an underlying marijuana importation offense, did not violate the double jeopardy clause since the predicate offense was not a "lesser included" offense of the CCE offense.[7] This decision was affirmed by the Supreme Court in a decision written by Justice Rehnquist.[8]

Judge Kravitch also wrote the panel opinion in *United States v. Evans*,[9] a case which ultimately was affirmed in one of the two seminal cases[10] decided by the Supreme Court this decade which addressed the quid pro quo requirements for a conviction under the Hobbs Act.[11] In *Evans*, the defendant, an elected member of the Board of Commissioners of DeKalb County, Georgia, was charged with having accepted a cash payment knowing that it was intended to ensure that he would vote in favor of a particular rezoning application, and was convicted of attempted extortion under the Hobbs Act. On appeal to the Eleventh Circuit, Evans claimed that the passive acceptance of a bribe is insufficient to make out an offense under the Hobbs Act, arguing that the crime of extortion under color of official right requires that a public official initiate some action which induces the victim to part with money or property. In affirming the conviction, Judge Kravitch wrote for the panel that the passive acceptance of a benefit by a public official is sufficient to form the basis of an offense of extortion under color of official right if it is shown that the official knew that he was being offered payment in exchange for a specific requested exercise of his official power;

7. *Garrett*, 727 F.2d at 1008-10.
8. Garrett v. United States, 471 U.S. 773 (1985).
9. 910 F.2d 790 (11th Cir. 1990).
10. The other Hobbs Act case decided by the Supreme Court was McCormick v. United States, 500 U.S. 257 (1991).
11. 18 U.S.C. § 1951(a) (1994).

the official need not take any specific action to induce the offering of the benefit.[12] This decision later was affirmed by the Supreme Court in an opinion written by Justice Stevens.[13]

In *United States v. Granderson*[14], Judge Kravitch decrypted the meaning of a sentencing statute described by Justice Scalia as "wretchedly drafted."[15] Defendant Granderson, who had been placed on five years federal probation, was found in possession of a controlled substance and his probation was revoked. At that time, the statute governing the revocation of probation had been amended by the Anti-Drug Abuse Act of 1988 to provide that if a probationer were found to be in possession of a controlled substance, "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence."[16] Upon revocation of Granderson's probation, the district court rejected defendant's argument that any potential sentence of imprisonment upon revocation of probation was limited to one-third of his originally-computed Sentencing Guidelines range of zero to six months imprisonment. Instead, the court sentenced Granderson to one-third of his probationary sentence—twenty months in prison. On appeal, the Eleventh Circuit vacated the sentence. Writing for the panel, Justice Kravitch invoked the "rule of lenity" to hold that the term "original sentence" referred to the range of incarceration faced by defendant under the Sentencing Guidelines at the time of sentencing, not to the term of probation actually imposed.[17] The government petitioned for a writ of certiorari, and the Supreme Court affirmed in an opinion written by Justice Ginsburg.[18]

Judge Kravitch also wrote the panel opinion in what is arguably the Eleventh Circuit's most important holding in a habeas corpus case. In *McCleskey v. Zant*,[19] Judge Kravitch wrote that a habeas corpus petitioner sentenced to death had

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12. *Evans*, 910 F.2d at 795-96.
13. Evans v. United States, 504 U.S. 255 (1992).
14. 969 F.2d 980 (11th Cir. 1992).
15. United States v. Granderson, 511 U.S. 39, 114 S. Ct. 1259, 1270 (1994) (Scalia, J., concurring).
16. 18 U.S.C. § 3565(a) (1988). This provision has since been repealed by Congress.
17. 969 F.2d at 983-84.
18. *Granderson*, 511 U.S. 39 (1994).
19. 890 F.2d 342 (11th Cir. 1989).

abused the writ by deliberately abandoning his *Massiah*[20] claim when he included the claim in his first habeas petition, abandoned it, and then later attempted to reassert it in a second petition.[21] The Supreme Court affirmed, using *McCleskey* as the vehicle for announcing the standard for determining when a petitioner abuses the writ in an action seeking federal habeas corpus relief.[22]

Of the many opinions authored by Judge Kravitch, *United States v. Swindall*[23] stands out as a case of first impression on the Speech or Debate Clause. Former United States Congressman Patrick L. Swindall testified before a federal grand jury investigating money-laundering activities, which questioned Swindall concerning certain financial transactions in which Swindall had been involved. Based on this testimony, the government indicted Swindall for perjuring himself in order to conceal the extent of his involvement in discussions concerning illegal money-laundering transactions. During his subsequent perjury trial, the government relied on Swindall's membership on the House Banking and Judiciary Committees, and his knowledge of statutes contemplated by these committees, to establish that Swindall lied to the grand jury. On appeal, Judge Kravitch wrote for the panel that a federal legislator's status as a member of a particular congressional committee, like evidence of a legislator's legislative acts, is protected by the Speech or Debate Clause of the United States Constitution. The privilege afforded by the Speech or Debate Clause protects a member of Congress from indictment when the legislator's committee membership is an essential element of proof. Judge Kravitch held that the speech or debate privilege was violated in *Swindall* by the government's use of an inference that Swindall knew the details of the money-laundering statutes because of his status as a member of the Banking and Judiciary Committees. As a result, the Eleventh Circuit dismissed those parts of the indictment

20. Massiah v. United States, 377 U.S. 201 (1964).

21. *McCleskey*, 890 F.2d at 349.

