

Appellate Practice and Procedure

by Robert G. Boliek, Jr.*

If there is a single watchword for the Eleventh Circuit's decisions in 2007 in the arena of appellate practice and procedure, it is "jurisdiction." The requirement of a "final decision" received particular attention, as did the requirements for perfection of certain interlocutory appeals. The Eleventh Circuit also recognized an additional limitation on its jurisdiction over remand orders in removal cases. Accordingly, the first section of this Article will discuss cases that addressed questions of the Eleventh Circuit's appellate jurisdiction, followed by a section describing two notable cases that addressed the preservation and presentation of error. The final section discusses an interesting new chapter, revealed by recent cases, in the story of the Eleventh Circuit's application of the "prior panel precedent" rule.

I. APPELLATE JURISDICTION

A. Appeals from a Final Decision

It is axiomatic that the exercise of appellate jurisdiction generally requires a "final decision" of the district court.¹ "Normally, an order by the district court is not considered 'final' and appealable unless it 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.'"² However, in certain circumstances, the

* Attorney at Law, Birmingham, Alabama. Auburn University (B.A., 1980); University of Alabama (J.D., 1986; M.F.A., 1999). Visiting Assistant Professor of Law, Walter F. George School of Law, Mercer University (Fall 2007); Visiting Assistant Professor of Law, Cumberland School of Law, Samford University (2006-2007). Member, Alabama State Bar.

1. 28 U.S.C. § 1291 (2000); *see, e.g.*, *Lloyd Noland Found., Inc. v. Tenet Health Care Corp.*, 483 F.3d 773, 778 n.5 (11th Cir. 2007).

2. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338 (11th Cir. 2007) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). Thus, in *Gilley v. Monsanto Co.*, 490 F.3d 848 (11th Cir. 2007), the Eleventh Circuit questioned its jurisdiction on the basis of a judgment's finality under 28 U.S.C. § 1291 when the district court awarded interest on an award of past benefits in an ERISA case but failed to set an

appellate courts do have jurisdiction over appeals of decisions that do not actually end the litigation. In 2007 the United States Court of Appeals for the Eleventh Circuit had occasion to address its jurisdiction over a number of these appeals.

1. The Collateral Order Doctrine. Of particular interest is *McMahon v. Presidential Airways, Inc.*,³ in which the Eleventh Circuit extensively discussed the “collateral order doctrine.”⁴ “The collateral order doctrine—a ‘practical construction’ of the final decision rule—permits appeals from ‘a small category of decisions that, although they do not end the litigation, must nonetheless be considered final.’”⁵

McMahon arose out of an aircraft accident involving a private air carrier under contract with the Pentagon to transport soldiers in and around Afghanistan. One of the carrier’s planes crashed, killing three soldiers. Their survivors sued the carrier and affiliated entities for wrongful death. The carrier sought to dismiss the lawsuit, arguing—among other theories—that it was entitled to derivative immunity under the *Feres* doctrine.⁶

On appeal, after noting that “[t]he district court’s pretrial denial of derivative *Feres* immunity does not qualify as a final judgment under the normal rule,”⁷ the Eleventh Circuit nonetheless held that it had jurisdiction under the collateral order doctrine.⁸ Under this doctrine, “[a]n interim decision is appealable as a collateral order only if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.”⁹

The Eleventh Circuit addressed the third requirement first, holding that the denial of the carrier’s substantial claim of *Feres* immunity was

interest rate or the date of calculating the interest with respect to the award. *See Gilley*, 490 F.3d at 855-56. The Eleventh Circuit ultimately concluded that it had jurisdiction over the appeal because the district court had granted injunctive relief as well, thus establishing an independent basis for appellate jurisdiction under 28 U.S.C. § 1292(a)(1) (2000). *See Gilley*, 490 F.3d at 856.

3. 502 F.3d 1331 (11th Cir. 2007).

4. *See id.*

5. *Id.* at 1338 (internal quotation marks omitted) (quoting *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995)).

6. *Id.* at 1336-37. “In *Feres*, the Supreme Court held that the government is immune from claims brought by soldiers for their service-related injuries, despite the waiver of sovereign immunity contained in the Federal Tort Claims Act.” *Id.* at 1339 (citing *Feres v. United States*, 340 U.S. 135, 146 (1950)).

7. *Id.* at 1338.

8. *Id.* at 1340.

9. *Id.* at 1338 (quoting *Sell v. United States*, 539 U.S. 166, 176 (2003)).

“effectively unreviewable on appeal,” because *Feres* immunity—like certain other immunities, such as Eleventh Amendment¹⁰ immunity, presidential immunity from civil damages, and the qualified immunity of federal officers—is “a true immunity from suit: i.e., an immunity that not only insulates the party from liability, but also prevents the party from being exposed to discovery and/or trial.”¹¹ As a consequence, “[b]ecause immunity from suit entails a right to be free from the burdens of litigation, an erroneous denial cannot be redressed through review of the final judgment, and therefore must be reviewed on interlocutory appeal.”¹² The Eleventh Circuit also explained that “[a] substantial claim to immunity from suit, not immunity itself, is the basis for a collateral order appeal.”¹³ Thus, even an unsettled claim of immunity can implicate the “right to be free from the burdens of litigation” for purposes of determining whether a collateral order is “effectively unreviewable on appeal,” so long as the claim of the immunity is a “substantial” one.¹⁴

In reaching this conclusion, the Eleventh Circuit cautioned that “a party must do much more than allege a ‘right not to stand trial’ in order to bring a collateral order appeal,” given that “[t]he Supreme Court has observed that ‘virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial.’”¹⁵ Thus, “to prevent the erosion of the final judgment rule, ‘it is not the mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is effectively unreviewable if review is to be left until later.’”¹⁶ On this point, the Eleventh Circuit held that the carrier’s claim—that allowing the suit to proceed would threaten interference with sensitive military judgments—established a sufficiently “substantial

10. U.S. CONST. amend. XI.

11. *Id.* at 1338-39.

