the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment." *Crawford*, 796 F.3d at 259. For these reasons, a guard's sexual abuse of a prisoner—including the guard's digital penetration of a prisoner's naked anus, with no legitimate penological or medical basis—satisfies the objective element of an Eighth Amendment violation.

Boxer X v. Harris, 437 F.3d 1107 (11th Cir. 2006), did not expressly consider contemporary standards of decency. And to the extent that we could generously attribute to *Boxer X* an intent to find that the conduct at issue there did not violate "contemporary standards of decency," since 2006, when we decided *Boxer X*, the changes to the national landscape as it concerns the view of sexual abuse of prisoners have been dramatic. When we issued *Boxer X*, 37 states criminalized sexual contact between correctional officers and prisoners; now every state but Oklahoma does.[3] Similarly, in 2006, the PLRA, without exception, prohibited recovery by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury." *See* 42 U.S.C. § 1997e(e) (1996). But seven years after *Boxer X* came out, Congress amended the PLRA to remove this limitation when a prisoner can show "the commission of a sexual act." *See* 42 U.S.C. § 1997e(e) (2013). So now, unlike in 2006, a federal cause of action for a correctional officer's sexual abuse of a prisoner is recognized, even in the absence of a physical injury.

For good reason. Groping, fondling, or touching of an inmate's private parts—as well as a whole host of other physical sexual invasions—that do nothing other than to gratify the guard's sexual desires or to dehumanize the victim can leave no lasting external physical traces. But the internal scars of such trauma can produce "significant distress and often lasting . . . harm." *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012). So physical sexual assaults by correctional officers of inmates violate the Eighth Amendment because no matter how difficult the inmate is, the official is never justified in punishing him in this manner. And sexual assault is not part of the penalty we impose for conviction of a crime.

James Michael HAND, Joseph James Galasso, Harold W. Gircsis, Jr., Christopher Michael Smith, William Bass, Jermaine Johnekins, Yraida Leonides Guanipa, James Larry Exline, Virginia Kay Atkins, Plaintiffs - Appellees,

v.

Ron DESANTIS, in his official capacity as Governor of Florida and member of the State of Florida's Executive Clemency Board, Ashley Moody, in her offi-

3. Statutes of states that have amended their codes to criminalize sexual contact between prisoners and guards, since we decided *Boxer X*, include the following: Alaska Stat. § 11.41.427; Ark. Code Ann. § 5-14-127(a)(2); Del. Code Ann. Tit. 11, § 780B(a) (2018), § 761(g); 720 Ill. Comp. Stat. §§ 5/11-9.2, 5/11-0.1; Ind. Code § 35-44.1-3-10; Kan. Stat. Ann. § 21-5512; Ky. Rev. Stat. Ann. § 510.120(1)(b); Miss. Code. Ann. § 97-3-104; Mo. Rev. Stat. §§ 566.145, 566.010(6); Tenn. Code Ann. § 39-16-408; W. Va. Code §§ 61-8B-2, 61-8B-7; Wyo. Stat. Ann. §§ 6-2-304, 6-2-303(a)(vii).

cial capacity as the Attorney General of Florida and member of the Executive Clemency Board, Nicole Fried, in his official capacity as Commissioner of Agriculture and member of the Executive Clemency Board, Jimmy Patronis, in his official capacity as Chief Financial Officer and member of the Executive Clemency Board, Defendants - Appellants.

No. 18-11388

United States Court of Appeals,
Eleventh Circuit.

(January 10, 2020)

Background: Disenfranchised felons brought action against Florida's Governor, Executive Clemency Board, and other officials, challenging Florida's re-enfranchisement scheme, pursuant to which Governor and Board had unfettered discretion in restoring voting rights to convicted felons who had completed their sentences. The United States District Court for the Northern District of Florida, No. 4:17-cv-00128-MW-CAS, Mark E. Walker, Chief Judge, 285 F.Supp.3d 1289, granted in part and denied in part parties' cross-motions for summary judgment. Board appealed.

Holdings: The Court of Appeals, Branch, Circuit Judge, held that referendum vote amending Florida's re-enfranchisement system rendered the case moot.

Vacated and remanded.

1. Federal Courts ⚿3251

The Court of Appeals has jurisdiction to reach the merits of a case only when there is an active controversy.

2. Federal Courts ⚿2196

The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.

3. Federal Courts ⚿2111, 2206

If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed.

4. Federal Courts ⚿3515

Referendum vote amending Florida's re-enfranchisement system rendered case moot pending appeal in disenfranchised felons' pre-amendment action against Florida's Governor, Executive Clemency Board, and other officials, challenging former re-enfranchisement scheme, pursuant to which Governor and Board had unfettered discretion in restoring voting rights to convicted felons who had completed their sentences, where amendments made felons eligible to seek restoration of their voting rights, and Court of Appeals was no longer able to accord felons meaningful relief from former system they had challenged. Fla. Const. art. 6, § 4; Fla. Stat. Ann. §§ 98.0751, 944.292(1).

5. Judgment ⚿564(2)

Court of Appeals would not vacate its own panel's prior order granting stay after case became moot pending appeal, where order granting stay was not final adjudication of merits of appeal, and therefore it had no res judicata effect and could not spawn any legal consequences.

Appeal from the United States District Court for the Northern District of Florida, D.C. Docket No. 4:17-cv-00128-MW-CAS

Michelle Kanter Cohen, Jonathan Lee Sherman, Fair Elections Center, Washing-

ton, DC, Theodore J. Leopold, Diana L. Martin, Poorad Razavi, Cohen Milstein Sellers & Toll, PLLC, Palm Beach Gardens, FL, for Plaintiffs-Appellees.

Amit Agarwal, Jonathan Alan Glogau, Lance Neff, Attorney General's Office, Tallahassee, FL, for Defendants-Appellants.

John J. Park, Jr., Strickland Brockington Lewis, LLP, Atlanta, GA, for Amicus Curiae Center for Equal Opportunity.

Dean John Sauer, Missouri Attorney General's Office, Jefferson City, MO, for Amici Curiae State of Missouri, State of Alabama, State of Kansas, State of Louisiana, State of South Carolina, State of Texas, and State of Utah.

David Gringer, Wilmer Cutler Pickering Hale & Dorr, LLP, Washington, DC, for Amicus Curiae The Sentencing Project.

Charles David Tobin, Ballard Spahr, LLP, Washington, DC, for Amicus Curiae American Probation and Parole Association.

Julie Ebenstein, ACLU Foundation, New York, NY, for Amicus Curiae American Civil Liberties Union.

Stephen F. Rosenthal, Podhurst Orseck, PA, MIAMI, FL, Nancy Gbana Abudu, Southern Poverty Law Center, Decatur, GA, for Amicus Curiae ACLU of Florida.

Chiraag Bains, Demos, Washington, DC, for Amicus Curiae Demos.

Before ED CARNES, Chief Judge, BRANCH, Circuit Judge, and GAYLES,* District Judge.

BRANCH, Circuit Judge:

The Executive Clemency Board of the State of Florida (the "Board") appeals the district court's orders (1) denying in part its motion for summary judgment; and (2) permanently enjoining Florida's former system for re-enfranchising convicted felons. James Hand and eight other convicted felons (collectively, "Hand") asserted that the former system—which involved state constitutional, statutory, and regulatory provisions—facially violated their First and Fourteenth Amendment rights. On cross-motions for summary judgment, the district court granted Hand's motion on three of four counts,[1] and in a separate order issued permanent injunctions prohibiting the Board from enforcing the then-current vote-restoration system and ending all vote-restoration processes, *inter alia*.[2] After granting a motion for stay, we heard oral argument as to the merits of the Board's appeal. On November 6, 2018, Florida voters amended their state constitution by referendum vote as it concerns

* Honorable Darrin P. Gayles, United States District Judge for the Southern District of Florida, sitting by designation.

1. The district court granted Hand's motion and denied the Board's motion with respect to Count One (unfettered discretion in the re-enfranchisement process violates the First Amendment), Count Two (unfettered discretion violates the Fourteenth Amendment), and Count Three (lack of time limits in processing the re-enfranchisement petitions violates the First Amendment). The district court denied Hand's motion for summary judgment and granted the Board's motion for summary judgment on Count Four (challenging the five- and seven-year waiting periods before applying for restoration of voting rights). Count Four is not before us in this appeal.

2. Additionally, the district court directed the Board to promulgate new criteria for vote-restoration within thirty days of the court's order and reconsider applicants who had been denied restoration since the time of the court's first order on cross-motions for summary judgment.

the re-enfranchisement of convicted felons.[3] And on July 1, 2019, Florida's legislature revised its statutory scheme for re-enfranchisement,[4] thus setting into motion a new system for vote restoration. Under the new system, Hand and his fellow plaintiffs claim they are eligible to seek restoration of their voting rights.

[1–3] We have jurisdiction to reach the merits of a case only where there is an active controversy. "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). "If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed." *World Wide Supply OU v. Quail Cruises Ship Mgmt.*, 802 F.3d 1255, 1259 (11th Cir. 2015) (quoting *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001)).

[4] In light of the changes to Florida's voter re-enfranchisement system since this case began, we no longer have the ability to accord Hand meaningful relief from the former system which he challenged. In supplemental briefing following oral argument, both parties concede that each individual plaintiff is eligible to seek re-enfranchisement under Florida's new system. Thus, no plaintiff requires relief from Florida's former re-enfranchisement system. We therefore hold that this case is moot.

[5] Accordingly, the district court's order on cross-motions for summary judgment dated February 1, 2018 is **VACATED** as to Counts One, Two, and Three. The district court's order directing entry of judgment dated March 27, 2018 is hereby **VACATED** in its entirety.[5] This case is hereby **REMANDED** with instructions to **DISMISS** for mootness.

