FEDERAL DEFENDER
MIDDLE DISTRICT OF FLORIDA

DONNA LEE ELM
FEDERAL DEFENDER

JAMES T. SKUTHAN
FIRST ASSISTANT

ROSEMARY CAKMIS
APPELLATE CHIEF

APPELLATE MANUAL

GUIDE TO CRIMINAL APPEALS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WITH RULE AMENDMENTS EFFECTIVE AUGUST 1, 2016
(AND AMENDMENTS PROPOSED TO TAKE EFFECT DECEMBER 1, 2016)

ORLANDO DIVISION
Seaside Plaza - Suite 300
201 South Orange Avenue
Orlando, Florida 32801
Telephone 407 648-6338
Facsimile 407 648-6095

TAMPA DIVISION
Park Tower - Suite 2700
400 North Tampa Street
Tampa, Florida 33602
Telephone 813 228-2715
Facsimile 813 228-2562

JACKSONVILLE DIVISION
BB&T Tower - Suite 1240
200 West Forsyth Street
Jacksonville, Florida 32202
Telephone 904 232-3039
Facsimile 904 232-1937

FT. MYERS DIVISION
Kress Building - Suite 301
1514 Broadway Street
Ft. Myers, Florida 33901
Telephone 239 334-0397
Facsimile 239 334-4109

OCALA DIVISION
Suite 102
201 S.W. Second Street
Ocala, Florida 34471
Telephone 352 351-9157
Facsimile 352 351-9162

PREFACE

The Federal Defender's Office for the Middle District of Florida created an appellate manual in 1999 to assist federal criminal defense practitioners representing indigent criminal defendants in the Eleventh Circuit Court of Appeals. Since then, our appellate division, past and present, has revised the manual many times to keep up with the ever changing appellate rules and procedures. The most recent revision includes the amendments to the Federal Rules of Appellate Procedure and Eleventh Circuit Rules that took effect on August 1, 2016, and the proposed amendments that will take effect on December 1, 2016, if approved by the court.

This manual summarizes the procedural rules that our appellate division most frequently deal with in representing indigent criminal defendants on appeal.

Tables/Charts are included to outline rules and requirements at a glance.

{ Practical practice tips are noted in response to procedural questions our appellate division often encounters. }

If you have feedback or suggestions about how to improve this manual, or if you have additional questions about representing indigent criminal defendants in the Eleventh Circuit, please contact anyone in our appellate division.

OFFICE OF THE FEDERAL DEFENDER, MDFL
APPELLATE DIVISION

Adeel Bashir
Aliza Bloom
Meghan Boyle
Rosemary Cakmis
Robert Godfrey
Allison Guagliardo
Conrad Kahn
Ali Kamalzadeh
Steven Kruer
Adam Labonte
Steve Langs
Danli Song
Michelle Yard

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I. ELEVENTH CIRCUIT OVERVIEW

The Eleventh Circuit is not the largest federal circuit in terms of geography or number of judges. The Eleventh Circuit Court of Appeals is, however, one of the busiest federal appellate courts. Yet the median time from the filing of the notice of appeal to the disposition of the appeal is only slightly more than seven months. *See* http://www.uscourts.gov/statistics-reports.

To effectively represent indigent criminal defendants in the Eleventh Circuit, counsel should be familiar with the court, the clerk's office, and the applicable rules.

A. Court

See 11th Cir. R. 47; IOP 47(2)

The Eleventh Circuit is authorized to have twelve active judges, but one seat is currently vacant. In addition to the eleven active judges, eight senior judges maintain offices and staff commensurate with the judicial work they choose to do. The senior judges also sit on oral argument panels and participate in the administrative and non-oral-argument work of the court.

Active Eleventh Circuit Judges	**Senior Eleventh Circuit Judges**
The Honorable Edward Carnes, Chief Judge	The Honorable James C. Hill
The Honorable Gerald Bard Tjoflat	The Honorable Peter T. Fay
The Honorable Frank M. Hull	The Honorable Phyllis A. Kravitch
The Honorable Stanley Marcus	The Honorable R. Lanier Anderson
The Honorable Charles R. Wilson	The Honorable J. L. Edmondson
The Honorable William H. Pryor, Jr.	The Honorable Emmett R. Cox
The Honorable Beverly B. Martin	The Honorable Joel F. Dubina
The Honorable Adalberto Jordan	The Honorable Susan H. Black
The Honorable Robin S. Rosenbaum	
The Honorable Julie E. Carnes	
The Honorable Jill A. Pryor	

In addition to the active and senior judges of the Eleventh Circuit, visiting judges from district and circuit courts throughout the United States frequently sit on the three-judge panels that decide appeals in the Eleventh Circuit. *See generally* 11th Cir. R. 34-2.

If the case is decided without oral argument, the parties will not know who is on the panel deciding their case until they receive the decision. But if the court grants oral argument, the parties can find out who the members of the panel will be by calling the oral argument clerk two weeks prior to the argument. *See* I.O.P. 34(7).

B. Clerk of Court

David J. Smith, Clerk of Court.

Mailing Address: All mail—e.g., non-ECF filings, correspondence, and paper copies of documents when required, *see infra* at III.B. (Filing & Service)—should be sent to:

U.S. Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Except, if counsel receives an Oral Argument calendar assigning an appeal to a specific day in Miami, paper copies may be sent to the clerk's satellite office in Miami up to the date of Oral Argument.

U.S. Court of Appeals
For the Eleventh Circuit
(Satellite Office)
99 N.E. 4th Street
Miami, Florida 33132

Physical Address: In-person filings and courier deliveries should be directed to the clerk's office behind the courthouse at:

John C. Godbold Federal Building
Court of Appeals Administrative Offices
96 Poplar St., N.W.
Atlanta, GA 30303

Deputy clerks are assigned to handle appeals based on Case Management Section and the letter at the end of the appeal number.