12. *Id.* at 1339. Although frequently referred to as an “interlocutory” appeal, an appeal from a collateral order is an appeal from a “final” order, because as the Eleventh Circuit also noted, the collateral order doctrine is a “practical construction” of the “final decision” rule. *Id.* at 1338; 19 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 202.09 (3d ed. 2007).

13. *McMahon*, 502 F.3d at 1339 n.6.

14. *Id.* at 1338-39.

15. *Id.* at 1340 n.7 (internal quotation marks omitted) (quoting *Digital Equip.*, 511 U.S. at 873).

16. *Id.* (internal quotation marks omitted) (quoting *Will v. Hallock*, 546 U.S. 345, 353 (2006)).

public interest” for purposes of the collateral order doctrine, given that such interference implicated the doctrine of the separation of powers.¹⁷

Having resolved the question of whether the collateral order was “effectively unreviewable on appeal,” the Eleventh Circuit readily concluded that the other two requirements of the collateral order doctrine were met.¹⁸ As to the first requirement—that the order conclusively determine the disputed question—the Eleventh Circuit held that “[e]ven if the district court reconsidered its decision after the motion to dismiss but prior to trial, its decision for the time being is ‘conclusive’ because it threatens to expose the contractor to arguably harmful discovery in the interim.”¹⁹ The carrier likewise met the second requirement—that the order embrace an “important” issue separate from the merits of the action—because “[a]voiding judicial interference with sensitive military judgments is clearly an ‘important’ interest” and because the legal test for application of the *Feres* immunity “does not significantly overlap with the merits of the tort suit.”²⁰

In comparison, *Romero v. Drummond Co.*²¹ involved far less challenging questions for an appellant asserting the collateral order doctrine. In *Romero* the plaintiffs alleged that a coal company and a number of its executives had “hired Colombian paramilitaries to kill and torture union members” at the company’s mine in Colombia.²² The Eleventh Circuit was presented with two consolidated appeals arising from the district court’s sealing of various documents related to the case.²³ As described by the Eleventh Circuit, “[t]he underlying complaint contains sordid allegations of intrigue, corruption, and assassination in Colombia, ‘where the awful is ordinary.’”²⁴ The procedural history with respect to the sealing of the documents is complex, reflecting in part the district court’s on-going concerns that any allegations and evidence presented prior to trial not interfere with any legitimate foreign policy interests of the United States.²⁵

One of the appeals involved an entry of a judgment of criminal contempt against counsel for the plaintiffs, whom the district court felt violated an order not to disclose the sealed documents.²⁶ As the

17. *Id.* at 1340 n.7.

18. *See id.*

19. *Id.*

20. *Id.*

21. 480 F.3d 1234 (11th Cir. 2007).

22. *Id.* at 1238.

23. *See id.*

24. *Id.* (quoting *Silva v. U.S. Att’y Gen.*, 448 F.3d 1229, 1242 (11th Cir. 2006)).

25. *See id.* at 1239-41.

26. *See id.* at 1238, 1242-45.

Eleventh Circuit noted, “[u]nlike civil contempt, an order of criminal contempt is a final decision that is immediately appealable,” and thus the appeal of the judgment of contempt did not present a jurisdictional issue.²⁷

The other appeal, however, required the Eleventh Circuit to address the collateral order doctrine.²⁸ This appeal was taken by a freelance journalist who had intervened in the district court to seek disclosure of certain sealed documents, arguing the common law right of access to judicial proceedings. The journalist challenged both the district court’s decision to seal the documents in the first place as well as the denial of the journalist’s motion to unseal them.²⁹ Given the ancillary nature of the journalist’s interest with respect to the underlying merits of the case, it is not surprising that the Eleventh Circuit summarily held that “[t]hese orders are appealable as collateral to the underlying action because they conclusively determine a disputed question, resolve an important issue, and are effectively unreviewable on appeal from a final judgment.”³⁰

McMahon and *Romero* thus present two extremes in the spectrum of factual situations in which the collateral order doctrine might be invoked: at one extreme is an appeal by a party seeking pretrial review of a dispositive defense; at the other extreme is an appeal by a stranger to the underlying dispute seeking review of an order affecting an important right that would not be resolved by a final judgment on the merits. In this respect, *McMahon* probably approaches the outer limit of the exercise of appellate jurisdiction under the collateral order doctrine. In the absence of the Eleventh Circuit’s recognition of the potential “substantial public interest” at stake—the threatened “interference with sensitive military judgments”³¹—it is hard to see how the air carrier in *McMahon* could have successfully invoked the collateral order doctrine.³²

27. *Id.* at 1242 (citing *Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985)).

28. *See id.*

29. *Id.* at 1238, 1241.

30. *Id.* at 1242.

31. *McMahon*, 502 F.3d at 1340 n.7.