3. Fla. Const. art. VI, § 4(a) (amended 2018) ("[A]ny disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.").

4. The legislature amended Fla. Stat. § 944.292(1) by adding the following sentence: "Notwithstanding the suspension of civil rights, such a convicted person may obtain restoration of his or her voting rights pursuant to s. 4, Art. VI of the State Constitution and s. 98.0751." The legislature also enacted Fla. Stat. § 98.0751, which in the part relevant here, subsection (1), states: "A person who has been disqualified from voting based on a felony conviction for an offense other than murder or a felony sexual offense must have such disqualification terminated and his or her voting rights restored pursuant to s. 4, Art. VI of the State Constitution upon the completion of all terms of his or her sentence, including parole or probation."

5. Hand requests we vacate our prior stay-panel opinion, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018). The Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–41, 71 S.Ct. 104, 95 L.Ed. 36 (1950), held that a circuit court should vacate as moot a district court's order where the case becomes moot pending appeal. Such vacatur is necessary, the Court reasoned, in order to prevent a district court's judgment from "spawning any legal consequences." *Id.* at 41, 71 S.Ct. 104; *see generally U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) (addressing whether "appellate courts in the federal system should vacate civil judgments of *subordinate courts* in cases that are settled after appeal is filed") (emphasis added). But *Munsingwear* does not address what a circuit court must do with its own prior stay order when a case has become moot. Hand cites to several of our cases which he asserts are on point but which are not. *See Ethredge v. Hail*, 996 F.2d 1173, 1177 (11th Cir. 1993) (vacating a district court's judgment); *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1258–59 (11th Cir. 2001) (same); *Atlanta Gas Light Co. v. F.E.R.C.*, 140 F.3d 1392, 1404 (11th Cir.

UNITED STATES of America, Plaintiff-Appellee,

v.

Najee OLIVER, Defendant-Appellant.

No. 17-15565

United States Court of Appeals, Eleventh Circuit.

January 6, 2020

Background: Defendant pleaded guilty in the United States District Court for the Southern District of Georgia, No. 4:17-cr-00065-WTM-GRS-1, William T. Moore, Senior District Judge, to possessing firearm and ammunition as convicted felon. Defendant appealed his mandatory 15-year minimum sentence under Armed Career Criminal Act (ACCA).

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that text, state case-law, and record of conviction did not resolve issue of whether Georgia terrorist threats statute was divisible, and therefore issue had to be resolved in favor of indivisibility, and consequently defendant's prior conviction under that statute did not categorically qualify as ACCA predicate offense.

Reversed and remanded.

Tallman, Circuit Judge for the Ninth Circuit, sitting by designation, filed dissenting opinion.

1. Criminal Law ⚿1139

A district court's determination that a prior conviction qualifies as a violent felony under the Armed Career Criminal Act (ACCA) is reviewed de novo. 18 U.S.C.A. § 924(e)(2)(B)(i).

2. Sentencing and Punishment ⚿1262

Under the provision of the Armed Career Criminal Act (ACCA) for imposing a 15-year mandatory-minimum sentence upon defendants who previously had been convicted of three or more violent felonies, which are crimes involving the use, attempted use, or threatened use of physical force, "use" requires active employment of physical force. 18 U.S.C.A. § 924(e)(2)(B)(i).

3. Sentencing and Punishment ⚿1284

In determining whether a state conviction qualifies as a violent felony under the Armed Career Criminal Act (ACCA) elements clause, a court employs a "categorical approach," examining only the elements of the statute of conviction, not the specific conduct of a particular offender. 18 U.S.C.A. § 924(e)(2)(B)(i).

1998) (vacating a federal agency's orders); *Vann v. Citicorp Sav. of Ill.*, 891 F.2d 1507, 1509 (11th Cir. 1990) (vacating a prior jurisdiction-panel order where the merits panel made an opposite determination on the jurisdictional question). The Fourth Circuit, however, addressed this issue squarely in *F.T.C. v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977), and expressly declined to vacate its own prior order granting a stay after the case became moot. The court reasoned that "[a]n order granting a stay ... is not a final adjudication of the merits of the appeal," and therefore it "has no res judicata effect and the rationale of the Munsingwear doctrine thus is inapplicable." *Id.* at 249. We find the Fourth Circuit's reasoning persuasive and hereby adopt it and decline to vacate our prior stay-panel opinion. By contrast, the Tenth Circuit in *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 n.1 (10th Cir. 1996), vacated its own prior order granting a stay without adequate explanation and is thus unpersuasive. As well, the D.C. Circuit's action in *United States v. Schaffer*, 240 F.3d 35 (D.C. Cir. 2001) (*en banc*), is inapposite as that court vacated prior merits-panel judgments which had *res judicata* effect.