Case Management Section 1—commonly called "Team 1"—handles appeals from docketing through the briefing schedule. During this phase, a single letter (A-J) follows the appeal number.

Case Management Section 2—commonly called "Team 2"—handles appeals from briefing through conclusion. During this phase, double letters (AA-JJ) follow the appeal number.

Although the deputy clerk assigned to a particular team and letter may change, the telephone numbers assigned to the teams and letters (as reflected in the chart on the next page) should remain constant.

Telephone Numbers for Sections/Letters/ Deputy Clerks

Case Management Section (Team) 1 Main Line (404) 335-6135			**Case Management Section (Team) 2 Main Line (404) 335-6130**		
CaCelia Wiliams Supervisor		(404) 335-6219	Andrea Ware Supervisor		(404) 335-6218
Regina Veals Assistant Supervisor		(404) 335-6163	Regina Veals Assistant Supervisor		(404) 335-6163
Appeals ending in	**Deputy Clerk**	**Direct Line** (404) 335-	**Appeals ending in:**	**Deputy Clerk**	**Direct Line** (404) 335-
A	Denise O'Guin	6188	**AA**	David Thomas	6169
B	Melanie Gaddis	6187	**BB**	Carol Lewis	6179
C	Walter Pollard	6186	**CC**	Joe Caruso	6177
D	Scott O'Neal	6189	**DD**	Elora Jackson	6173
E	Gloria Powell	6184	**EE**	Sandra Brasselmon	6181
F	Gerald Frost	6182	**FF**	Janet Mohler	6178
G	Bryon Robinson	6185	**GG**	Eleanor Dixon	6172
H	Dionne Young	6224	**HH**	Tonya Searcy	6180
J	Davina Burney-Smith	6183	**JJ**	Julie Cohen	6170

The ECF help desk also is available to assist counsel at (404) 335-6125, from 8:30 am to 5:00 pm, Monday through Friday, except federal holidays.

C. Applicable Rules

Federal Rules of Appellate Procedure (FRAP)
Available at http://www.ca11.uscourts.gov

The FRAP govern the procedural aspects of appellate practice in *all* U.S. Circuit Courts of Appeals. Each circuit is authorized to create its own local rules to supplement the FRAP for appeals in that circuit. However, local rules imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with that local requirement. *See* FRAP 47.

Eleventh Circuit Rules (11th Cir. R.),
Internal Operating Procedures (IOP),
and the Addenda to Eleventh Circuit Rules
are available at http://www.ca11.uscourts.gov

The Eleventh Circuit Rules are located at the end of the corresponding FRAP and are followed by the Eleventh Circuit's Internal Operating Procedures (IOPs). The Eleventh Circuit also posts the Addenda to its Rules on its website. The most critical Addenda for our purposes are Addendum Four and Addendum Eight.

- Addendum Four contains the Eleventh Circuit Criminal Justice Act (CJA) Plan and Guidelines for Counsel Supplementing the Eleventh Circuit CJA Plan, which address the duties of *court-appointed and retained* counsel.
- Addendum Eight addresses attorney conduct/misconduct, discipline, and competency.

II. COUNSEL'S DUTIES

Once a retained or court-appointed attorney undertakes representation of a criminal defendant in a district court within the Eleventh Circuit, that attorney is responsible for the appeal in the Eleventh Circuit, unless/until granted leave to withdraw.

The Sixth Amendment right to effective assistance of counsel continues through the criminal defendant's appeal. Counsel who fails to file a notice of appeal after being asked to appeal by a criminal defendant is ineffective. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Additionally, the FRAP and the Eleventh Circuit Rules & Addenda impose various general and specific duties upon criminal defense counsel—*both court-appointed and retained counsel*.

Before accepting a court appointment or otherwise appearing on behalf of a criminal defendant in a district court within the Eleventh Circuit, all retained & court-appointed attorneys are urged to read FRAP 46 and the corresponding Eleventh Circuit Rules & Addenda, especially Addendum Four and Addendum Eight, in their entirety.

The Eleventh Circuit CJA Plan and the Guidelines for Counsel Supplementing that Plan set out the duties of *all* attorneys—*retained and court-appointed*. *See* Addendum Four.

The district courts within the Eleventh Circuit also have CJA Plans that apply in appeals from those districts except insofar as the District Court Plan is inconsistent with some provision of the Eleventh Circuit Plan, in which case the Eleventh Circuit Plan controls. *See* Addendum Four, § (b). The CJA Plan for the U.S. District Court for the Middle District of Florida is available at http://www.flmd.uscourts.gov/forms/Attorney.

The most frequently applied rules relating to counsel's duties are outlined below.

A. Bar Admission

See FRAP 46 & corresponding Eleventh Circuit Rules

FRAP 46 and the corresponding Eleventh Circuit Rules and IOPs address admission to the circuit court bar, renewal of bar membership, admission for particular proceedings, *pro hac vice* admission, entry of appearance, attorney discipline, and appointment and withdrawal of counsel.

Attorneys practicing before the Eleventh Circuit must be admitted to the Eleventh Circuit Bar. *See* 11th Cir. R. 46-1. Court-appointed counsel are "admitted" to the Eleventh Circuit Bar for the particular proceeding in which they are appointed without the need to apply to or pay the admission/renewal fee for the Eleventh Circuit Bar. *See* 11th Cir. R. 46-3.

Effective December 1, 2016, Eleventh Circuit Rule 46-2 will delete the existing renewal schedule and require attorneys to submit their renewal forms and payments electronically through CM/ECF every five years from the date of the attorney's admission.

B. Conduct & Competence

See Addendum Eight

Addendum Eight to the Eleventh Circuit Rules addresses attorney misconduct subject to discipline and attorney incompetence subject to remedial action.

In addition to the powers derived from statutes, rules of procedure, and rules of court, the Eleventh Circuit has the inherent power to maintain control over proceedings conducted before it. Those powers are not limited by any provision in Addendum Eight. *See* Addendum Eight, Prefatory Statement.

Attorney Misconduct: The first seven Rules in Addendum Eight discuss attorney misconduct and potential discipline. *See* Addendum Eight, Rules 1-7. A violation of the Rules of Professional Conduct constitutes attorney misconduct. Attorneys practicing in the Eleventh Circuit are governed by the FRAP, the Eleventh Circuit Rules, the American Bar Association Model Rules of Professional Conduct (ABA Rules), and the rules of professional conduct adopted by the highest court of the state in which the attorney is admitted to practice, except that the ABA Rules control if the state rules are inconsistent with the ABA Rules. *See* Addendum Eight, Rule 1.A.

If alleged attorney misconduct is brought to the Eleventh Circuit's attention, the court may: (1) dispose of the matter through the use of its inherent, statutory, or other powers; (2) refer the matter to an appropriate state bar agency for investigation and disposition; (3) refer the matter to the court's Committee on Lawyer Qualifications and Conduct; or (4) take any other action the court deems appropriate. These procedures are not mutually exclusive.

Discipline may include disbarment, suspension, reprimand, monetary sanctions (including payment of the costs of disciplinary proceedings), removal from district court CJA panels, removal from the Eleventh Circuit's roster of attorneys eligible for practice before the court and for appointment under the CJA, or any other sanction the court may deem appropriate.

Attorney Incompetency: Rule 8 discusses attorney incompetency and potential remedial action. *See* Addendum Eight, Rule 8. An attorney's incompetency is at issue if "it appears that [the] attorney, for whatever reason, is failing to perform at an adequate level of competency necessary to protect the interests of the attorney's client[.]" *See* Addendum Eight, Rule 8.A.

Competency matters are not disciplinary matters, and thus are not subject to the same procedures. If it appears that an attorney is not performing competently, for whatever reason, the Eleventh Circuit "may take any remedial action that it deems appropriate including but not

limited to referral of the attorney to appropriate institutions and professional personnel for assistance in raising the attorney's level of competency." *See* Addendum Eight, Rule 8.A-B.

C. Continuing Representation

See Addendum Four, §§ (d)(2), (e)(1); 11th Cir. R. 46-10

Once any attorney—*appointed or retained*—undertakes representation of a criminal defendant in the district court, that attorney must continue representation through the appeal until *either* (i) successor counsel is appointed or appears on the defendant's behalf, *or* (ii) the Eleventh Circuit grants the attorney leave to withdraw.

D. Advising Clients

See Addendum Four, § (f)(4), (5)

Appointed counsel must advise their clients of the right to appeal without prepayment of fees and costs or giving security therefor and without filing the affidavit of financial inability to pay such costs required by 28 U.S.C. § 1915(a).

If the Eleventh Circuit decides the appeal adversely to the defendant, in whole or in part, counsel must advise the client of the right to file a petition for panel rehearing, for rehearing en banc, and for a writ of certiorari. *See infra* at II.K (Rehearing/Certiorari).

E. Perfecting the Appeal

See Addendum Four, §§ (d)(2), (e)(1); 11th Cir. R. 46-10

If the defendant states s/he wants to appeal,
counsel *must* file a notice of appeal,
***even if* the defendant entered into a plea agreement with an appeal waiver**
and no errors occurred in the district court.

Once a criminal defendant states s/he wants to appeal, counsel—whether appointed and retained—must file the notice of appeal, do everything necessary to perfect the appeal, and continue to represent the defendant on appeal until relieved by new counsel or court order. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Federal criminal defense practitioners are strongly urged to personally visit their clients *after* sentencing to discuss the pros & cons of appeal and the client's decision concerning whether to appeal—even if the client said s/he did not want to appeal *before* sentencing. And it is wise to confirm the client's decision by sending the client a follow-up letter memorializing the client's decision to appeal or not appeal.

F. Withdrawing As Counsel

See Addendum Four

In general, if counsel represented a criminal defendant in the district court, but does not want to continue the representation on appeal, counsel must file a motion to withdraw. If the defendant is indigent, counsel also should request appointment of substitute counsel.

Federal Defender Attorneys should move on behalf of the Federal Defender's Office for the Federal Defender's Office to withdraw, lest the court misconstrue the motion and allow the particular attorney to withdraw while leaving the office (and another Federal Defender Attorney) on the case.

Though basically the same, the rules applicable to court-appointed and retained counsel differ slightly, as explained below.

1. Court-Appointed Counsel

See Addendum Four, §§ (d) & (e)

Court-appointed counsel may move either the trial or appellate court for leave to withdraw on appeal, but counsel must continue to represent the defendant until the motion is granted. *See infra* at VI. H (Motions to Withdraw as Counsel, discussing 11th Cir. R. 27-1(a)(7)).

Defendants also may move the Eleventh Circuit to relieve and replace the attorney previously appointed by the trial court. *See* Addendum Four, § (e)(3).

The Eleventh Circuit may accept the trial court's previous finding regarding the defendant's financial inability to obtain representation and appoint appellate counsel without further proof. *See* Addendum Four, § (d)(5).

2. Retained Counsel

See Addendum Four, §§ (d)(2), (e)

Counsel retained in the trial court may move the trial or appellate court for leave to withdraw on appeal, but counsel must continue to represent the defendant until the motion is granted. *See infra* at VI. H (Motions to Withdraw as Counsel, discussing 11th Cir. R. 27-1(a)(7)).

The trial court may appoint appellate counsel after conducting an *in camera* review of the defendant's financial circumstances and the fee arrangements between the defendant and retained trial counsel. *See* Addendum Four, § (d)(2).

In the Eleventh Circuit, appointment of appellate counsel may be requested by filing an appropriate motion supported by an affidavit that substantially complies with Form 4 in the Appendix to the FRAP. *See* Addendum Four, §§ (d)(2), (e)(1).

G. Disclosure

See Addendum Four, § (d)(5)

Court-appointed attorneys have a continuing duty to disclose to the court any change in the defendant's circumstances that might render the defendant ineligible for continued court-appointed representation.

H. Unauthorized Payments

See Addendum Four, § (f)(6)

Court-appointed counsel shall not accept any payment from or on behalf of the person that counsel represents without prior authorization by a United States circuit judge.

I. Copies to Client

See Addendum Four, § (f)(2)

Court-appointed counsel shall provide their client with a copy of the Eleventh Circuit's decision when issued, and, upon written request, with a copy of appellate motions and briefs.

J. Oral Argument

See Addendum Four, § (f)(3)

If oral argument is scheduled, appointed counsel shall appear unless otherwise directed by the court. *See also infra* at X (Oral Argument).

K. Rehearing/Certiorari

See Addendum Four, § (f)(5)

The DUTY TO INFORM the client of the right to seek further review of an adverse decision on appeal is MANDATORY.

The DUTY TO FILE a petition for further review DEPENDS on whether counsel determines sufficient grounds exist.

In every appeal decided adversely to counsel's client, upon receiving the adverse decision, counsel *must inform* the client of the right to petition the Eleventh Circuit for panel rehearing and/or rehearing en banc and to petition the U.S. Supreme Court for a writ of certiorari.

Counsel *must file* a petition for rehearing, a petition for rehearing en banc, or a petition for a writ of certiorari if requested to do so in writing by the client, *but only if* sufficient grounds exist in counsel's considered judgment.

To properly advise the client in the event of an adverse decision, counsel must be familiar with the grounds for Rehearing, *see* FRAP 40; Rehearing en banc, *see* FRAP 35; and Certiorari, *see* S. Ct. R. 10.

If counsel concludes that there are not sufficient grounds to seek further review of a type requested by the client, counsel shall so inform the client and shall advise the client that such review will not be sought by counsel. In such circumstances, counsel is not required to move to withdraw.

If the client files a *pro se* petition for writ of certiorari, and the Supreme Court grants certiorari and remands the matter to the Eleventh Circuit for further consideration, counsel shall resume representation of the client in proceedings on remand before the Eleventh Circuit.

III. General Rules For Appellate Pleadings

The discussion below focuses on how to compute due dates and how to file and serve *most* appellate pleadings *in general*. Additional considerations regarding due dates, filing, and service of *specific pleadings* are discussed in connection with the particular pleading, *infra*.

A. Computing Due Dates

See FRAP 26

Most appellate due dates are triggered by an event. And the general practice in the Eleventh Circuit is to state periods of time in terms of days, as opposed to hours. If you receive an order with a deadline stated in terms of hours instead of days, refer to FRAP 26(a)(2), which explains how to compute due dates when the period is stated in hours.

Calculating Due Dates Based On Days & Triggered By Events

Rule	Example
Do NOT Count the day of the event that triggers the period, i.e., Day 1 is the day after the triggering event.	The 14-day period to file appellant's reply brief is triggered by the date in the certificate of service in appellee's answer brief. Day 1 is the day after "service" (the date in the certificate of service) of the answer brief.
Do Count every day (after the day of the triggering event), including Saturdays, Sundays, & legal holidays.	If appellee's answer brief is served on Friday, Day 1 is Saturday, Day 2 is Sunday, etc.
When a due date falls on a Saturday, Sunday, or legal holiday, the due date becomes the next business day.	If the 14th day after service of appellee's answer brief is Saturday, appellant's reply brief would be due Monday.
Add 3 days* to the due date if (a) the event that triggers the due date is the date a document is served, and (b) service was via postal mail (OR SERVICE BY ECF UNTIL DEC. 1, 2016).	UNTIL DEC. 1, 2016, if appellee's answer brief was served by postal mail or ECF, the reply brief would be due 17 days after the date in the answer brief's certificate of service.

*** EFFECTIVE DECEMBER 1, 2016,**
THE 3 ADDITIONAL DAYS WILL BE ELIMINATED FOR DOCUMENTS FILED/SERVED VIA ECF.

The 3 additional days were granted originally because most documents were served by U.S. Mail, which took several days to arrive. Those 3 "mailing" days, therefore, are not allowed when the document triggering the due date is hand-delivered.

Although ECF eliminated the delay between filing and service, the rules continued to allow the 3 additional "mailing" days when the triggering document was electronically served, in an effort to encourage parties to accept electronic filing and service. But electronic filing and service are now mandatory.

Hence, effective December 1, 2016, the additional 3 "mailing days" will be eliminated for triggering documents that are electronically served via ECF. *See* Pending Amendment to FRAP 26(c).

Unless a particular court order specifies that a document is due by a certain time, e.g., 5:00 pm, the time that the "Last Day" or due date for filing the document ends depends on how and where the pleading is filed.

Pleadings electronically filed in the district court—e.g., notices of appeal—must be filed before midnight (by 11:59 pm) in the district court's time zone.

For example, notices of appeal must be filed in the U.S. District Court for the Middle District of Florida by the due date at 11:59 pm Eastern Time.

Pleadings electronically filed in the court of appeals must be filed before midnight (by 11:59 pm) in the time zone for the principal office of the circuit clerk of court.

For example, in the Eleventh Circuit, pleadings must be filed by the due date at 11:59 pm Eastern Time because the principal office of the Eleventh Circuit Clerk is in Atlanta.

When uploading a brief in the Eleventh Circuit from a place outside the time zone in Atlanta (Eastern Time), remember that the time in Atlanta controls, not the time in the time zone where you are.

Legal Holidays When computing time under FRAP 26, the following are considered legal holidays: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. *See* FRAP 26(a)(6).

Inaccessibility If a document is due on a day on which the weather or other conditions make the clerk's office inaccessible, the due date is the next working day. But this is an extremely rare occurrence. IOP 26(2) discusses the Eleventh Circuit policy on inaccessibility of the clerk's office due to inclement weather or other extraordinary conditions. If the Chief Judge determines that the clerk's office is inaccessible due to such conditions, filings due on that day will automatically be processed as timely if

received on the day the clerk's reopens for business. No special application by the party is needed. However, local conditions at the place from which the filings are sent do not ordinarily trigger this provision, except upon application to the clerk and court order.

When in doubt about a particular due date, check with the clerk's office.

B. Filing & Service

See FRAP 25, corresponding Eleventh Circuit Rules,
& Eleventh Circuit Guide to Electronic Filing

Filing and serving pleadings in all federal appellate courts are generally governed by FRAP 25, which was last amended in 2009. Although that rule references several methods of service—e.g., via mail, electronic means, and personal or courier delivery—it also authorizes circuit courts to require electronic filing. *See* FRAP 25(a)(2)(D). The Eleventh Circuit has done that.

The Eleventh Circuit mandates electronic filing and service via the Electronic Case Files (ECF) system in accordance with the procedures set forth in the Eleventh Circuit Guide to Electronic Filing.

1. Mandatory Electronic Filing & Exemptions

Counsel must electronically file and serve *almost** all documents in the Eleventh Circuit using the Electronic Case Files (ECF) system, in accordance with the procedures set forth in the Eleventh Circuit Guide to Electronic Filing (Guide). *See* 11th Cir. R. 25-3, General Order 38, & Guide at 4.1.

* **The following documents are exempted from electronic filing:**

(1) Documents filed by a party who is not represented by counsel;

(2) Petitions for permission to appeal under FRAP 5;

(3) Petitions for review of an agency order under FRAP 15;

(4) Petitions for a writ of mandamus, writ of prohibition, or other extraordinary writ under FRAP 21;

(5) Documents initiating an original action in the court of appeals;

(6) Applications for leave to file a second or successive habeas corpus petition or motion to vacate, set aside or correct sentence;

(7) Documents filed under seal or requested to be filed under seal; and

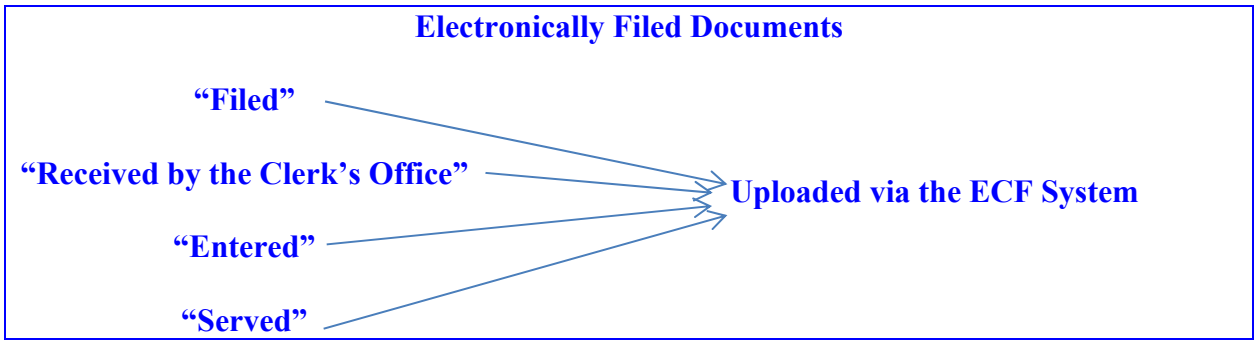
(8) Vouchers and associated documents pertaining to a claim for compensation and reimbursement of expenses concerning representation pursuant to the CJA or Addendum Five to the Eleventh Circuit Rules. *See* Guide at 4.5.

For good cause, counsel may move the court for exemption from the mandatory electronic filing requirement.

To understand filing and service in the Eleventh Circuit, the Eleventh Circuit Rules must be read in conjunction with the Guide, which can be downloaded from the Eleventh Circuit website. The Guide authoritatively explains the following:

1. Definitions
2. Registration/Passwords
3. Signatures
4. Mandatory Electronic Filing/Exceptions
5. Entry on the Docket/Official Court Record
6. Filing Deadlines/Technical Failure
7. Service of Documents
8. Access to Documents
9. Documents under Seal
10. Briefs/Petitions for Rehearing/Petitions for En Banc Consideration
11. Appendices
12. Privacy Protection/Redactions
13. Contacts

2. "Filed," "Received by the Clerk's Office," "Served," "Entered"



You do *not* need to serve paper copies of any electronically filed documents —including briefs, appendices, and petitions— on any attorney listed in the ECF system, including Assistant U.S. Attorneys.

An electronically filed document is "filed," "served," "received by the clerk's office," and "entered" onto the official docket when it is uploaded via the ECF system. *See* Guide at 5.1.

When a document is uploaded via the ECF system, a docket entry results and the ECF system automatically generates and emails a **Notice of Docket Activity (NDA)**. All counsel listed in the ECF system are "served" with electronically filed documents by the NDA, which sets forth the time of filing, the text of the docket entry, the names of the attorneys required to receive notice of the filing, the name of the person who filed the document, the type of document, and a hyperlink to the filed document. The same applies to documents filed by the court.

Registration to use the ECF system constitutes consent to receive electronic service of all documents, as well as correspondence, orders, and opinions issued by the court. But if the certificate of service includes someone who is *not* listed in the ECF system, e.g., the defendant, that person must be served a paper copy of the pleading in accordance with FRAP 25.

Procedural questions concerning docketing specific events, including failing to receive an NDA after transmitting a document to the ECF system, should be directed to the Eleventh Circuit ECF help desk at 404-335-6125. The ECF help desk is available while the clerk's office is open.

3. Technical Difficulties

Uploading the wrong document into your case or uploading the right document into the wrong case does *not* constitute compliance with filing deadlines. If this happens, the clerk will send counsel notice of the error. If counsel corrects the error within 5 days of the clerk's notice, a motion to file the document out of time is not required. After 5 days, counsel must file a motion for leave to file the document out of time. *See* Guide at 6.2.

When a correction to an electronically filed document (e.g., motion, brief, or appendix) is necessary, counsel must upload the entire new document, and not just the corrected pages. *See* Guide at 6.3.

If a filing is untimely as the result of a technical failure, counsel may seek appropriate relief from the court.

To resolve a technical failure that may be attributable to the PACER Service Center or the court, counsel should communicate with the appropriate contact person.

Technical issues such as log-in and password questions, and creating and uploading PDF documents, should be directed to the PACER Service Center help desk at (800) 676-6856 or (210) 301-6440; www.pacer.gov; or PACER Service Center, P.O. Box 780549, San Antonio, TX 78278.

4. Formatting for Electronically Filed Documents

PDF: Electronically filed documents must be in PDF format and, whenever possible, in Text-Searchable PDF generated from an original word-processing file. Documents that are created by scanning are not searchable unless they are processed using optical character recognition software.

Size: The maximum size of a document that may be filed electronically is 25 MB. If a document exceeds 25 MB, it must be filed in separate volumes, each not to exceed 25 MB. *See* Guide at 4.3.

Signatures: All documents must contain a signature. Counsel's use of the assigned log-in and password to submit a document electronically via ECF serves as that attorney's signature on that document for all purposes. Counsel's identity must be reflected at the end of the document by an

e-signature block that includes: *s/attorney's name*, the attorney's name, business address, telephone number, and e-mail address. Graphic and other electronic signatures are discouraged.

If a document is filed on behalf of more than one attorney, requiring multiple attorney signatures, the document must list the names of other attorney signatories by means of an e-signature block ("*s/[attorney's name]*" block) for each attorney. By submitting such a document, the attorney filer certifies that each of the other attorneys has expressly agreed to the form and substance of the document, and that the attorney filer has their authority to submit the document electronically. *See* Guide at 3.2; *see also infra* at VII.B.

Certificate of Service: A certificate of service is required for all documents, including documents that are filed electronically and served by the NDA that the ECF system automatically generates. The NDA does *not* replace the certificate of service required by FRAP 25. *See* Guide at 7.2.

5. Paper Copies

Electronic filing eliminates the need to send the court paper copies,
except for briefs, appendices, and rehearing petitions.

On the day counsel electronically files a brief, appendix, or rehearing petition, counsel also must mail paper copies to the clerk by first-class mail (or other class of mail that is at least as expeditious) with postage prepaid, or dispatch the copies to a third-party commercial carrier for delivery to the clerk within 3 days. *See* FRAP 25(a)(1) & (2)(B) & IOP 25(1). Because these documents are electronically filed with an electronic signature, counsel does *not* need to send the court an "original" with a "wet signature."

Some Rules may seem confusing
because they are still evolving to account for electronic filing and service.
Confusion can usually be resolved
by reference to the Eleventh Circuit Guide to Electronic Filing.

C. Privacy & Redaction

See 11th Cir. R. 25-5

Eleventh Circuit Rule 25-5 first lists five "Personal Data Identifiers"—Social Security Numbers, Names of Minor Children, Dates of Birth, Financial Account Numbers, and Home Addresses—that must not be included in any document filed in the Eleventh Circuit, including exhibits. The Rule explains how to redact these Personal Data Identifiers if they must be included in a document. *See* chart below. Counsel is responsible for redacting such information before filing. If a person files a document containing the person's own information without redaction and not under seal, the person waives the protection of this Rule.

The Rule then lists eight additional items and states parties should "exercise caution" when filing a document containing these items. The Rule, however, does not state how this information is to be redacted. *See* chart below.

Personal Data Identifiers

Personal Data Identifiers That Must Not Be Included In Any Document (including Exhibits) Filed In The Eleventh Circuit	How To Redact These Personal Data Identifiers If They Must Be Included In A Document Filed In The Eleventh Circuit
Social Security Numbers	Only Use The Last 4 Digits
Names of Minor Children	Only Use Initials If A Person Is Under 18
Date of Birth	Only Use The Year
Financial Account Number	Only Use The Last 4 Digits
Home Address	Only Use The City and State

A party filing a document containing Social Security Numbers, Names of Minor Children, Dates of Birth, Financial Account Numbers, Home Addresses, shall file:

(1) a redacted document for the public file, and

(2) either (a) a reference list under seal, or (b) an unredacted document under seal and a motion to file the unredacted document under seal, specifying the type of personal data identifier included in the document and why the party believes that including it in the document is necessary or relevant.

Additional Private Items Warranting Caution

Personal Identifying Number, e.g., Driver's License Number
Medical Records, Treatment and Diagnosis
Employment History
Individual Financial Information
Proprietary or Trade Secret Information
Information Regarding an Individual's Cooperation with the Government
National Security Information
Sensitive Security Information as Described in 49 U.S.C. § 114(s)

If a party files a redacted document that contains any of these eight additional private items, the party must file an unredacted document under seal, along with a motion to file the unredacted document under seal, specifying the item included in the document and why the party believes that including it in the document is necessary or relevant.

Such information is contained in criminal pre-sentence reports, which are sealed, and substantial assistance motions, which are sealed sometimes. Quoting from those documents at length in briefs or motions is discouraged.

If a substantial assistance motion is not already sealed in the district court, you might consider moving to seal it or asking the government to move to seal it.

D. Impermissible Language

See 11th Cir. R. 25-6

Any paper filed with the court must not contain *ad hominen* or defamatory language, or information that would constitute a clearly unwarranted invasion of personal privacy or would violate legally protected interests if publicly disclosed.

If a paper containing such information is filed, the court may take "appropriate action" on motion of a party, or on its own motion without prior notice. Such action may include sealing or striking the document or the language and ordering an explanation from the party who filed the document.

IV. NOTICE OF APPEAL

See FRAP 3, FRAP 4, & corresponding Eleventh Circuit Rules

A. Criminal vs. Civil Appeals

Criminal and civil appeals are handled differently in certain respects, such as the due date for the notice of appeal. Before starting an appeal, check the rules to determine whether the appeal will be considered a civil or a criminal appeal, and then follow the applicable rules.

Criminal appeals include appeals from the judgment and sentence, orders revoking supervised release, and orders entered pursuant to Rule 35 of the Federal Rules of Criminal Procedure (substantial assistance) or 18 U.S.C. § 3582 (retroactive sentencing guideline amendment).

Civil appeals in the Eleventh Circuit include appeals from post-conviction (habeas corpus) proceedings, i.e., proceedings brought under 28 U.S.C. §§ 2241, 2254, or 2255, even though such proceedings are brought to challenge a criminal defendant's conviction and/or sentence of imprisonment. *See* 11th Cir. R. 42-2(a) & 42-3(a).

B. All Notices of Appeal

See FRAP 3 & 4

Where to File

Civil and criminal appeals are initiated by filing a notice of appeal in the district court, *not* in the appellate court. *See* FRAP 3(a), 4(a) & (b).

If the notice of appeal is mistakenly filed in the appellate court, the appellate clerk will simply note when it was received and forward it to the district clerk. *See* FRAP 4(d).

Contents The notice of appeal in all cases must specify:

(i) the party taking the appeal,

(ii) the judgment, order, or part thereof being appealed, and

(iii) the court to which the appeal is taken.

See FRAP 3(c).

FRAP Form 1 is a sample notice of appeal form.

Cross-Appeals The notice of appeal in a cross-appeal has the same contents. The party who files a notice of appeal first is the appellant for purposes of FRAP 28.1 (Cross-Appeals). If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order. *See* FRAP 28.1(b). If the parties agree to modify their designation, they must notify the clerk in writing, upon commencement of the briefing schedule as to who will file the first brief. IOP 28.1(1).

{ Additional requirements for cross-appeals are addressed *infra* at VII.F (Briefs in Cross-Appeals). }

C. Criminal Cases

See FRAP 4(b)

1. Due Date

Defendant's Notice of Appeal	Government's Notice of Appeal
14 days from either:	30 days from either:
(i) entry of the final judgment/order appealed *or* (ii) filing of government's notice of appeal	(i) entry of the final judgment/order appealed *or* (ii) filing of defendant's notice of appeal
See FRAP 4(b)(1)(A)	*See* FRAP 4(b)(1)(B)

{ The U.S. Attorney must obtain the Solicitor General's permission to appeal. If permission has not been granted by the time the notice of appeal is due, the U.S. Attorney usually files a protective notice of appeal and dismisses the appeal later if permission is denied. }

Limited exception
See FRAP 4(b)(3)

The time to file the notice of appeal from a judgment is tolled if one of the following 3 motions is timely filed within 14 days from entry of the judgment:

(i) motion for judgment of acquittal under Fed. R. Crim. P. 29,

(ii) motion for new trial under Fed. R. Crim. P. 33,*

(iii) motion for arrest of judgment under Fed. R. Crim. P. 34.

{ * Under Rule 33, a motion for new trial based on newly discovered evidence may be filed within three years of judgment. Such motions, however, only toll the time to file the notice of appeal if they are filed no later than 14 days after entry of judgment. *See* FRAP 4(b)(3)(A)(ii). }

If one of those three motions is timely filed within 14 days from entry of the judgment, the time to file the notice of appeal is tolled until 14 days after entry of the order disposing of the last such motion or 14 days after entry of the judgment, whichever is later.

"Filed"

"Filed" means received in the district clerk's office, not merely placed in the mail (except for notices of appeal filed by inmates of correctional institutions as provided in FRAP 4(c)). *See* FRAP 4(b)(1)(A) & IOP4(1); FRAP 25(a)(2)(A).

► ***But a notice of appeal "filed" via ECF is "filed" when uploaded.*** ◄

If a notice of appeal is filed after the district court announces a decision, but before the order/judgment is entered, the notice of appeal is treated as being timely filed on the date of and after the entry. *See* FRAP 4(a)(2) & (b)(2).

{Prison inmate filings are treated differently. *See* FRAP 4(c). }

"Entry"

"Entry" of final judgment in criminal cases occurs when the clerk enters the judgment on the docket. *See* FRAP 4(b)(6).

{ The definition of "entry" in a civil case is more complicated. *See* FRAP 4(a)(7)}

Example

Monday	Tuesday	Wed.	Thurs.	Friday	Sat.	Sun.
Sentencing Hearing	Judgment signed/filed	Judgment entered on docket	Day 1	Day 2	Day 3	Day 4
Day 5	Day 6	Day 7	Day 8	Day 9	Day 10	Day 11
Day 12	Day 13	Day 14 notice of appeal must be filed				

It is easier to calendar the due date for the notice of appeal *in every case* than to ask the court to allow you to file a belated appeal. An appeal can easily be voluntarily dismissed if the client decides not to appeal.

2. Untimely Notice of Appeal

A notice of appeal filed more than 14 days after entry of the final judgment in a criminal case is untimely. The effect of an untimely notice of appeal primarily depends on how untimely it is.

An untimely notice of appeal in a criminal case, however, does *not* divest the Eleventh Circuit jurisdiction. *See United States v. Lopez*, 562 F.3d 1309 (11th Cir. 2009).

The law and rules governing the notice of appeal in a habeas (civil) appeal are *very* different. *See* FRAP 4(a)(5). In civil case, a timely notice of appeal is jurisdictional and the district court's authority to grant an extension to file the notice of appeal is limited. *See infra* at IV.D (Civil/Habeas Cases).

Within 44 days The district court may extend the time to file a notice of appeal in criminal cases for not more than 30 days from the expiration of the 14-day period prescribed in FRAP 4(b) {14+30=44}, *upon a finding of excusable neglect or good cause*, before or after the 14-day period has expired, with or without motion and notice.
See FRAP 4(b)(4).

After 44 days Failure to file the notice of appeal in a criminal case within the time prescribed FRAP 4 does *not* deprive the Eleventh Circuit of jurisdiction. *See United States v. Lopez*, 562 F.3d 1309 (11th Cir. 2009). But the district court can only extend the time for up to 44 days {14+30=44}. After that, the viability of the appeal depends on whether the government files a motion to dismiss as untimely. If it does, the Eleventh Circuit will dismiss the appeal. *See id.*

3. District Court Jurisdiction

The filing of the notice of appeal divests the district court of jurisdiction over most matters, other than appointment of counsel and bond. Other matter that may still be considered by the district court subsequent to the notice of appeal include:

Motion to Correct Sentence, Fed. R. Crim. P. 35(a)

- → The filing of a notice of appeal under FRAP 4(b) does not divest a district court of jurisdiction to correct a sentence under Rule 35(a), Fed. R. Crim. P.
- → The filing of a Rule 35(a) motion does not affect the validity of a notice of appeal filed before entry of the order disposing of the motion.
- → The filing of a Rule 35(a) motion does not suspend the time to file a notice of appeal from the judgment of conviction. *See* FRAP 4(b)(5).

Motion for Indicative Ruling Where Pending Appeal Bars Relief, FRAP 12.1

- → If you have grounds for some relief in the district court, but the district court lacks jurisdiction to grant relief because the appeal is pending, Rule 12.1 might help.
- → File the motion in the district court and ask the court to state either that it would grant the motion or that the motion raises a substantial issue.
- → At the same time (or at least within 14 days of filing the motion in the district court) file a motion in the Eleventh Circuit asking the court to stay the appeal pending an indicative ruling by the district court. *See* 11th Cir. R. 12.1-1(a).
- → If the Eleventh Circuit stays the appeal, then the party who filed the motion in the district court must file written status reports at 30-day intervals in the Eleventh Circuit pending resolution of the motion filed in the district court. *See* 11th Cir. R. 12.1-1(a).
- → *See* 11th Cir. R. 12.1-1 (b)-(d) (explaining the scenarios where the district court can issue relief without the Eleventh Circuit needing to intervene in some way, such as issuing a remand or dismissing an appeal without prejudice).

**Do *not* rely on Rule 4(b) for § 2241, § 2254, and § 2255 appeals.
Rule 4(b) applies to criminal appeals. Rule 4(a) applies to civil appeals.
Criminal and civil (habeas) appeals are treated very differently,
e.g., regarding motions for extensions of time to file the notice of appeal,
reopening the time to file the appeal, and
the definition of "entry" of a judgment or order.**

D. Civil (Habeas) Cases.

See FRAP 4(a)

**Counsel must file a notice of appeal in § 2254 and § 2255 cases,
even if the district court sua sponte granted a COA
before a notice of appeal was filed. *See* 11th Cir. R. 22-1(a).**

1. Due Date

The due date for a notice of appeal in a civil case depends on whether the United States is a party.

The U.S. is *not* a party in habeas challenges to state conviction/sentence under 28 U.S.C. § 2254. The notice of appeal is thus due within *30 days* of judgment's entry. *See* FRAP 4(a)(1)(A).

The U.S. is a party in post-conviction challenges to federal conviction/sentence under 28 U.S.C. §§ 2241, 2255. The notice of appeal is thus due within *60 days* of judgment's entry. *See* FRAP 4(a)(1)(B).

2. Untimely Notice of Appeal

Unlike in criminal cases, the failure to file the notice of appeal within the time prescribed by FRAP 4(a) is jurisdictional in civil (habeas corpus) cases. Therefore, if the notice of appeal is untimely filed, the appeal will be dismissed for lack of jurisdiction.

Also unlike in criminal appeals, the district court can only extend the time for filing the notice of appeal in civil (habeas corpus) cases if a motion is filed within 30 days of the time prescribed in FRAP 4(a). *See* FRAP 4(a)(5).

3. Certificate of Appealability (COA)

See FRAP 22 & corresponding Eleventh Circuit Rules

A certificate of appealability (COA) from either the trial or appellate court is required for a movant/petitioner (defendant) to appeal from the denial of relief in § 2254 or § 2255 cases.

A COA is *not* required to appeal in § 2241 cases.

A COA is *not* required when the U.S. or the state appeals.

The motion/application for a COA should be filed in the district court at the same time as the notice of appeal. If a COA motion is not filed, the district court will construe the notice of appeal as one.

In the order denying § 2254 or § 2255 relief, some district judges also deny a COA. When filing the notice of appeal, a "renewed" motion for COA can be filed in the district court.

If the district court denies the COA, the Eleventh Circuit clerk will issue an ECF notice giving the movant/petitioner (defendant) 14 days to file a COA motion in the Eleventh Circuit. If no COA motion is filed, the Eleventh Circuit will construe the notice of appeal as one.

Although the trial and appellate courts will *construe* a notice of appeal as a COA motion, the better practice is to file a COA motion simultaneously with the notice of appeal.

In the Eleventh Circuit, a COA motion can be filed with or without a separate brief in support thereof. