

# Appellate Practice and Procedure

by Robert G. Boliek, Jr.\*

The United States Court of Appeals for the Eleventh Circuit addressed a wide array of significant issues in the area of appellate practice and procedure in 2009.<sup>1</sup> However, the most significant decision for the Eleventh Circuit in the area of appellate procedure came from the United States Supreme Court. In *Mohawk Industries, Inc. v. Carpenter*,<sup>2</sup> the Supreme Court affirmed a 2008 Eleventh Circuit decision in which the court held that the collateral order doctrine does not allow for an immediate appeal of an order requiring the disclosure of evidence purportedly protected by the attorney–client privilege.<sup>3</sup>

Accordingly, this Article will first discuss *Carpenter* in the context of the Eleventh Circuit’s appellate jurisdiction under the collateral order doctrine and then discuss other significant cases in which the Eleventh Circuit elaborated upon the question of its jurisdiction. This Article will then discuss cases in which the Eleventh Circuit addressed issues such as the timeliness of the filing of a notice of appeal in criminal cases, the preservation of error in cases referred to magistrate judges, and a number of cases deciding or elaborating upon the applicable standard of review.

## I. APPELLATE JURISDICTION

As the Eleventh Circuit has recently noted, “for this Court to exercise jurisdiction over an appeal, our jurisdiction must be both (1) authorized by statute and (2) within constitutional limits.”<sup>4</sup> As a practical matter,

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1. For analysis of Eleventh Circuit appellate practice and procedure during the prior survey period, see Robert G. Boliek, Jr., *Appellate Practice and Procedure, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1129 (2009).

2. 130 S. Ct. 599 (2009), *affg* 541 F.3d 1048 (11th Cir. 2008).

3. *Id.* at 603.

4. *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1355 (11th Cir. 2008).

the first requirement for the exercise of appellate jurisdiction (“authorized by statute”) usually means that the decision from which the appeal is taken must be a “final” decision for purposes of 28 U.S.C. § 1291.<sup>5</sup> Section 1291 is the “workhorse” jurisdictional statute for the courts of appeals because it “generally vests courts of appeals with jurisdiction over appeals from “final decisions” of the district courts.”<sup>6</sup>

#### A. Appeals from “Final” Decisions

Usually, “[a] final decision is one that ‘ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.’”<sup>7</sup> Notwithstanding this definition, a limited number of decisions are considered “final” for purposes of § 1291 despite the fact that they do not end the litigation on the merits.<sup>8</sup>

##### 1. The “Collateral Order” Doctrine

Among such “final” decisions are those that qualify as “collateral orders” under the “collateral order doctrine.” The collateral order doctrine is “a ‘practical construction’ of the final decision rule [that] permits appeals from ‘a small category of decisions that, although they do not end the litigation, must nonetheless be considered “final.””<sup>9</sup> The doctrine had its origin in the Supreme Court’s decision in *Cohen v.*

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5. See 28 U.S.C. § 1291 (2006); *W.R. Huff Asset Mgmt. Co. v. Kohlberg, Kravis, Roberts & Co.*, 566 F.3d 979, 984 (11th Cir. 2009). While “[i]n general, the final judgment rule permits an appeal to the circuit court only from a final judgment,” some statutes provide that appeals of interlocutory decisions “are permissible . . . in certain limited situations.” 19 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 202.05[1] (3d ed. 2009). A familiar example is an appeal from orders relating to injunctive relief authorized by 28 U.S.C. § 1292(a)(1) (2006). Various other statutes also permit appeals—final, interlocutory, or both—in particular instances. For instance, a 2009 case of interest to immigration practitioners is the case of *Avila v. U.S. Attorney Gen.*, 560 F.3d 1281 (11th Cir. 2009), in which the Eleventh Circuit held that an order of reinstatement of an order of removal was a “final” order under the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(1) (2006), and in a matter of first impression for the circuit, that § 1252(b)(2) of the Act was a venue provision and not a jurisdictional limitation. *Avila*, 560 F.3d at 1283–85. As a result, the Eleventh Circuit had jurisdiction over the appeal of an order of reinstatement issued in Miami, Florida, *id.* at 1285, despite the fact that the initial order of removal had been issued in Arlington, Virginia, *id.* at 1283.