22. McCleskey v. Zant, 499 U.S. 467 (1991). The rule announced by the Supreme Court in *McCleskey* is that the government bears the burden of pleading abuse of writ when a prisoner files a second or subsequent habeas corpus petition, and the burden then shifts to the petitioner to show either cause and prejudice so as to excuse his failure to raise the claim earlier or a fundamental miscarriage of justice. *Id.* at 494-95.

23. 971 F.2d 1531 (11th Cir. 1992).

against Swindall that relied on or made reference to his congressional committee membership status.[24]

Judge Kravitch also has authored many notable dissenting opinions. While on the Former Fifth Circuit, her dissents in *United States v. Gaultney*[25] later formed the basis for the Supreme Court's opinion on certiorari in *Steagald v. United States*,[26] which reversed the decision in *Gaultney*, holding that, absent exigent circumstances or consent, law enforcement officers could not legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant.[27] In *Bush v. Singletary*,[28] a state court capital case which reached the Eleventh Circuit on a petition for writ of habeas corpus, Judge Kravitch dissented from the portion of the majority's opinion which affirmed the denial of habeas corpus relief as to Bush's ineffective assistance of counsel claim. In Judge Kravitch's view, Bush received inadequate representation at sentencing, and there was a reasonable probability that, but for defense counsel's constitutionally deficient performance, Bush would not have been sentenced to death.[29] Although the Supreme Court ultimately denied Bush's petition for certiorari,[30] Justice Blackmun dissented from the denial of the certiorari petition, agreeing with the position expressed by Judge Kravitch in her dissent.[31] Similarly, her dissent from the denial of rehearing en banc in *Stephens v. Kemp*[32] helped to persuade Justices Brennan, Marshall, and Stevens to dissent from the

24. *Id.* at 1534.

25. 606 F.2d 540 (5th Cir. 1979). Judge Kravitch dissented from both the panel opinion, *id.* at 548 (Kravitch, J., dissenting), and the denial of a petition for rehearing en banc, 615 F.2d 642, 644 (1980) (Kravitch, J., dissenting).

26. 451 U.S. 204 (1981).

27. *See id.* at 207n.1 (noting Judge Kravitch's dissents in *Gaultney*).

28. 988 F.2d 1082 (11th Cir. 1993).

29. *Id.* at 1093-97 (Kravitch, J., concurring in part and dissenting in part).

30. 510 U.S. 1065 (1994).

31. *Id.* (Blackmun, J., dissenting). When Bush applied for permission to file a second habeas corpus petition requesting a stay of his execution, Judge Kravitch joined in the per curiam panel opinion which denied his petition. *See* Bush v. Singletary, 99 F.3d 373 (11th Cir. 1996). Bush's subsequent petitions for certiorari were denied by the Supreme Court. 117 S. Ct. 336 (1996); 117 S. Ct. 355 (1996); 117 S. Ct. 378 (1996).

32. 722 F.2d 627 (11th Cir. 1983).

denial of a petition for certiorari.[33] In *Stephens*, the petitioner, having been convicted in state court of murder, presented the Former Fifth Circuit with an emergency application for a certificate of probable cause and for a stay of his execution date, claiming that Georgia's death penalty statute was being applied in an arbitrary and discriminatory manner. Although Judge Kravitch initially joined in the panel opinion affirming the denial of the petition,[34] she later dissented from the denial of rehearing en banc, urging the court to stay its denial pending the court's en banc decision in *Spencer v. Zant*[35]—a case which was then pending before the court on an identical issue.[36] The three Supreme Court dissenters agreed with Judge Kravitch that a stay of Stephen's execution pending the outcome of *Spencer* would have been prudent.[37]

Certainly, Judge Kravitch has contributed much to criminal justice jurisprudence. After eighteen years on the federal appellate bench, there is every reason to believe that in senior status she will remain a vital voice on the Eleventh Circuit and an invaluable resource to those around her.

33. Stephens v. Kemp, 469 U.S. 1043 (1984).

34. 721 F.2d 1300 (11th Cir. 1983).

35. 715 F.2d 1562 (11th Cir. 1983), *rehearing en banc granted*, 715 F.2d 1562, *proceedings stayed*, 729 F.2d 1293 (1984). On rehearing en banc in *Spencer*, the Eleventh Circuit eventually reversed the decision of the district court denying habeas corpus relief, and remanded the case to the district court to allow Spencer to raise and develop his claim that he was convicted by a jury drawn from an unconstitutionally composed array. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (en banc).

36. *Stephens*, 722 F.2d at 629 (Kravitch, J., dissenting).

37. 469 U.S. at 1050, 1058.