Appellate Practice and Procedure

by Robert G. Boliek, Jr.*

In 2010 the United States Court of Appeals for the Eleventh Circuit addressed a number of cases of significance to appellate practitioners, including cases presenting issues of apparent first impression for the Eleventh Circuit on questions of mootness and justiciability as well as a number of such cases dealing with the preservation of error.[1] In addition, the Eleventh Circuit decided a number of interesting cases relating to interlocutory appeals of orders involving injunctive relief, to questions of the finality of judgments, and to the timeliness of the filing of a notice of appeal.

Perhaps the most interesting case from the standpoint of appellate practice and procedure, however, was *Davis v. Terry*,[2] which raised a question of apparent national first impression: Does a court of appeals have jurisdiction over the appeal of a habeas petition that the Supreme Court of the United States has granted under its original jurisdiction to issue the writ?[3] A close second is *United States v. Irey*,[4] the first en banc decision of the Eleventh Circuit to reverse a sentence for substantive unreasonableness under the abuse of discretion standard of review articulated in *Gall v. United States*[5] by the Supreme Court.[6]

Accordingly, this Article will first discuss *Davis* and the other cases of note that relate to the Eleventh Circuit's appellate jurisdiction before turning to cases that address various procedural issues such as the

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1. For an analysis of Eleventh Circuit appellate practice and procedure during the prior survey period, see Robert G. Boliek, Jr., *Appellate Practice and Procedure*, *2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1017 (2010).
2. 625 F.3d 716 (11th Cir. 2010).
3. *Id.* at 719.
4. 612 F.3d 1160 (11th Cir. 2010) (en banc).
5. 552 U.S. 38 (2007).
6. *Irey*, 612 F.3d at 1165-66, 1180.

preservation of error. The article will close with *Irey's* elaboration on the abuse of discretion standard of review for federal sentences.

I. APPELLATE JURISDICTION

A. Statutory Limitations on 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."[7] In *Davis v. Terry*,[8] the Supreme Court had previously exercised its original jurisdiction to issue a writ of habeas corpus,[9] and the Eleventh Circuit was confronted with an issue of apparent national first impression: Whether the Eleventh Circuit had appellate jurisdiction over the United States District Court for the Southern District of Georgia's denial of habeas relief after the Supreme Court had transferred the petition to the district court for findings of fact on the petitioner's actual innocence claim.[10] The Supreme Court had not invoked this procedure in nearly fifty years,[11] and as the district court noted, there was simply no legal authority explaining what avenue of appeal was available to the petitioner after it denied the writ, although the district court surmised that such an appeal would be directed to the Supreme Court.[12]

The Eleventh Circuit agreed with the district court, reasoning that, because the petitioner had already exhausted his other habeas remedies, the Supreme Court could have only issued the writ pursuant to its original habeas jurisdiction; therefore, any appeal of the district court's order had to be presented directly to the Supreme Court.[13] In support of this holding, the Eleventh Circuit also noted that it would exceed its own jurisdiction under the relevant statutes governing habeas relief to conclude otherwise: "If this court . . . reviewed the district court's order

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7. OFS Fitel, L.L.C. v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1355 (11th Cir. 2008) (citing Druhan v. Am. Mut. Life, 166 F.3d 1324, 1326 (11th Cir. 1999)).

8. 625 F.3d 716 (11th Cir. 2010).

9. *In re* Davis, 130 S. Ct. 1, 1 (2009).

10. *Davis*, 625 F.3d at 718-19.

11. *In re Davis*, 130 S. Ct. at 2 ("Today this Court takes the extraordinary step–one not taken in nearly 50 years–of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus.") (Scalia, J., dissenting).

12. *In re Davis,* No. CV409-130, 2010 WL 3385081, at *1 n.1 (S.D. Ga. Aug. 24, 2010). The district court stated, "[f]unctionally, then, this Court is operating as a magistrate for the Supreme Court, which suggests appeal of this order would be directly to the Supreme Court. However, this Court has been unable to locate any legal precedent or legislative history on point." *Id.*

13. *Davis*, 625 F.3d at 719.

at this juncture, . . . we would effectively be restoring his remedies in federal court, in complete contradiction to the express intent of Congress."[14] Accordingly, the petitioner's appellate remedy was the contemporaneous appeal he had also filed directly to the Supreme Court, and the Eleventh Circuit therefore dismissed the petitioner's appeal and denied his request for a certificate of appealability.[15]

1. Appeals from "Final" Decisions. In *Davis* the Eleventh Circuit was confronted with an appeal that had a highly "unusual procedural posture";[16] much more commonly, the question of whether the court's appellate jurisdiction is authorized by statute arises in cases when the court must decide whether, pursuant to 28 U.S.C. § 1291,[17] the appeal taken is a final decision of a district court. Section 1291 is the "workhorse" jurisdictional statute for the courts of appeals that "generally vests courts of appeals with jurisdiction over appeals from 'final decisions' of the district courts."[18] 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.'"[19]

In keeping with the finality requirement of 28 U.S.C. § 1291, in *Ryan v. Occidental Petroleum Corp.*,[20] the former United States Court of

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14. *Id*.

15. *Id*. at 718-19.

16. *Id*. at 717.

17. 28 U.S.C. § 1291 (2006).

18. W.R. Huff Asset Mgmt. Co. v. Kohlberg, Kravis, Roberts & Co., 566 F.3d 979, 984 (11th Cir. 2009) (quoting Cunningham v. Hamilton Cnty., 527 U.S. 198, 203 (1999)).

19. 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 sub nom.*, Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009).

Notwithstanding this definition, a limited number of decisions are considered final for purposes of 28 U.S.C. § 1291 despite the fact that they do not end the litigation on the merits. These include collateral orders under the collateral order doctrine, *see*, *e.g.*, *Carpenter*, 541 F.3d at 1052, and appeals from stay orders that put a litigant "effectively out of court," *see*, *e.g.*, King v. Cessna Aircraft Co., 505 F.3d 1160, 1165 (11th Cir. 2007) (internal quotation marks omitted). In addition, in rare circumstances, a nonfinal order may also be reviewed in conjunction with other appealable orders under the doctrine of pendent appellate jurisdiction. *See*, *e.g.*, McMahon v. Presidential Airways, Inc., 502 F.3d 1357 (11th Cir. 2007). In contrast to recent surveys, the Eleventh Circuit did not appear to break any new ground with respect to these doctrines during this particular survey period, although *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814 (11th Cir. 2010), contains good discussions summarizing the court's approach to the collateral order doctrine and the doctrine of pendent appellate jurisdiction. *See id.* at 819-20; *see also* Thomas v. Blue Cross & Blue Shield Ass'n, 594 F.3d 823, 831 (11th Cir. 2010) (related case discussing the collateral order doctrine).

20. 577 F.2d 298 (5th Cir. 1978), *overruled on other grounds by* Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1 (1980), *as recognized in* Bryant v. Rich, 237 F. App'x 429, 430

Appeals for the Fifth Circuit[21] held long ago that a party cannot be allowed to manufacture finality by voluntarily dismissing claims without prejudice in order to appeal an adverse judgment as to other claims.[22] According to the former Fifth Circuit, such a rule would circumvent Rule 54(b) of the Federal Rules of Civil Procedure (F.R.C.P.) [23] by allowing a party what was in essence a "piecemeal" appeal of some portion of his claims despite reserving the right to pursue the dismissed claims at some later date, thus undermining the interest in judicial economy that both the finality rule and Rule 54(b)'s certification requirements seek to protect.[24]

In *Equity Investment Partners, LP v. Lenz*,[25] however, the Eleventh Circuit distinguished *Ryan* by holding that the court had jurisdiction over the appeal of a partial summary judgment entered against the plaintiff that was made final by the parties' stipulated voluntary dismissal without prejudice of a defendant's counterclaim and cross-claim.[26] The court did so on the basis that the voluntary dismissal in *Lenz* "was not an improper attempt . . . to manufacture a final judgment to pursue an immediate appeal; rather, it was prompted by the district court's refusal to permit [the defendant] to join an indispensable party."[27] Thus, *Lenz* suggests that, even when the party seeking the appeal participates in the voluntary dismissal, finality may not be destroyed under the *Ryan* rule when a party can point to a legitimate independent basis for the dismissal other than a desire to manufacture that finality.[28]

2. Appeals of Interlocutory Decisions. 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."[29] A familiar example would be an appeal from interlocutory orders relating

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n.1 (11th Cir. 2007).

21. *See* Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that decisions of the former Fifth Circuit decided before the close of business on September 30, 1981, are binding on the Eleventh Circuit).

22. *Ryan*, 577 F.2d at 301-02.

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

24. *Ryan*, 577 F.2d at 302-03.

25. 594 F.3d 1338 (11th Cir. 2010).

26. *Id*. at 1341 n.2.

27. *Id*.

28. *See* CSX Transp., Inc. v. City of Garden City, 235 F.3d 1325, 1329 (11th Cir. 2000) (holding the *Ryan* rule not applicable when the appealing party did not participate in the voluntary dismissal).

29. 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.05[1] (3d ed. 2010).

to injunctive relief under 28 U.S.C. § 1292(a)(1).[30] Consequently, an interlocutory order explicitly denying injunctive relief is immediately appealable.[31] As the Eleventh Circuit reminded litigants in *Edwards v. Prime, Inc.*,[32] so too is an interlocutory order that has the practical effect of denying injunctive relief, even when the order does not explicitly do so, so long as the order also meets certain additional requirements.[33] In particular, "[j]ust because a district court's order has the 'practical effect of refusing an injunction,' it does not automatically qualify for immediate appeal under § 1292(a)(1)."[34] Instead, such a practical denial must also "threaten[] a serious, perhaps irreparable, consequence [that] can be effectually challenged only by immediate appeal."[35] Otherwise, "the general congressional policy against piecemeal review will preclude interlocutory appeal."[36]

In short, in cases of practical denials, as with orders that have the practical effect of granting interlocutory injunctive relief, the court "adhere[s] to the time-tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck."[37] However, unlike explicit interlocutory orders involving injunctions–whether they grant or deny injunctive relief–and unlike interlocutory orders that have the practical effect of granting such relief,[38] a practical denial must at least threaten serious injury that can be alleviated by appeal before interlocutory review will be permitted.[39] As the court explained in *Edwards*, "[s]ection 1292(a) is not . . . a golden ticket litigants can use to take any decision affecting injunctive relief on a trip to the court of appeals."[40]

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30. 28 U.S.C. § 1292(a)(1) (2006). Perhaps the most familiar example of an appealable judgment that does not actually end the litigation on the merits is actually a creature of the rules of civil procedure–a judgment properly certified as final under F.R.C.P. 54(b).

31. Edwards v. Prime, Inc., 602 F.3d 1276, 1290 (11th Cir. 2010).

32. 602 F.3d 1276 (11th Cir. 2010).

33. *Id.* at 1290.

34. *Id*. (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)).

35. *Id.* (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)) (internal quotation marks omitted).

36. *Id.* (quoting Carson v. Am. Brands, Inc., 450 U.S. 79, 84 (1981)) (internal quotation marks omitted).

37. Sierra Club v. Van Antwerp, 526 F.3d 1353, 1359 (11th Cir. 2008) (quoting BMC Indus., Inc. v. Barth Indus., Inc., 160 F.3d 1322, 1337 (11th Cir. 1998)).

38. Such an order "must be a clear and understandable directive from the district court, it must be enforceable through contempt proceedings, and it must give some or all of the substantive relief sought in the complaint." *Sierra Club*, 526 F.3d at 1358; *see also* Birmingham Fire Fighters Ass'n 117 v. City of Birmingham, 603 F.3d 1248, 1254 (11th Cir. 2010).

39. *Edwards*, 602 F.3d at 1290.

40. *Id.* Likewise, while interlocutory orders modifying injunctions are appealable under § 1292(a)(1), orders that merely clarify injunctions are not entitled to the golden ticket.

Indeed, even a properly punched 28 U.S.C. § 1292(a)[41] ticket can be immediately revoked by events in the district court, as *Birmingham Fire Fighters Ass'n 117 v. City of Birmingham*[42] amply illustrates.[43] In *Birmingham Fire Fighters*, the court dealt with another chapter in decades-long litigation over discriminatory employment practices by various governmental actors, specifically the appeal of an interlocutory injunction that appointed two persons to a county personnel board in order to insure the board's compliance with the district court's orders.[44] While the appeal of this interlocutory injunction was pending, the district court resolved most of the claims in the underlying litigation, entering final judgments as to those claims. This order included a judgment making permanent the interlocutory injunction then pending on appeal in the Eleventh Circuit, and no party appealed this final judgment.[45] The Eleventh Circuit dismissed the appeal of the interlocutory injunction for lack of appellate jurisdiction, noting that "[i]ntervening events can affect an appellate court's jurisdiction over an interlocutory appeal" and holding that the order entering the final judgment "stripped this Court of its jurisdiction over the . . . appeal because, when a final injunction incorporates the same relief as an interlocutory injunction, an appeal is properly taken only from the final order."[46]

B. Constitutional Limitations on Appellate Jurisdiction

The fact that a statute confers appellate jurisdiction over the appeal of a particular decision does not end the jurisdictional inquiry.[47] As noted above, the appellate court's jurisdiction must also be "within constitutional limits,"[48] including the question of whether the decision to be reviewed presents a live controversy: "The doctrine of mootness, which evolved directly from Article III's 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).'"[49] Thus, "[a] case is moot when it no longer

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See, *e.g.*, *Thomas*, 594 F.3d at 831-32.

41. 28 U.S.C. § 1292(a) (2006).

42. 603 F.3d 1248 (11th Cir. 2010).

43. *Id.* at 1254-55.

44. *Id*. at 1250. Indeed, the United States District Court for the Northern District of Alabama characterized the case as "Dickensian." *Id*. at 1250 n.1.

45. *Id*. at 1253-54.

46. *Id*. at 1254.

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

48. *Id*.

49. Frulla v. CRA Holdings, Inc., 543 F.3d 1247, 1250-51 (11th Cir. 2008) (quoting Tanner Adver. Group, L.L.C. v. Fayette Cnty., 451 F.3d 777, 785 (11th Cir. 2006)).

presents a live controversy with respect to which the court can give meaningful relief."[50]

Death of a party while an appeal is pending often moots the appeal.[51] In *Thomas v. Bryant*,[52] however, the Eleventh Circuit held that a plaintiff's death after judgment in the plaintiff's favor, but before the court had issued its decision, did not entirely moot the plaintiff's appeal because the plaintiff's claim of attorney's fees presented a live controversy.[53] *Thomas* involved a 28 U.S.C. § 1983[54] action in which inmates alleged that Florida corrections officers unconstitutionally used chemical agents on inmates with mental illnesses in contravention of the Eighth Amendment's[55] prohibition on cruel and unusual punishment.[56] After a judgment in two of the inmates' favor was entered by the United States District Court for the Middle District of Florida granting declaratory and injunctive relief, one of the inmates died while the appeal of the case was pending.[57] In a case of apparent first impression for the Eleventh Circuit, the court held that

> although [the inmate's] death deprives us of jurisdiction to determine the merits of his Eighth Amendment claim and the district court's award of his injunctive relief, "[w]hen plaintiffs clearly succeeded in obtaining the relief sought before the district court and an intervening event rendered the case moot on appeal, plaintiffs are still 'prevailing parties' for the purposes of attorney's fees for the district court litigation."[58]

Accordingly, the court vacated the judgment as to the merits of the deceased inmate's claims but allowed for the substitution of the inmate's father with respect to the inmate's interests "in order to allow the district court to resolve [the inmate's] motion for attorney's fees."[59] The

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50. *Id.* at 1251 (quoting Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993)) (internal quotation marks omitted).

51. *See*, *e.g.*, United States v. Koblan, 478 F.3d 1324, 1325 (11th Cir. 2007) (per curiam) (holding that the death of a criminal defendant mooted the appeal and required the judgment of conviction to be vacated and the indictment dismissed despite a pending order of restitution and despite a circuit split on the issue of whether such pending order presented a live controversy under the doctrine of mootness).

52. 614 F.3d 1288 (11th Cir. 2010).

53. *Id*. at 1294-95.

54. 42 U.S.C. § 1983 (2006).

55. U.S. CONST. amend. VIII.

56. *Thomas*, 614 F.3d at 1293.

57. *Id*. at 1294.

58. *Id.* (second alteration in original) (quoting Diffenderfer v. Gomez-Colon, 587 F.3d 445, 454 (1st Cir. 2009)).

59. *Id.*; *see* FED. R. APP. P. 43(a).

court also noted, however, that any claim on behalf of the inmate for attorney's fees for prosecuting the appeal had in fact been mooted by the inmate's death because the inmate died before the court issued its judgment.[60]

Mootness, of course, is just one strand in the over-arching concept of "justiciabilty," "the term of art employed to give expression to th[e] . . . limitation placed upon federal courts by the case-and-controversy doctrine."[61] In *United States v. Rivera*,[62] also a case of apparent first impression for the Eleventh Circuit, the court invoked the broader contours of the doctrine of justiciability to hold that it lacked appellate jurisdiction over an appeal by a receiver who had been removed by the district court for misfeasance in the liquidation of assets that had been forfeited in a criminal proceeding.[63] In particular, the Eleventh Circuit concluded that an appeal raising the issue of whether the district court's opinion removing the receiver had damaged the receiver's reputation did not present a justiciable controversy in the absence of an additional tangible injury.[64]

In reaching this conclusion, the Eleventh Circuit reminded litigants that "[w]e review[] judgments, not statements in opinions, to respect the limits of jurisdiction"[65] and that "[w]e have never held that an appeal of a professional who challenges only a finding of fact that is potentially detrimental to . . . reputation is justiciable."[66] Importantly, the Eleventh Circuit also declined to follow the decisions of some circuits, including the Fifth Circuit, which had held to the contrary, because

> [m]ost circuits have declined to exercise jurisdiction over challenges to naked findings of fact about even attorney misconduct because an order to vacate statements or findings in a judicial opinion alone "would not

60. *Thomas*, 614 F.3d at 1294 n.3.

61. United States v. Rivera, 613 F.3d 1046, 1049 (11th Cir. 2010) (omission in original) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)) (internal quotation marks omitted).

62. 613 F.3d 1046 (11th Cir. 2010).

63. *Id*. at 1048-49.

64. *Id*. at 1051-53.

65. *Id*. at 1051 (second alteration in original) (quoting Keating v. City of Miami, 598 F.3d 753, 761 (11th Cir. 2010)) (internal quotation marks omitted). In *Keating v. City of Miami*, 598 F.3d 753 (11th Cir. 2010), the Eleventh Circuit relied on this rule in the context of an appeal involving the qualified immunity of government actors, refusing to review preliminary statements in the opinion of the district court to the effect that the actors had engaged in unconstitutional conduct in light of the fact that the district court had ultimately held that the actors were entitled to immunity. *Id.* at 760-61. As such, there was neither an underlying adverse judgment to review nor a proper collateral order–as might exist when an application of immunity is denied–to confer appellate jurisdiction on the Eleventh Circuit. *See id*. at 760-62, 761 n.4.

66. *Rivera*, 613 F.3d at 1051.

> usually affect any tangible interest, thus placing such an order outside of our Article III power to decide cases and controversies."[67]

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, the procedural requirements for taking the appeal must be carefully observed. These requirements can themselves be jurisdictional, and even when they are not, the court will often decline to reach the merits if the relevant procedural rules are violated. For example, "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement."[68] On the other hand, the timely filing of a notice of appeal in a criminal case is not.[69] This distinction arises because the time limit for filing a notice of appeal in a civil case[70] is based on a statute,[71] while the time limit for filing the notice in a criminal case is not, because that limit is based solely on the Federal Rules of Appellate Procedure.[72] As such, under the analysis of *Bowles v. Russell*,[73] which is premised on recognition of congressional authority to establish the jurisdiction of the federal courts, the former limits the jurisdiction of a federal court to hear an appeal, while the latter is a court-adopted claims-processing rule that does not represent a jurisdictional limitation.[74]

In *Advanced Bodycare Solutions, L.L.C. v. Thione International, Inc.*,[75] the Eleventh Circuit applied the foregoing analysis to conclude that a notice of appeal filed in a civil case that was untimely with respect to the final judgment could nevertheless be timely with respect to the district court's order denying post-trial motions for a judgment as a matter of law, for a new trial, and to alter and amend the judgment.[76] In particular, the Eleventh Circuit held that, even though F.R.C.P. 6(b)(2)[77] precludes an extension of time for the filing of such post-trial motions, the non-moving party had forfeited the issue of the propriety

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67. *Id*. at 1052 (quoting Clark Equip. Co. v. Lift Parts Mfg. Co., 972 F.2d 817, 820 (7th Cir. 1992)).
68. Bowles v. Russell, 551 U.S. 205, 214 (2007).
69. United States v. Lopez, 562 F.3d 1309, 1310 (11th Cir. 2009).
70. *See* FED. R. APP. P. 4(a).
71. *Lopez*, 562 F.3d at 1312; *see also* 28 U.S.C. § 2107 (2006).
72. *Lopez*, 562 F.3d at 1313; *see also* FED. R. APP. P. 4(b).
73. 551 U.S. 205 (2007).
74. *See Lopez*, 562 F.3d at 1311-13.
75. 615 F.3d 1352 (11th Cir. 2010).
76. *Id*. at 1359 n.15.
77. FED. R. CIV. P. 6(b)(2).

of the district court's decision to extend the time for filing these motions by failing to raise this objection before the district court.[78] Because the notice of appeal was timely with respect to the order of denial as a result of the extension, the Eleventh Circuit decided it had jurisdiction over these aspects of the appeal.[79]

In reaching this conclusion, the court reasoned that, because F.R.C.P. 6(b)(2) was not based on a statute, it was a non-jurisdictional claims-processing rule and, accordingly, objections as to noncompliance with the rule could be forfeited.[80] Thus, while the notice of appeal was untimely with respect to the entry of the final judgment itself–a jurisdictional matter that could not be forfeited–the notice was timely as to the order denying the post-trial motions in light of the district court's issuance of the otherwise unchallenged extension of time in which to file them.[81]

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,[82] with some limited exceptions.[83] Indeed, "a litigant who fails in his initial

78. *Advanced Bodycare*, 615 F.3d at 1359 n.15.

79. *Id*.

80. *Id*.

81. *Id*. *But cf. Lopez*, 562 F.3d at 1313-14 (concluding that the Government did not forfeit its objection to the untimely notice of appeal in a criminal case by failing to raise the objection in the district court on the basis that the appellate court, not the district court, was the arbiter of compliance with appellate rules, which did not require the objection to be made before the filing of the Government's merit brief).

82. *See*, *e.g.*, Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1313 (11th Cir. 2007).

83. *See*, *e.g.*, United States v. Lewis, 492 F.3d 1219, 1220-21 (11th Cir. 2007) (en banc) (applying, in the context of the criminal "plain error rule," 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).

In two cases decided in 2010, the Eleventh Circuit exercised its discretion to apply two of five much more rarely invoked "civil" plain error exceptions to allow for appellate review of issues not raised before the district court. In *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324 (11th Cir. 2010), the court reached an issue not otherwise preserved on the basis that it presented "a pure question of law, in which the proper resolution is beyond any doubt." *Id*. at 1329 n.2.; *see also* Brown v. Alabama Dep't of Transp., 597 F.3d 1160, 1186 (11th Cir. 2010) (internal quotation marks omitted) (reaching issue on the basis that "its proper resolution [was] beyond any doubt"). In addition to these two exceptions for purely legal questions that should be decided to avoid injustice and questions that may be resolved beyond any doubt, the Eleventh Circuit may also exercise its discretion to consider issues not otherwise preserved when the appellant lacks an opportunity to raise the issue in the district court, when the interest of substantial justice is at stake, and when the "issue presents significant questions of general impact or of great public concern." *Virone*, 612

brief even to allege an error waives the right to relief based upon that allegation,"[84] including those cases "where a litigant 'fail[s] to elaborate or provide any citation of authority in support of the . . . allegation.'"[85] In *Jones v. Secretary, Department of Corrections*,[86] the Eleventh Circuit applied these rules of waiver to deny a habeas petitioner's application for a certificate of appealability in a case of apparent first impression for the circuit.[87] Although the court construed the application as arguing with sufficient specificity four of the grounds the petitioner attempted to raise, the court declined others on the basis that the petitioner did "not provide facts, legal arguments, or citations of authority that explain[ed] why he [was] entitled to a certificate on those other grounds."[88]

Waivers, however, can themselves be waived.[89] In *Howard v. Walgreen Co.*,[90] also a case of apparent first impression, the court concluded that the issue of the improper inclusion of additional grounds for the granting of a post-judgment motion for a judgment as a matter of law–as compared with the grounds relied on in the pre-judgment motion–can be forfeited by the non-moving party's failure to object to the inclusion of the additional grounds.[91] In general, the failure to raise a ground in a prejudgment motion for judgment as a matter of law waives the right to present that ground in a post-judgment motion for judgment as a matter of law.[92] In *Howard*, however, the court decided that the non-moving party forfeited its right to raise the issue of waiver on appeal by failing to object to the post-judgment motion on this basis, relying on the holdings of the other circuit courts of appeals that have

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F.3d at 1329 n.2 (quoting Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 361 (11th Cir. 1984)).

84. Jones v. Sec'y, Dep't of Corr., 607 F.3d 1346, 1353-54 (11th Cir. 2010).

85. *Id*. at 1354 (alteration in original) (omission in original) (quoting Flanigan's Enters., Inc. v. Fulton Cnty., 242 F.3d 976, 987 n.16 (11th Cir. 2002), *superseded by statute*, FULTON CNTY., GA., CODE § 18-79(17) (2001), *as recognized in* Flanigan's Enters., Inc. v. Fulton Cnty., 596 F.3d 1265, 1274 (11th Cir. 2010)).

86. 607 F.3d 1346 (11th Cir. 2010).

87. *Id.* at 1354-55. The court held last year, in *Pardo v. Secretary, Florida Department of Corrections*, 587 F.3d 1093 (11th Cir. 2009), that a petitioner that failed to raise an issue in an application for a certificate had waived that issue for purposes of presenting it on appeal. *Id*. at 1103. The court, however, does not appear to have previously addressed the question of the level of specificity required to avoid the waiver of issues a petitioner has at least attempted to allege.

88. *Jones*, 607 F.3d at 1353.

89. *See*, *e.g.*, *supra* notes 74-80 and accompanying text (discussing *Advanced Bodycare Solutions, L.L.C. v. Thione Int'l, Inc.*, 615 F.3d 1352 (11th Cir. 2010)).

90. 605 F.3d 1239 (11th Cir. 2010).

91. *Id*. at 1243-44.

92. *See id*. at 1243.

considered this issue.[93] "All of our sister circuits confronted with the issue have held that when, as here, a party fails to raise the inadequacy of a Rule 50(a) motion in response to a Rule 50(b) motion, that party is precluded from raising the issue on appeal."[94]

In *United States v. Pilati*,[95] the Eleventh Circuit held that waiver can also occur when a party fails to present an issue to the district court in those cases when the district court is acting in an appellate capacity in a criminal case tried to a magistrate judge, which was an issue of first impression for the circuit.[96] In particular, a criminal defendant can consent to trial before a magistrate judge,[97] and that defendant is thereafter entitled to an appeal to the district court, when the remedy is not a trial de novo, but for review in the district court that is equivalent to review in a court of appeals.[98] Any subsequent appeal from the district court to the Eleventh Circuit is a second-tier appeal, and after *Pilati* a failure to raise an issue on appeal to the district court waives that issue for purposes of appeal to the Eleventh Circuit as well.[99]

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. "In even moderately close cases, the standard of review may be dispositive of an appellate court's decision."[100]

Although the Eleventh Circuit clarified issues relating to the standard of review in other contexts during this survey period,[101] in *United*

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93. *Id*.
94. *Id*.
95. 627 F.3d 1360 (11th Cir. 2010).
96. *Id*. at 1363-64.
97. *See* FED. R. CRIM. P. 58(b)(3)(A).
98. *See* 18 U.S.C. § 3402 (2006); *see also* FED. R. CRIM. P. 58(g)(2)(D).
99. *See Pilati*, 627 F.3d at 1364.
100. News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1187 (11th Cir. 2007).
101. *See, e.g.,* Thompson v. RelationServe Media, Inc., 610 F.3d 628, 636-39 (11th Cir. 2010) (holding appellate review of sanctions under the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), is conducted under the same abuse of discretion standard as under F.R.C.P. 11, but under PSLRA district courts must make highly specific findings of fact as to any alleged sanctionable conduct, and absent such findings, the Eleventh Circuit will remand for their entry to properly review sanctions decisions); Richardson v. Johnson, 598 F.3d 734, 738-40 (11th Cir. 2010) (holding sua sponte dismissal of prisoner's in forma pauperis claims against prison guard for failure to serve guard, who was no longer working

States v. Irey,[102] the court, in the wake of *Gall v. United States*,[103] rendered its most important decision to date elaborating on the standard for reviewing federal sentencing decisions.[104] The holding in *Gall* requires that an appellate court apply an abuse of discretion standard to such decisions in a two-step process.[105] First, the reviewing court should "ensure that the district court committed no significant procedural error."[106] Second, "*Gall* directs that 'the appellate court should then consider the substantive reasonableness of the sentence imposed.'"[107]

In *Irey* a divided en banc panel of the Eleventh Circuit reversed a below guidelines sentence as substantively unreasonable under *Gall's* second step in a child pornography case in which the defendant "raped, sodomized, and sexually tortured fifty or more little girls, some as young as four years of age, on many occasions over a four- or five-year period" and "scripted, cast, starred in, produced, and distributed worldwide some of the most graphic and disturbing child pornography that has ever turned up on the internet."[108] The majority, separate, and dissenting opinions in *Irey* occupy some 113 pages in the *Federal Reporter, Third Series*.[109] This fact alone suggests the struggle an appellate court must sometimes face in making sense of its duty under *Gall* to both defer to the judgment of the district courts in matters of sentencing while at the same time insuring that the district courts do not abuse the great discretion that they have in these matters. This fact also suggests that *Irey* is not really amenable to the ready summary appropriate for a survey such as this Article.

Nevertheless, at the risk of greatly oversimplifying what *Irey* means, it is fair to say that, at its core, *Irey* emphasizes that a district court can abuse its discretion when it improperly weighs or balances[110] the evidence relevant to the statutory factors a district court is to consider

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at the prison, was abuse of discretion under standard of review recognized in *Rance v. Rocksolid Granit USA, Inc.*, 583 F.3d 1284, 1286 (11th Cir. 2009), in a case where a prisoner provided sufficient information to identify guard, and there was no evidence that server of process could not have verified guard's current address with reasonable effort).

102. 612 F.3d 1160 (11th Cir. 2010) (en banc).

103. 552 U.S. 38 (2007).

104. *Irey*, 612 F.3d at 1188-89.

105. *Gall*, 552 U.S. at 51.

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

107. *Id.* at 1190 (quoting *Gall*, 552 U.S. at 51).

108. *Irey*, 612 F.3d at 1166.

109. *See id*. at 1165, 1278.

110. *See id.* at 1189, 1192-94.

in passing sentence.[111] Accordingly, the Eleventh Circuit may conclude that a district court abuses its discretion, not only if the district court finds facts that are unsupported by the record[112] or if the district court ignores undisputed evidence that is relevant to those factors,[113] but also if the district court improperly weighs the evidence relevant to the balancing of those factors, a key issue in *Irey*, in which many of the district court's underlying findings of fact were credited.[114]

The dissenters in *Irey* felt that such an approach, though couched in terms of review for abuse of discretion, actually constituted a resentencing by the majority[115] that was at odds with the deferential standard of review for abuse of discretion: "[A]n appellate court's reweighing of the evidence or giving the facts a different construction–to grant something in the record more or less value . . . and so to conclude that the record overall weighs more heavily for a higher sentence–smacks of a kind of *de novo* review . . . ."[116]

In any event, as the first en banc opinion to overturn a sentence under *Gall* on the basis of substantive unreasonableness,[117] *Irey* is the most authoritative statement of the law of the Eleventh Circuit to date on this issue. *Irey* accordingly deserves the careful attention of any lawyer challenging a defendant's federal sentence in the Eleventh Circuit.

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111. *See id.* at 1184 n.13. The relevant factors are delineated in 18 U.S.C. § 3553(a) (2006) and include such matters as the history and characteristics of the defendant and the seriousness of the offense. *See Irey*, 612 F.3d at 1184 n.13.

112. *See id.* at 1198-99. The Eleventh Circuit noted that "[t]he factual problem is . . . with the district court's implicit finding that child pornography . . . caused [the defendant] to sexually abuse children" but declined to disturb this "clearly erroneous finding" given the Government's failure to challenge it. *Id*.

113. *See id*. at 1190 (holding that "[t]he failure to mention facts may well reflect the district court's judgment that those facts are not important, but the importance of facts in light of the § 3553(a) factors is not itself a question of fact but instead is an issue of law").

114. *See id*. at 1201. After crediting the clearly erroneous finding that pedophiles are not acting in a "purely volitional" way when they commit their crimes because the Government did not challenge this finding, the Eleventh Circuit concluded that this "assumed fact cannot reasonably carry much weight" in assessing the 18 U.S.C. § 3553(a) factor relating to the nature and circumstances of the offense and the defendant's history and characteristics. *Id*.

115. *Id*. at 1226 (Tjoflat, J., concurring specially in part and dissenting in part) (concluding "we have assumed the role of resentencer").

116. *See id*. at 1272 (Edmondson, J., dissenting).

117. *Id*. at 1194. The Eleventh Circuit noted that there had been only been four such cases prior to *Irey*, and they were all panel decisions. *Id*. (citing United States v. Livesay, 587 F.3d 1274, 1278-79 (11th Cir. 2009); *Pugh*, 515 F.3d at 1183; United States v. Martin, 455 F.3d 1227, 1238-39 (11th Cir. 2006); United States v. Crisp, 454 F.3d 1285, 1290 (11th Cir. 2006)).