6. *W.R. Huff Asset Mgmt. Co.*, 566 F.3d at 984 (quoting *Cunningham v. Hamilton County*, 527 U.S. 198, 203 (1999)).

7. *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1052 (11th Cir. 2008) (quoting *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1338 (11th Cir. 2007)), *aff’d*, 130 S. Ct. 599 (2009).

8. See *id.*

9. *McMahon*, 502 F.3d at 1338 (quoting *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995)).

*Beneficial Industrial Loan Corp.*<sup>10</sup> “Under *Cohen*, an order is appealable 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.”<sup>11</sup>

**a. The Supreme Court’s 2009 Decision in *Mohawk Industries v. Carpenter*.** In 2008 the Eleventh Circuit decided *Carpenter v. Mohawk Industries, Inc.*,<sup>12</sup> a case the Supreme Court would ultimately review.<sup>13</sup> In *Carpenter* the Eleventh Circuit was presented with the appeal of an order requiring the production of documents claimed to be protected by the attorney–client privilege.<sup>14</sup> After noting the uncontroversial proposition that “discovery orders are normally not immediately appealable,”<sup>15</sup> the Eleventh Circuit acknowledged that “[t]his circuit ha[d] not, however, directly addressed the question of whether a discovery order compelling the disclosure of information claimed to be protected by the attorney–client privilege can be appealed before final judgment under *Cohen*” as well as the existence of a split in the circuits on the matter.<sup>16</sup>

In addressing the third requirement of the *Cohen* test, the Eleventh Circuit “conclude[d] that the challenged discovery order [was] not an appealable collateral order under *Cohen*.”<sup>17</sup> The Eleventh Circuit explained that it did “not find that a discovery order . . . implicat[ing] the attorney–client privilege [was] *effectively unreviewable* on appeal from a final judgment.”<sup>18</sup> In so holding, the Eleventh Circuit relied on its precedent denying application of the doctrine to an appeal involving an order requiring disclosure of material implicating the accountant–client privilege and the fact that “[the] Court ha[d] never exercised [its] jurisdiction under the collateral order doctrine to review any discovery order involving any privilege.”<sup>19</sup> Instead, the Eleventh

10. 337 U.S. 541 (1949); *Carpenter*, 541 F.3d at 1052.

11. *Carpenter*, 541 F.3d at 1052 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

12. 541 F.3d 1048 (11th Cir. 2008), *aff’d*, 130 S. Ct. 599 (2009). The portion of this discussion addressing the Eleventh Circuit’s treatment of the issues in *Carpenter* reiterates that contained in last year’s survey. See Robert G. Boliek, Jr., 2008 *Eleventh Circuit Survey, Appellate Practice and Procedure*, 60 MERCER L. REV. 1129, 1130–31 (2009).

13. See *Mohawk*, 130 S. Ct. 599.

14. See *Carpenter*, 541 F.3d at 1050.

15. *Id.* at 1052.

16. *Id.* at 1053 (stating that “[a] number of circuits have addressed the issue, and there are decisions on both sides”).

17. *Id.*

18. *Id.* at 1052 (emphasis added).

19. *Id.* at 1053.

Circuit held that a petition for a writ of mandamus was the appropriate remedy for the prejudgment review of discovery orders, including those implicating privileges.<sup>20</sup>

In 2009 the Supreme Court resolved the circuit split by affirming the Eleventh Circuit's decision in *Mohawk Industries, Inc. v. Carpenter*,<sup>21</sup> a case of historical, as well as procedural, interest because it was Justice Sotomayor's first opinion for the Court.<sup>22</sup> In affirming the Eleventh Circuit, the Supreme Court limited its opinion to the question of whether an order of disclosure was "effectively unreviewable" under the third requirement of *Cohen* and in essence agreed with the Eleventh Circuit's analysis by holding that "[p]ostjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege."<sup>23</sup>

Of particular interest was the Supreme Court's reiteration of the principle that "the class of collaterally appealable orders must remain 'narrow and selective in its membership'"<sup>24</sup> to avoid potentially burdensome piecemeal appeals to the circuit courts.<sup>25</sup> The Court recognized that "[t]his admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable."<sup>26</sup> Consequently, the Court concluded:

We expect that the combination of standard post judgment appeals, § 1292(b) appeals, mandamus, and contempt appeals will continue to provide adequate protection to litigants ordered to disclose materials purportedly subject to the attorney-client privilege. Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides.<sup>27</sup>

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20. *See id.* at 1053–54. As an alternate remedy for either the very brave or the very desperate, the Eleventh Circuit also noted that another avenue of relief might include appealing an order of contempt in the face of a refusal to produce allegedly privileged material, so long as the order of contempt appealed from was a final judgment involving a non-contingent sanction. *See id.* at 1054–55. The Eleventh Circuit also went on to hold that the high standards for issuing the extraordinary writ of mandamus had not been met in *Carpenter*. *Id.* at 1055.

21. 130 S. Ct. 599 (2009).

22. 78 U.S.L.W. 1345 (Dec. 15, 2009).

23. *Mohawk*, 130 S. Ct. at 603.

24. *Id.* at 609 (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)).

25. *Id.* at 608.

26. *Id.* at 609 (quoting *Swint*, 514 U.S. at 48).

27. *Id.*

In short, the federal courts continue to receive appeals of previously unrecognized or novel collateral orders with little sympathy. As a result, their recognition will likely depend on the rulemaking process and not on litigation.

**b. The Eleventh Circuit's Collateral Order Decisions.** While a decision may sometimes be “effectively unreviewable on appeal” under *Cohen's* third requirement because it requires a party to face burdensome litigation it would not otherwise have to face, the Eleventh Circuit carefully adheres to the proposition that “to prevent the erosion of the final judgment rule, ‘it is not 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.’”<sup>28</sup> Although courts frequently address the question of whether a stay order is “final” for purposes of an appeal under the “effectively out of court” doctrine discussed below,<sup>29</sup> the Eleventh Circuit analyzed the stay order issued in *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*<sup>30</sup> under the collateral order doctrine as well. In *Miccosukee Tribe*, the United States District Court for the Southern District of Florida issued a stay order deferring decision until such time as the Eleventh Circuit decided an appeal in a related case.<sup>31</sup> The Eleventh Circuit held that the stay was not appealable under the collateral order doctrine.<sup>32</sup> Specifically, the Eleventh Circuit concluded that the “important issue[s]” of federalism or international comity are not implicated by such a stay<sup>33</sup> (as would be the case with stays in favor of state or foreign court proceedings).<sup>34</sup> Accordingly, the plaintiffs had no “substantial public interest” in asserting a right to simultaneously prosecute two federal lawsuits with common issues and could not justify an immediate appeal.<sup>35</sup>

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28. *McMahon*, 502 F.3d at 1340 n.7 (quoting *Will*, 546 U.S. at 353) (emphasis added).

29. See *infra* notes 41–47 and accompanying text.

30. 559 F.3d 1191 (11th Cir. 2009).

31. See *id.* at 1193.

32. *Id.* at 1200.

33. *Id.*

34. *Id.*

35. *Id.* Interestingly, the Eleventh Circuit treated the “substantial public interest” consideration of the collateral order doctrine as part of *Cohen's* second requirement—that the order resolve an “important issue” that is separate from the rest of the litigation—rather than as part of the third requirement. *Id.* at 1199–1200. See *supra* note 28 and accompanying text.

Moreover, in *W.R. Huff Asset Management Co. v. Kohlberg, Kravis, Roberts & Co.*,<sup>36</sup> the Eleventh Circuit recognized that an order of a federal district court may be “effectively reviewable” on appeal, even when that appeal will be in a state court.<sup>37</sup> In particular, the court held that an order granting leave to amend a complaint substituting parties and resulting in the destruction of subject matter jurisdiction<sup>38</sup> is not a collateral order because the order can be reviewed after remand in the state appellate courts,<sup>39</sup> at least where the state courts would not be collaterally estopped from reaching the merits and are otherwise competent to apply the underlying federal law governing the case.<sup>40</sup>

## 2. Stay Orders

“The general rule is that a stay is not a final disposition, and thus not immediately appealable.”<sup>41</sup> 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.”<sup>42</sup> As the Eleventh Circuit’s decision in *Miccosukee Tribe* makes clear, however, the “effectively out of court” doctrine is unlikely to apply to a stay issued in favor of related proceedings in another federal forum.<sup>43</sup>

The Eleventh Circuit noted, “Because [the stay] does not require the federal court plaintiffs to await a decision from a non-federal court or other tribunal, they have not been put effectively out of court in the traditional way.”<sup>44</sup> The Eleventh Circuit noted as well that a stay that denies a federal forum for an indefinite period of time<sup>45</sup> constitutes a final order under the effectively out of court doctrine only in cases in which the plaintiff is effectively out of court for “no good reason,” such

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36. 566 F.3d 979 (11th Cir. 2009).

37. *Id.* at 985–86.

38. *Id.* at 982.

39. *Id.* at 985–86.

40. *See id.* The order of remand itself was not reviewable under 28 U.S.C. § 1447(d) (2006); the appellants in *W.R. Huff Asset Management Co.* sought application of a limited exception to § 1447(d) that allows for review of orders that lead to but are separate from the order of remand—here, the order granting leave to amend. 566 F.3d at 983. Such separate orders must themselves be final, however, for the appellate court to exercise jurisdiction over them. *See id.* at 984.

41. *King v. Cessna Aircraft Co.*, 505 F.3d 1160, 1165 (11th Cir. 2007).

42. *Id.*

43. *See* 559 F.3d at 1196.

44. *Id.*

45. In *Miccosukee Tribe*, the Eleventh Circuit referred to this as the “suspended animation” aspect of the effectively out-of-court doctrine. *See id.* at 1196–97.

as when “there [i]s little likelihood that the other forums’ decisions would control or significantly inform the litigation.”<sup>46</sup> In *Miccossukee Tribe*, however, “the reason for the district court’s stay was at least a good one, if not an excellent one: to await a federal appellate decision that [was] likely to have a substantial or controlling effect on the claims and issues in the stayed case.”<sup>47</sup>

### 3. Orders of Remand to Administrative Agencies

In *World Fuel Corp. v. Geithner*,<sup>48</sup> the Eleventh Circuit reminded litigants that a remand order from a district court to an administrative agency is generally not a final appealable order for purposes of § 1291<sup>49</sup> and expanded the class of such non-final orders to include orders of remand that require an agency to formulate “a new legal standard appropriate for the statute at issue.”<sup>50</sup> Such an order is distinguishable from previously recognized “final” orders of remand that require an agency to apply a legal standard the district court has itself formulated.<sup>51</sup> In the latter cases, the requirement of finality is met because the agency, “‘forced to conform its decision to the district court’s mandate, cannot appeal its own subsequent order.’”<sup>52</sup>

### 4. Pendent Appellate Jurisdiction

Certain otherwise unappealable, non-final decisions may very rarely be reached on appeal under the doctrine of “pendent appellate jurisdiction.” The Eleventh Circuit emphasized the limits of pendent appellate jurisdiction in *King v. Cessna Aircraft Co.*,<sup>53</sup> a case in which the court was presented with an appeal from a final order dismissing numerous foreign plaintiffs on the ground of forum non conveniens and a non-final order denying the dismissal of the case of the sole American decedent on the same grounds.<sup>54</sup> In a decision notable for its thorough discussion of the applicable law—including the recognition that “pendent appellate jurisdiction should be present only under rare circumstances”—the

46. *Id.* at 1197.

47. *Id.* at 1198.

48. 568 F.3d 1345 (11th Cir. 2009).

49. *Id.* at 1348.

50. *Id.* at 1349.

51. *See id.*

52. *Id.* at 1348 (quoting *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1271 (11th Cir. 2002)).

53. 562 F.3d 1374 (11th Cir. 2009), *cert denied sub nom.* *Forsman v. Cessna Aircraft Co.*, 130 S. Ct. 324 (2009) (mem.).

54. *Id.* at 1378.

Eleventh Circuit explained that pendent appellate jurisdiction “is present when a nonappealable decision is ‘inextricably intertwined’ with the appealable decision or when ‘review of the former decision [is] necessary to ensure meaningful review of the latter.’”<sup>55</sup> Because the district court’s forum non conveniens analysis “was conducted separately for both groups,” and “a determination of the propriety of the district court’s refusal to dismiss [the American decedent’s case was] not necessary to resolve the propriety of its decision to dismiss” the foreign plaintiffs,<sup>56</sup> the Eleventh Circuit concluded it lacked pendent appellate jurisdiction over the denial of the motion to dismiss.<sup>57</sup>

### B. Remand Orders in Removal Cases

A corollary of the fact that appellate jurisdiction must be “authorized by statute” is that what Congress gives, it may also limit—power that is amply illustrated by the circumscribed review afforded remand orders in cases asserting removal jurisdiction.<sup>58</sup> However, in *Corporate Management Advisors, Inc. v. Artjen Complexus, Inc.*,<sup>59</sup> the Eleventh Circuit recognized that a sua sponte remand order for procedural defects in the removal process may be reviewed by appeal under 28 U.S.C. § 1447(d), as distinguished from a sua sponte remand order for a lack of subject matter jurisdiction, which is unreviewable.<sup>60</sup> Moreover, the Eleventh Circuit also noted that “the failure to establish a party’s citizenship at the time of filing the removal notice is a ‘procedural, rather than a jurisdictional, defect.’”<sup>61</sup> Accordingly, a district court must await a party’s motion before ordering a remand based on the failure to establish citizenship for purposes of diversity jurisdiction in the removal notice;<sup>62</sup> in addition, free amendment of such jurisdictional allegations should be allowed pursuant to 28 U.S.C. § 1653.<sup>63</sup>

### C. Constitutional Limitations on Appellate Jurisdiction: Mootness

The fact that a statute confers appellate jurisdiction over the appeal of a particular decision does not end the jurisdictional inquiry. This is

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55. *Id.* at 1379 (quoting *Swint*, 514 U.S. at 51).

56. *Id.* at 1380.

57. *Id.* at 1381.

58. See 28 U.S.C. § 1447(d) (2006).

59. 561 F.3d 1294 (11th Cir. 2009).

60. *Id.* at 1296.

61. *Id.* (quoting *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993)).

62. See *id.* at 1296–97.

63. 28 U.S.C. § 1653 (2006); *Corp. Mgmt. Advisors*, 561 F.3d at 1297.

because, as noted above,<sup>64</sup> the appellate court's jurisdiction must also be "within constitutional limits,"<sup>65</sup> including the requirement that the decision to be reviewed presents a "live" controversy: "The doctrine of mootness, which evolved directly from Article III's<sup>66</sup> case-or-controversy limitation, provides that 'the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'"<sup>67</sup> Thus, "[a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief."<sup>68</sup>

Moreover, as noted above,<sup>69</sup> while a party may invoke 28 U.S.C. § 1653 to correct faulty jurisdictional *allegations*, § 1653 does not allow for the correction of jurisdictional *facts*, including facts demonstrating that an appeal is moot, as the Eleventh Circuit made clear in *San Francisco Residence Club, Inc. v. 7027 Old Madison Pike, LLC*.<sup>70</sup> There, the clerk of the United States District Court for the Northern District of Alabama had disbursed certain funds at issue on the appeal to a nonparty—funds the appellant had been previously deposited into the court registry.<sup>71</sup> The Eleventh Circuit held that no "meaningful relief" could be granted to the appellant regarding these funds because they were in the hands of a stranger to the suit over which the district court had no jurisdiction.<sup>72</sup> As such, the court held that the appeal was moot regarding any relief the appellant requested with respect to the nonparty.<sup>73</sup> Moreover, the appellant had not requested reimbursement of the funds from the appellee in the district court, and thus, there was no basis to support the appeal on this alternative ground—a jurisdictional "fact" that the appellant could not "correct" on appeal by invoking § 1653.<sup>74</sup>

## II. PROCEDURAL ISSUES IN THE TAKING OF AN APPEAL

Even when jurisdiction exists under a statute and there is no constitutional bar to the exercise of the Eleventh Circuit's jurisdiction,

64. See *supra* text accompanying note 4.

65. *OFS Fitel*, 549 F.3d at 1355.

66. U.S. CONST. art. III.

67. *Frulla v. CRA Holdings, Inc.*, 543 F.3d 1247, 1250–51 (11th Cir. 2008) (quoting *Tanner Adver. Group, L.L.C. v. Fayette County, Ga.*, 451 F.3d 777, 785 (11th Cir. 2006)).

68. *Id.* at 1251 (quoting *Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993)).