32. In this regard, *ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc.*, 504 F.3d 1208 (11th Cir. 2007), reaches what is likely to be a more typical result. In *ConArt, Inc.*, the Eleventh Circuit rejected the argument that an order refusing to enjoin an arbitration was an appealable collateral order on the basis that the “mere avoidance” of an arbitration, like the “mere avoidance” of a trial, is insufficient to show that a decision is “effectively unreviewable” on appeal. *See id.* at 1211 (internal quotation marks omitted) (quoting *Will v. Hallock*, 546 U.S. 345, 353 (2006)). The court in *ConArt, Inc.* also held that the Federal

Indeed, the Eleventh Circuit rejected the carrier's claim to derivative *Feres* immunity on the merits, in part because the Eleventh Circuit ultimately held that "*Feres* immunity is an inappropriate vehicle for a 'sensitive military judgments' immunity for private contractor agents."³³ Thus, while the carrier's claim of immunity was "substantial" enough for the Eleventh Circuit to take jurisdiction over the appeal under the collateral order doctrine, it was not substantial enough to carry the day.³⁴ As the Eleventh Circuit noted, "the natural result of our disposition is that an interlocutory appeal by a private military contractor asserting derivative *Feres* immunity will, in the future, be unnecessary because the claim to immunity based on *Feres* will no longer be substantial in this Circuit."³⁵

2. Final Judgments Under Federal Rule of Civil Procedure 54(b). Perhaps the prototypical judgment that does not end the litigation but is nevertheless considered a final decision is one that has been certified as a final judgment by a district court under Federal Rule of Civil Procedure 54(b) ("Rule 54(b)").³⁶ Under this rule, "the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that

Arbitration Act foreclosed appellate jurisdiction over interlocutory appeals of orders refusing to enjoin arbitrations, at least where no permissive interlocutory appeal was sought under 28 U.S.C. § 1292(b) (2000). *ConArt, Inc.*, 504 F.3d at 1210.

33. *See McMahon*, 502 F.3d at 1353, 1354.

34. *See id.* at 1354. The Eleventh Circuit did not foreclose the possibility that a separate "sensitive military function" immunity for private contractors might one day be recognized, but it declined to address that question because the air carrier relied exclusively on the *Feres* doctrine throughout the litigation and thus did not preserve this issue for review by presenting it to the district court. *See id.* at 1355-56.

35. *Id.* at 1339 n.6. A case that keeps on giving in the arena of appellate jurisdiction, *McMahon* also speaks to the application of "pendant appellate jurisdiction" in the context of a collateral order appeal. *See id.* at 1357. In addition to asserting *Feres* immunity, the air carrier also argued that the district court should have dismissed the case under the political question doctrine. *Id.* The Eleventh Circuit declined to consider whether the district court's denial of the motion to dismiss on this ground was appealable as a collateral order, a question of first impression in the circuit. *See id.* at 1357. Instead, given the Eleventh Circuit's conclusion that the issue of *Feres* immunity was properly before it under the collateral order doctrine, the Eleventh Circuit decided to exercise pendant appellate jurisdiction over the political question issue, which it may do in the case of "an order that is 'inextricably intertwined with an issue that is properly before [it] on interlocutory appeal.'" *Id.* (quoting *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1297 (11th Cir. 2000)). The discretionary nature of whether to exercise pendant appellate jurisdiction was underscored by the Eleventh Circuit's decision to decline similar treatment to the final issue raised by the carrier—whether the plaintiffs' claims were preempted by a provision of the Federal Tort Claims Act. *See id.* at 1366.

36. FED. R. CIV. P. 54(b).

there is no just reason for delay and upon an express direction for the entry of judgment.”³⁷ Certification involves a two-step process. First, “the court’s decision must be ‘final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action,’ and a ‘judgment in the sense that it is a decision upon a cognizable claim for relief.’”³⁸ Second, “the district court must then determine that there is no ‘just reason for delay’ in certifying [the decision] as final and immediately appealable.”³⁹ The appellate courts do not have jurisdiction over judgments that are not actually “final” under the first prong of this test.⁴⁰

In *Lloyd Noland Foundation, Inc. v. Tenet Health Care Corp.*,⁴¹ the Eleventh Circuit clarified the standard of review applicable to such certifications⁴² and reminded courts and litigants that there can be a difference between “legal theories” and “claims for relief” for purposes of the proper certification of a judgment as final under Rule 54(b).⁴³

Specifically, the Eleventh Circuit held that the district court’s adjudication of a theory asserting contractual indemnity was not a final judgment because an alternative theory for common law indemnity that sought identical relief was left unaddressed by the district court.⁴⁴ As a consequence, the Eleventh Circuit dismissed the appeal for lack of jurisdiction over a properly certified final decision of the district court.⁴⁵

After noting that “the line between deciding one of several claims and deciding only part of a single claim is very obscure,” the Eleventh Circuit explained that “when the plaintiff presents more than one legal

37. *Id.*

38. *Lloyd Noland Found., Inc.*, 483 F.3d at 777 (internal quotation marks omitted) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980)).

39. *Id.* (quoting *Curtiss-Wright Corp.*, 446 U.S. at 8).

40. *Id.* at 778 n.5.

41. 483 F.3d 773 (11th Cir. 2007).

42. *See id.* at 778 n.5. The Eleventh Circuit explained that the first prong of the test for entering a Rule 54(b) order was subject to “pure” de novo review on appeal, rejecting language in *In re Southeast Banking Corp.*, 69 F.3d 1539 (11th Cir. 1995), that suggested a more deferential standard, one “‘approaching’” the de novo standard but which nevertheless gave “‘some room for deference particularly where the district court has made its reasoning clear.’” *Lloyd Noland Found., Inc.*, 483 F.3d at 778 n.5 (quoting *In re Se. Banking Corp.*, 69 F.3d at 1546). In so holding, the Eleventh Circuit reasoned that “it would be peculiar for this court to defer to a district court in policing the boundaries of our appellate jurisdiction.” *Id.* On the other hand, the Eleventh Circuit acknowledged that the second prong of the test—“whether there is ‘any just reason for delay’”—is committed to the discretion of the district court and is accordingly reviewed for the abuse of that discretion. *Id.* (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)).

43. *See Lloyd Noland Found., Inc.*, 483 F.3d at 780.

44. *Id.* at 781.

45. *Id.* at 781-82.

theory, but will be permitted to recover on only one of them[,] . . . there is only a single inseparable claim for relief.”⁴⁶ Accordingly, “the touchstone for determining whether an entire ‘claim’ has been adjudicated for the purposes of Rule 54(b) is whether that claim is ‘separately enforceable’ without ‘mutually exclud[ing]’ or ‘substantially overlap[ping]’ with remedies being sought by the remaining claims pending in the district court.”⁴⁷ Because the claim of common law indemnity “represented merely an alternate legal theory for a recovery identical to that sought by [the claim of contractual indemnity],” and because the party seeking the indemnity “would be entitled to recover its losses . . . only once, at most,”⁴⁸ the court concluded that “[t]he district court’s grant of summary judgment . . . did not ‘dispose[]’ entirely of a separable claim.”⁴⁹

Interestingly, after briefs had been filed and after oral argument on the merits, the Eleventh Circuit raised this issue sua sponte,⁵⁰ which suggests both litigants and district courts should seek and enter Rule 54(b) orders with scrupulous attention to the question of whether “claims for relief” and not merely “legal theories” have been adjudicated, as difficult as this distinction may be to draw at times. Fortunately for the litigants in *Lloyd Noland Foundation, Inc.*, the Eleventh Circuit invited the parties “to mitigate the wasted effort on this appeal by requesting that . . . any future appeal . . . from a properly certified Rule 54(b) partial judgment be submitted on the records and briefs prepared in this appeal, supplemented with the new judgments, and on the oral argument previously heard before this panel.”⁵¹

3. Appeals from Stay Orders. In *King v. Cessna Aircraft Co.*,⁵² the Eleventh Circuit addressed the question of when the issuance of a stay of proceedings by a district court is considered to be a final decision

46. *Id.* at 780 (alteration in original) (brackets in original) (quoting *In re Se. Banking Corp.*, 69 F.3d at 1547).

47. *Id.* (brackets in original) (quoting *In re Se. Banking Corp.*, 69 F.3d at 1547).

48. *Id.* at 781 (citing *In re Se. Banking Corp.* 69 F.3d at 1547).

49. *Id.* at 781 (brackets in original) (quoting *In re Se. Banking Corp.*, 69 F.3d at 1547).

In reaching this conclusion, the Eleventh Circuit also held that it could not, consistent with Rule 54(b), assume an “implicit adjudication” of the claim for common law indemnity on the basis that the district court also purported to dismiss the complaint which asserted that claim in its Rule 54(b) order, in light of the fact that the summary judgment itself was limited to the issue of contractual indemnity. *Id.* (internal quotation marks omitted) (quoting *Lamp v. Andrus*, 657 F.2d 1167, 1169 (10th Cir. 1981)).

50. *Id.* at 782.

51. *Id.*

52. 505 F.3d 1160 (11th Cir. 2007).

that will support an appeal.⁵³ “The general rule is that a stay is not a final disposition, and thus not immediately appealable.”⁵⁴ An exception exists, however, “for stays that put a plaintiff ‘effectively out of court,’ and in applying that exception [the Eleventh Circuit] ha[s] held that a stay order that is immoderate and involves a protracted and indefinite period of delay is final and appealable under 28 U.S.C. § 1291.”⁵⁵

King, a wrongful death case involving numerous foreign decedents and one American decedent, arose out of an aircraft accident in Italy. The district court dismissed the claims brought on behalf of the foreign decedents on the ground of forum non conveniens and stayed the case prosecuted on behalf of the American decedent until such time as the Italian courts had resolved parallel litigation over the disaster.⁵⁶ The Eleventh Circuit determined that because of the stay, the plaintiff prosecuting the American decedent’s claims “has for all practical effects been put out of court indefinitely while litigation whose nature, extent, and duration are unknown, is pending in Italy.”⁵⁷ Thus, the stay was a final decision for purposes of invoking the Eleventh Circuit’s jurisdiction.⁵⁸

In reaching this conclusion, the Eleventh Circuit rejected the argument that the “effectively out of court” doctrine was limited to stays in favor of state proceedings pursuant to various federal abstention doctrines, and thus the doctrine should not be extended to actions in foreign courts.⁵⁹ The essence of this argument was that abstention stays are generally tantamount to actual final decisions because the state court action will often have preclusive effect on the stayed federal action, with the result that “the abstention necessarily ends the federal court’s involvement with the suit.”⁶⁰ However, the Eleventh Circuit noted that *Idlewild Bon Voyage Liquor Corp. v. Epstein*,⁶¹ the case in which the United States Supreme Court first recognized the “effectively out of court” doctrine,⁶² involved *Pullman* abstention, which “is not one of the state court abstention doctrines that is likely to result in a res

53. *See id.* at 1165.

54. *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983)).

55. *Id.* (citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 10 n.11; 28 U.S.C. § 1291).

56. *Id.* at 1163.

57. *Id.* at 1169.

58. *Id.*

59. *See id.* at 1168.

60. *Id.* at 1168 (internal quotation marks omitted).

61. 370 U.S. 713 (1962).

62. *King*, 505 F.3d at 1166 (citing *Idlewild Bon Voyage Liquor Corp.*, 370 U.S. at 715 n.2).

judicata effect on subsequent federal litigation.”⁶³ Indeed, “[a] district court stay pursuant to *Pullman* abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds.”⁶⁴ Having recognized that the plaintiff in *King* was “at least as ‘effectively out of court’ as the plaintiff in *Idlewild*,”⁶⁵ and after deciding that subsequent Supreme Court precedent had not explicitly overruled *Idlewild*, the Eleventh Circuit declined to distinguish *King* from *Idlewild* on the basis that a foreign court proceeding was involved.⁶⁶

The Eleventh Circuit also took pains to distinguish the “effectively out of court” exception from the “death knell” doctrine.⁶⁷ The discredited death knell doctrine—despite its ominously terminal-sounding name—would have allowed a finding of finality even in some instances when “the order sought to be appealed ha[s] no *legal* effect on the named plaintiff’s ability to proceed with his individual claim in federal court.”⁶⁸ With respect to this issue, the Eleventh Circuit held that in *King*, “[t]he stay order does have the *legal* effect of preventing [the plaintiff] from proceeding with his claims in federal court for an indefinite period of time, potentially for years.”⁶⁹ Thus the inoperative death knell doctrine is not implicated in cases where stays are entered with the understanding that a plaintiff’s federal suit may one day be resumed, so long as the plaintiff is presently denied a federal forum for some protracted and indefinite period of time.⁷⁰

B. *Interlocutory Appeals*

While “[i]n general, the final judgment rule permits an appeal to the circuit court only from a final judgment”—including judgments or decisions that are deemed final like those discussed above—interlocutory

63. *Id.* at 1168 (citing *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 10). Under the *Pullman* abstention doctrine, “federal courts abstain from resolving constitutional disputes where a state court’s clarification of its own law might render a constitutional ruling unnecessary.” *Id.* at 1166 (citing *Idlewild Bon Voyage Liquor Corp.*, 370 U.S. at 714).

64. *Id.* at 1168 (brackets in original) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 10).

65. *Id.*

66. *See id.* at 1168-70.

67. *Id.* at 1167.

68. *Id.* (brackets and emphasis in original) (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 10 n.11).

69. *Id.* at 1169 (emphasis added).

70. *See id.* at 1169. At least one commentator would not distinguish the death knell doctrine from the effectively out of court exception and has suggested that the “death knell” doctrine is not itself “dead.” *See MOORE ET AL.*, *supra* note 12, at ¶ 202.09.

appeals concerning nonfinal judgments or decisions “are permissible . . . in certain limited situations.”⁷¹ An example is an appeal permitted by 28 U.S.C. § 1292(b), which allows a discretionary appeal when the district court certifies that an unsettled but controlling question of law exists in a particular case.⁷² Two appeals decided by the Eleventh Circuit in 2007 underscore the importance of timely filing the appropriate petitions with the Eleventh Circuit to properly invoke appellate jurisdiction over interlocutory appeals.

In *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*,⁷³ the Eleventh Circuit addressed two consolidated appeals of class actions that had been removed from state court to the district court under 28 U.S.C. § 1453⁷⁴ of the Class Action Fairness Act of 2005 (“CAFA”).⁷⁵ The class actions were filed in state court before the effective date of CAFA, but service was not initiated until after CAFA became effective. Relying on the filing date, the plaintiffs sought remand on the basis that CAFA did not apply to the actions, but the district court denied their motions.⁷⁶ Section 1453(c)(1) of CAFA allows for interlocutory appeals of such orders within the discretion of the courts of appeal, and the plaintiffs sought to appeal the order by filing notices of appeal in the district court.⁷⁷

After noting that it had recently decided in *Evans v. Walter Industries, Inc.*,⁷⁸ that such appeals were governed by Federal Rule of Appellate Procedure 5,⁷⁹ which “applies to appeals ‘within the court of appeals’ discretion,”⁸⁰ the Eleventh Circuit held that the filing of the notices of appeal failed to invoke its jurisdiction under Rule 5.⁸¹ The Eleventh Circuit reasoned as follows:

Filing a notice of appeal in the district court, which is all these two plaintiffs and would-be appellants did, does not comply with the requirement of Rule 5(a)(1) & (2) that a petition for permission to appeal be filed with the circuit clerk within the time specified in the authorizing statute for the discretionary appeal.⁸²

71. MOORE ET AL., *supra* note 12, at ¶ 202.5.

72. See 28 U.S.C. § 1292(b).

73. 475 F.3d 1228 (11th Cir. 2007).

74. 28 U.S.C. § 1453 (Supp. V 2005).

75. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

76. *Main Drug, Inc.*, 475 F.3d at 1229.

77. 28 U.S.C. § 1453(c)(1); *Main Drug, Inc.*, 475 F.3d at 1229.

78. 449 F.3d 1159 (11th Cir. 2006).

79. FED. R. APP. P. 5(a)(1).

80. *Main Drug, Inc.*, 475 F.3d at 1230 (quoting FED. R. APP. P. 5(a)(1)).

81. See *id.* at 1229-30.

82. *Id.* at 1230.

Given that prior panel precedent had held that the requirements of Rule 5 are jurisdictional,⁸³ the Eleventh Circuit dismissed the appeal for lack of jurisdiction.⁸⁴

Among the arguments that the Eleventh Circuit rejected in reaching this conclusion was the contention that the Eleventh Circuit should suspend the requirement for the timely filing of the petition under Federal Rule of Appellate Procedure 2 ("Rule 2").⁸⁵ As the Eleventh Circuit pointed out, "Rule 2 authorizes the suspension for good cause of any provision of the appellate rules 'except as otherwise provided in Rule 26(b),' which forbids extending the time for filing a petition for permission to appeal."⁸⁶ The Eleventh Circuit also refused to construe the notices of appeal as petitions for permission to appeal on the basis that a notice of appeal does not contain the additional information required of such petitions.⁸⁷ The court further held that the notices would be held defective even if they were construed to be petitions, given the absence of this additional information.⁸⁸

Jenkins v. BellSouth Corp.,⁸⁹ also a class action, presented the Eleventh Circuit with an untimely interlocutory appeal of an order denying class certification. In *Jenkins* the putative class members' first petition was untimely because the courier service retained to deliver the petition to the Eleventh Circuit failed to do so within the ten-day deadline provided by Federal Rule of Civil Procedure 23(f) ("Rule 23(f)"),⁹⁰ owing to the intervention of the Thanksgiving holidays. The Eleventh Circuit dismissed this initial petition as untimely. Alleging excusable neglect, the putative class members then moved the district court to vacate the original order and enter a new order; the district court did so, entering a second order identical to the first. The putative class members then appealed this second order.⁹¹

Accordingly, in *Jenkins* the Eleventh Circuit was presented with

an issue of first impression: whether a district court has the authority to circumvent the ten-day deadline for obtaining interlocutory review

83. See *id.* (citing *Aparicio v. Swan Lake*, 643 F.2d 1109, 1111 (5th Cir. Unit A Apr. 1981); *Cole v. Tuttle*, 540 F.2d 206, 207 n.2 (5th Cir. 1976); *Ala. Labor Council v. Alabama*, 453 F.2d 922, 923-25 (5th Cir. 1972)).

84. *Id.* at 1232.

85. *Id.* at 1231; FED. R. APP. P. 2.

86. *Main Drug, Inc.*, 475 F.3d at 1231 (quoting FED. R. APP. P. 2).

87. *Id.*

88. *Id.* at 1232.

89. 491 F.3d 1288 (11th Cir. 2007).

90. FED. R. CIV. P. 23(f).

91. *Jenkins*, 491 F.3d at 1289-90.

of an order denying class certification by vacating and reentering that order, [sic] after the aggrieved parties filed and this Court dismissed an untimely petition for an interlocutory appeal.⁹²

The Eleventh Circuit held that the district court had no such authority and rejected the argument that interlocutory appeals of class action certification orders under Rule 23(f) were analogous to the interlocutory appeals permitted under 28 U.S.C. § 1292(b).⁹³ As noted above, § 1292(b) permits interlocutory appeals when a district court certifies that a controlling question of law is ripe for appellate review, an appeal the appellate court may, in its discretion, allow.⁹⁴ In the context of § 1292(b), the Eleventh Circuit “ha[s] held that a district court has the authority to vacate and reenter its certification order . . . to allow a new period for filing a petition for interlocutory review.”⁹⁵

The Eleventh Circuit distinguished interlocutory appeals involving class certifications under Rule 23(f) from appeals under § 1292(b) because Rule 23(f) “‘departs from the § 1292(b) model in two significant ways.’”⁹⁶ First, there is no “certification” requirement under Rule 23(f), and the discretion exercised under the rule is vested only in the court of appeals and not the district court.⁹⁷ Second, the breadth of the appellate court’s discretion is emphasized by the fact that there is no parallel requirement limiting the interlocutory appeal under Rule 23(f) to appeals involving an undecided controlling question of law that would materially advance the termination of the litigation.⁹⁸ Instead, “[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.”⁹⁹

Given these distinctions and the fact that the purpose of Rule 23(f)’s ten-day deadline is to “provide[] a single window of opportunity to seek interlocutory review” of class certification orders—a “window [that] closes quickly to promote judicial economy”¹⁰⁰—the Eleventh Circuit concluded that it lacked jurisdiction over the second petition as well.¹⁰¹ The Eleventh Circuit noted, “If appeal were allowed after later motions, any litigant could effectively defeat the function of the 10-day limit by

92. *Id.* at 1289.

93. *See id.* at 1291.

94. 28 U.S.C. § 1292(b); *see Jenkins*, 491 F.3d at 1291.

95. *Jenkins*, 491 F.3d at 1290 (citing *Aparicio*, 643 F.2d at 1112).

96. *Id.* at 1291 (quoting FED. R. CIV. P. 23(f) advisory committee’s note).

97. *Id.* (citing FED. R. CIV. P. 23(f) advisory committee’s note).

98. *Id.* (citing FED. R. CIV. P. 23(f) advisory committee’s note).

99. *Id.* (brackets in original) (quoting FED. R. CIV. P. 23(f) advisory committee’s note).

100. *Id.* at 1290.

101. *Id.* at 1289.

filing a motion to decertify at any point in the litigation and then requesting any interlocutory appeal from that ruling.”¹⁰²

The holding in *Jenkins* applies only to *interlocutory* appeals of orders regarding class certifications. Litigants remain free to raise the issue of the propriety of class certification orders after entry of a final judgment.¹⁰³

C. Appeals of Remand Orders

In *Alvarez v. Uniroyal Tire Co.*,¹⁰⁴ the Eleventh Circuit recognized that it lacked jurisdiction to review a district court’s order of remand in a properly removed case when the order was based on the district court’s post-removal finding of lack of subject matter jurisdiction.¹⁰⁵ The Eleventh Circuit explained,

In *Poore v. American-Amicable Life Insurance Co.*, this Court held that 28 U.S.C. § 1447(d)’s bar to appellate review of a district court’s remand to state court pursuant to § 1447(c) did not apply where subject matter jurisdiction existed *at the time of removal* and the district court based its remand on a plaintiff’s *post-removal* amendment to the complaint.¹⁰⁶

The Eleventh Circuit held that, in *Powerex Corp. v. Reliant Energy Services, Inc.*,¹⁰⁷ the Supreme Court had abrogated this approach.¹⁰⁸ According to the Eleventh Circuit, “[i]n *Powerex*, the Supreme Court held that when a district court remands a properly removed case because it nonetheless determines post-removal that it lacks . . . jurisdiction, the remand is covered by § 1447(c) and thus is shielded from appellate review by § 1447(d).”¹⁰⁹ Accordingly, the Eleventh Circuit overruled *Poore* to the extent it held to the contrary; henceforth, “[i]f at any time before final judgment the district court issues an order remanding a case

102. *Id.* at 1291-92; MOORE, ET AL., *supra* note 12, at ¶ 23.88[2][c].

103. *Id.* at 1292. With respect to appeals from final judgments, the rules allow, and the Eleventh Circuit has shown, more leniency for claims of excusable neglect in the late filing of notices of appeal, at least when the district court has extended the time for filing the notice. *See Locke v. SunTrust Bank*, 484 F.3d 1343 (11th Cir. 2007) (holding that a notice of appeal was timely despite its late filing because of a legal assistant’s failure to properly calendar the deadline).

104. 508 F.3d 639 (11th Cir. 2007).

105. *Id.* at 640.

106. *Alvarez*, 508 F.3d at 640 (citation omitted) (citing 28 U.S.C. § 1447 (2000)) (emphasis in original); *Poore v. Am.-Amicable Life Ins. Co.*, 218 F.3d 1287 (11th Cir. 2000), *overruled by Alvarez*, 508 F.3d at 641.

107. 127 S. Ct. 2411 (2007).

108. *Alvarez*, 508 F.3d at 641.

109. *Id.*

to state court because it lacks subject matter jurisdiction, that order is not reviewable.”¹¹⁰

II. PRESERVATION AND PRESENTATION OF ISSUES

Issues not properly preserved in the district court or issues preserved but not presented in the briefs on appeal are generally waived.¹¹¹ However, for issues not properly preserved in the district court, an exception exists in the criminal context.¹¹² Under Federal Rule of Criminal Procedure 52(b),¹¹³ an appellate court, within limitations, “may correct a ‘plain error that affects substantial rights . . . even though it was not brought to the [district] court’s attention.’”¹¹⁴

As the Eleventh Circuit explained in *United States v. Lewis*,¹¹⁵ the Supreme Court has recognized a distinction between a “forfeiture” of an error and a “waiver” of an error for purposes of plain error review.¹¹⁶ Quoting the Supreme Court’s decision in *United States v. Olano*,¹¹⁷ the Eleventh Circuit noted that “[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.”¹¹⁸ Moreover, “[m]ere forfeiture, as opposed to waiver, does not extinguish an error under Rule 52 (b).”¹¹⁹ In short, forfeitures may receive “plain error” review; waivers may not.

In *Lewis*, an en banc decision, the Eleventh Circuit overruled its precedent that had held that the failure to raise the issue of double jeopardy at trial waived that issue for purposes of plain error review, concluding that the precedent was inconsistent with the forfeiture-waiver distinction advanced in *Olano*.¹²⁰ As such, the decision in *Lewis* established that future claims of double jeopardy not raised in the district court will be considered forfeited and thus subject to plain error

110. *Id.*

111. *See, e.g.,* *Action Marine, Inc. v. Cont’l Carbon, Inc.*, 481 F.3d 1302 (11th Cir. 2007) (holding various issues were either waived by failure to preserve them at trial or by the failure to raise the issues in the briefs).

112. *United States v. Lewis*, 492 F.3d 1219, 1221 (11th Cir. 2007) (en banc).

113. FED. R. CRIM. P. 52(b).

114. *Lewis*, 492 F.3d at 1221 (alteration in original) (brackets in original) (quoting FED. R. CRIM. P. 52(b)).

115. 492 F.3d 1219 (11th Cir. 2007) (en banc).

116. *Id.* at 1221 (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)).

117. 507 U.S. 725 (1993).

118. *Lewis*, 492 F.3d at 1221 (quoting *Olano*, 507 U.S. at 733).

119. *Id.* (brackets in original) (internal quotation marks omitted) (quoting *Olano*, 507 U.S. at 733).

120. *Id.* at 1221-22.

review, so long as the defendant did not take any affirmative steps to relinquish and thus actually waive the issue.¹²¹ Moreover, as an en banc decision, *Lewis* should provide valuable and authoritative guidance in the future for the Eleventh Circuit's approach to the *Olano* forfeiture-waiver distinction in cases of plain error review.

As for the proposition that issues must be presented in appellate briefs in order to be addressed by an appellate court, the Eleventh Circuit in *Hodges v. Attorney General*¹²² reminded habeas petitioners that not all issues that are briefed will necessarily be considered.¹²³ In particular, the petitioner in *Hodges* attempted to brief issues beyond those designated in a certificate of appealability that had been issued by the Eleventh Circuit.¹²⁴ The Eleventh Circuit struck the arguments in the brief that exceeded the scope of the certificate,¹²⁵ noting that the petitioner's remedy was to move for reconsideration of the order granting the certificate,¹²⁶ not to present the excluded arguments to the panel to which the case had been assigned under the assumption that the panel could decide to reach them under a local rule of court.¹²⁷

III. THE PRIOR PANEL PRECEDENT RULE: NARROWLY AVOIDING A CONFLICT IN ITS APPLICATION?

Among the arguments that the Eleventh Circuit rejected in *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*,¹²⁸ was the contention that an intervening Supreme Court decision required departure from the Eleventh Circuit's prior panel precedent that had held that the requirements of Federal Rule of Appellate Procedure 5 ("Rule 5")¹²⁹ were jurisdictional.¹³⁰ However, as the Eleventh Circuit noted, "[w]ithout a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court."¹³¹ In *Main Drug, Inc.*, the intervening decision was not "clearly contrary" because the Supreme Court precedent addressed a rule

121. *See id.* at 1222.

122. 506 F.3d 1337 (11th Cir. 2007).

123. *See id.* at 1340-41.

124. *Id.* at 1339-40.

125. *Id.* at 1341.

126. *Id.* at 1339.

127. *See id.* at 1340 (refusing to apply local rule 11th Cir. R. 27-1(g) so as to treat the issuance of the certificate of appealability as a motion that the panel could revisit).

128. 475 F.3d 1228 (11th Cir. 2007).

129. FED. R. APP. P. 5.

130. *See Main Drug, Inc.*, 475 F.3d at 1230.

131. *Id.* (brackets in original) (quoting *NLRB v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. Unit A Apr. 1981)).

of criminal procedure, not Rule 5, and the Eleventh Circuit observed that “[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing.”¹³²

The question of precisely when an intervening Supreme Court decision is sufficiently contrary to prior panel precedent to require departure from the panel’s decision was addressed again in *Atlantic Sounding Co. v. Townsend*.¹³³ Relying on *Main Drug, Inc.* and other authorities, the Eleventh Circuit in *Townsend* held that “a later panel may depart from an earlier panel’s decision only when the intervening Supreme Court decision is ‘clearly on point.’”¹³⁴ Elaborating on this idea, the Eleventh Circuit observed that “[t]he Supreme Court reminds us that ‘[t]here is . . . an important difference between the holding in a case and the reasoning that supports that holding.’”¹³⁵ Thus, “that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision.”¹³⁶

Interestingly, the *Main Drug-Townsend* formulation of this rule appears to be in conflict with the rule espoused in *Greenberg v. National Geographic Society*.¹³⁷ *Greenberg* is currently before the Eleventh Circuit on rehearing en banc and accordingly has been vacated.¹³⁸ Nevertheless, in *Greenberg* the Eleventh Circuit overruled its decision in a prior appeal of the same case, and it explicitly based its decision on the *reasoning* of an intervening Supreme Court decision:

The exception to the prior panel precedent rule is clear-cut when a subsequent Supreme Court case expressly overrules a prior panel decision, and it is no less applicable “when the *rationale* the Supreme Court uses in an intervening case directly contradicts the analysis [the Eleventh Circuit] has used in a related area, and establishes that [the Eleventh Circuit’s] current rule is wrong.”¹³⁹

132. *Id.*

133. 496 F.3d 1282 (11th Cir. 2007).

134. *Id.* at 1284 (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir. 2003)).

135. *Id.* (second brackets in original) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998)).

136. *Id.*

137. 488 F.3d 1331 (11th Cir. 2007), *vacated*, 497 F.3d 1213 (11th Cir. 2007) (en banc).

138. *See id.*

139. *Greenberg*, 488 F.3d at 1338 (quoting *Johnson v. K Mart Corp.*, 273 F.3d 1035, 1063 (11th Cir. 2001) (Barkett, J., concurring specially), *vacated*, 281 F.3d 1368 (11th Cir. 2002)) (emphasis in original).

The tension between these two formulations of the prior panel precedent rule is evident, and it will be interesting to see if this tension is addressed in the ultimate decision in *Greenberg*. Of course, there are good arguments for the principles inherent in the *Greenberg* formulation—beginning with the old maxim, *cessante ratione cessat, et ipsa lex*¹⁴⁰—but Judge Carnes’s concurrence in *Townsend* may well have the best of the arguments in the context of a multi-member court that usually sits in panels like the Eleventh Circuit:

The prior panel precedent rule is a fundamental ground rule that embodies the principle of adherence to precedent. It promotes predictability of decisions and stability of the law, it helps keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided. Without the rule every sitting of this court would be a series of do-overs, the judicial equivalent of the movie “Groundhog Day.” While endlessly recurring fresh starts is an entertaining premise for a romantic comedy, it would not be a good way to run a multi-member court that sits in panels.

. . . .
Of course, even if an intervening Supreme Court decision does not conflict with a prior panel precedent to the extent of overruling it, en banc rehearing may be granted for the purpose of addressing the issue afresh in light of the reasoning or implications of the Supreme Court decision.¹⁴¹

To Judge Carnes’s analysis, one might also add that articulating the extent to which rules and reasons conflict or cohere is a notoriously tricky business at best.¹⁴² In making such fine judgments, the many heads of an en banc court are probably better than the three of any single panel.

140. “The reason for the law having ceased, the law itself ceases.” BALLENTINE’S LAW DICTIONARY 188 (3d ed. 1969).

141. *Townsend*, 496 F.3d at 1286, 1288 (Carnes, J., concurring).

142. See, e.g., Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).