69. See *supra* text accompanying notes 58–63.

70. 583 F.3d 750, 755 (11th Cir. 2009).

71. See *id.* at 753–54.

72. *Id.* at 755.

73. *Id.*

74. See *id.*

the procedural requirements for taking the appeal must be carefully observed. These requirements can themselves be jurisdictional, and even when they are not, the Eleventh Circuit often requires scrupulous adherence to the rules before it will reach the merits.<sup>75</sup>

The case of *United States v. Lopez*<sup>76</sup> illustrates this proposition. Under the rationale of *Bowles v. Russell*,<sup>77</sup> the Eleventh Circuit overruled its panel precedent and held that the time limit for the filing of a notice of appeal in a criminal case under Federal Rule of Appellate Procedure 4(b)<sup>78</sup> is not jurisdictional because the time limit arises from the court-adopted rules of procedure rather than the statutory limitations fixed by Congress.<sup>79</sup> In contrast, the Eleventh Circuit recognized that under the rationale of *Bowles* the deadline in Federal Rule of Appellate Procedure 4(a)<sup>80</sup> “for filing a notice of appeal in a civil case is mandatory and jurisdictional because it is grounded in a federal statute.”<sup>81</sup> Nevertheless, the Eleventh Circuit dismissed the appeal in the criminal case of *Lopez* as untimely, noting that the government had not forfeited this objection by failing to raise it in the district court; indeed, the objection of timeliness may be raised by an appellee “for the first time in its merit brief.”<sup>82</sup>

### III. PRESERVATION AND PRESENTATION OF ERROR

Issues not properly preserved in the district court or issues preserved but not presented in the briefs on appeal are generally waived,<sup>83</sup> although an exception exists in the criminal context for the preservation of certain “plain errors” that affect substantial rights.<sup>84</sup> In *Williams v.*

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75. See *United States v. Lopez*, 562 F.3d 1309 (11th Cir. 2009).

76. 562 F.3d 1309 (11th Cir. 2009).

77. 551 U.S. 205 (2007).

78. FED. R. APP. P. 4(b).

79. *Lopez*, 562 F.3d at 1313.

80. FED. R. APP. P. 4(a).

81. *Lopez*, 562 F.3d at 1312 (citing 28 U.S.C. § 2107 (2006)).

82. *Id.* at 1313.

83. See, e.g., *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1313 (11th Cir. 2007). For example, in *United States v. White*, 590 F.3d 1210 (11th Cir. 2009), the Eleventh Circuit held that an objection to venue that had been raised in a post-judgment motion was untimely because it was not presented prior to trial, and there was a lack of evidence that the defendant “was unaware of his constitutional right” to be tried in a district where the offense occurred. *Id.* at 1214.

84. See, e.g., *United States v. Lewis*, 492 F.3d 1219, 1221 (11th Cir. 2007) (en banc) (recognizing the distinction between unintentional “forfeitures” of substantial rights by a failure to timely object, which are entitled to plain error review, from intentional “waivers,” which are not).

*McNeil*,<sup>85</sup> a case of first impression for the Eleventh Circuit,<sup>86</sup> the court addressed the waiver of arguments made in cases referred to magistrate judges and concluded that “a district court has discretion to decline to consider a party’s argument when that argument was not first presented to the magistrate judge,”<sup>87</sup> including arguments raised for the first time in an objection to the magistrate’s report and recommendation.<sup>88</sup> As a consequence, litigants run the risk of waiving arguments not properly raised before a magistrate.<sup>89</sup> If, as was the case in *Williams*, a party raises an argument for the first time before the district court, and the district court declines to consider that argument, then the Eleventh Circuit will regard the matter as having been waived for purposes of appeal, at least in the absence of an abuse of discretion.<sup>90</sup>

#### IV. STANDARDS OF REVIEW

Assuming the existence of the appellate court’s jurisdiction and that such procedural requirements as the timely filing of a notice of appeal or the appropriate petition have been satisfied, few issues are more critical to the success of an appeal than the standard of review.<sup>91</sup> “In even moderately close cases, the standard of review may be dispositive of an appellate court’s decision.”<sup>92</sup>

##### A. *Post-Gall Review of Federal Sentences*

Perhaps the most important standard of review the Eleventh Circuit has recently addressed is the standard for reviewing federal sentencing decisions in the wake of *Gall v. United States*,<sup>93</sup> which requires that courts apply an abuse of discretion standard in a two-step process.<sup>94</sup> First, the reviewing court should “ensure that the district court committed no significant procedural error.”<sup>95</sup> Second, “*Gall* directs

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85. 557 F.3d 1287 (11th Cir.), *cert. denied*, 129 S. Ct. 2747 (2009) (mem.).

86. *Id.* at 1288.

87. *Id.* at 1292.

88. *Id.* at 1288.

89. *See id.* at 1292.

90. *See id.*

91. *See News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007).

92. *Id.*

93. 552 U.S. 38 (2007).

94. *See id.* at 51.

95. *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008) (quoting *Gall*, 552 U.S. at 51).

that ‘the appellate court should then consider the substantive reasonableness of the sentence imposed.’<sup>96</sup>

The Eleventh Circuit continued to elaborate on the ramifications of the *Gall* standard in 2009. One of the more instructive cases is *United States v. Livesay*,<sup>97</sup> in which the Eleventh Circuit again reversed the United States District Court for the Northern District of Alabama in a series of sentencing decisions in a case involving a “white-collar” defendant accused of corporate fraud.<sup>98</sup> The Eleventh Circuit had previously reversed a below-the-guidelines sentence in the same case in 2008 because of “procedural error” under the first step of the *Gall* standard.<sup>99</sup> The Eleventh Circuit based the prior decision on its conclusion that “the district court [had] committed procedural *Gall* error by basing the extent of its . . . departure on an impermissible consideration: specifically, [the defendant’s] repudiation of or withdrawal from the conspiracy.”<sup>100</sup>

In the 2009 appeal, the Eleventh Circuit was presented with no such procedural error, but instead reversed the district court’s below-the-guidelines sentence under *Gall*’s second requirement.<sup>101</sup> In particular, the Eleventh Circuit held that a sentence of probation was “substantively unreasonable,” not only on the basis that such a sentence did not reasonably reflect the seriousness of the crime, which involved enormous amounts of money, but also on what the Eleventh Circuit felt was the sentence’s limited deterrent effect in white-collar cases.<sup>102</sup> “[I]t is difficult to imagine a would-be white-collar criminal being deterred from stealing millions of dollars from his company by the threat of a purely probationary sentence, regardless of how much probation that person received.”<sup>103</sup> Thus, the two post-*Gall* *Livesay* opinions give valuable insights into the Eleventh Circuit’s approach to review under *Gall*, especially in white-collar cases, because they represent two separate reversals of the same case under each aspect of the *Gall* standard.

In contrast, in *United States v. Jordan*,<sup>104</sup> the Eleventh Circuit applied *Gall* to affirm a below-the-guidelines sentence in a case involving the improper use of a criminal database.<sup>105</sup> In *Jordan* an incumbent

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96. *Id.* (quoting *Gall*, 552 U.S. at 51).

97. 587 F.3d 1274 (11th Cir. 2009).

98. *Id.* at 1276, 1279.

99. *Id.* at 1277.

100. *Id.*

101. *Id.* at 1279.

102. *Id.* at 1278–79.

103. *Id.* at 1279.

104. 582 F.3d 1239 (11th Cir. 2009).

105. *See id.* at 1244, 1249–51.

lost a close and hotly contested race for county sheriff. Suspecting voter fraud, the incumbent retained counsel for a possible election contest, and the lawyer in turn enlisted a member of the sheriff's staff to examine the database in the hope of proving that felons had illegally voted in the election. A jury ultimately concluded that the examination of the database violated federal law.<sup>106</sup> The court sentenced the lawyer to a fine and to probation<sup>107</sup> rather than the minimum prison term that would have been applicable under the sentencing guidelines.<sup>108</sup> In affirming the below-the-guidelines sentence, the Eleventh Circuit relied in part on the finding of the United States District Court for the Northern District of Alabama that "the offense involved very little planning or concealment and could easily have been discovered."<sup>109</sup> One possible lesson to take from *Livesay* and *Jordan* may be that in "white-collar" and similar cases, the Eleventh Circuit is more likely to apply *Gall* to affirm a below-the-guidelines sentence when the defendant's conduct lacks the kind of calculation and planning the Eleventh Circuit has held will be more effectively deterred by a sentence that is within the guidelines.

*B. "De Novo" Standard of Review Applies to a District Court's Order Interpreting Injunction Issued by Another Judge*

In *Alley v. U.S. Department of Health & Human Services*,<sup>110</sup> a case in which the question of the standard of review presented an issue of first impression for the Eleventh Circuit,<sup>111</sup> the court concluded that a district court judge's interpretation of an injunction issued by another judge is entitled to no deference and will be reviewed de novo.<sup>112</sup> The question arose because the order appealed from interpreted an injunction initially issued thirty years before by a judge in another district that limited a predecessor agency of the Department of Health and Human Services (HHS) from releasing certain medical reimbursement records under the Freedom of Information Act.<sup>113</sup> The injunction had remained in force after all these years, and the plaintiff sought to require the release of reimbursement records notwithstanding the HHS's argument that the injunction prevented their release. The district court

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106. *Id.* at 1244–45.

107. *Id.* at 1245.

108. *See id.* at 1249–50.

109. *Id.* at 1251 (internal quotation marks omitted).

110. 590 F.3d 1195 (11th Cir. 2009).

111. *Id.* at 1201.

112. *Id.* at 1202.

113. 5 U.S.C. § 552 (2006); *Alley*, 590 F.3d at 1198.

concluded that release of the particular information the plaintiff sought was not precluded by the injunction and ordered its release, a decision the HHS appealed.<sup>114</sup>

Addressing the standard of review, the Eleventh Circuit noted that while “[w]e do review a district court’s interpretation of its own orders only for an abuse of discretion,” including orders relating to injunctions, “it does not follow that the standard applies to one judge’s interpretation of an injunction issued by another judge.”<sup>115</sup> In particular, the Eleventh Circuit reasoned that “any insider knowledge that a judge may have about her own orders would not extend to the orders of another judge,” and “[t]here is no reason to believe that a district court judge would have any advantage over the judges of this Court in interpreting an injunction issued by another district judge.”<sup>116</sup> Under the *de novo* standard of review, the Eleventh Circuit held that the injunction precluded release of the records the plaintiff sought and reversed the United States District Court for the Northern District of Alabama, rejecting what it ultimately considered the plaintiff’s “attempt to collaterally attack” an injunction issued by a judge who sat in another district.<sup>117</sup> Instead, if a plaintiff “believes [an] injunction is invalid, overly broad, or outdated,” the plaintiff’s remedy is to “challenge it in [the district where it was issued] after joining all necessary parties.”<sup>118</sup>

*C. “Abuse of Discretion” Standard of Review Applies to Sua Sponte Dismissal of Complaint Due to the Plaintiff’s Failure to Timely Effect Service*

In *Rance v. Rocksolid Granit USA, Inc.*,<sup>119</sup> a case in which the standard of review presented another issue of first impression for the Eleventh Circuit,<sup>120</sup> the court concluded that the “abuse of discretion” standard applies to a district court’s *sua sponte* dismissal of a complaint for failure to effect timely service under Federal Rule of Civil Procedure 4(m).<sup>121</sup> Moreover, while this standard is highly deferential, it is not completely “without teeth,” as the court’s decision in *Rance* itself demonstrates. In *Rance* the Eleventh Circuit reversed the United States District Court for the Southern District of Florida’s order of dismissal

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114. *Alley*, 590 F.3d at 1200–02.

115. *Id.* at 1202.

116. *Id.*

117. *Id.* at 1210.

118. *Id.*

119. 583 F.3d 1284 (11th Cir. 2009).

120. *Id.* at 1286.

121. FED. R. CIV. P. 4(m); *Rance*, 583 F.3d at 1286.

without prejudice when the complaint of a pro se plaintiff (who was proceeding *in forma pauperis*) was dismissed without prejudice because the United States Marshal failed to timely effectuate service without any fault on the part of the plaintiff.<sup>122</sup> The Eleventh Circuit held that in such circumstances the district court abused its discretion in failing to consider the extent to which the marshal's failure constituted "good cause" for the failure to serve that warranted an extension of the deadline.<sup>123</sup>

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122. *Rance*, 583 F.3d at 1288.

123. *See id.*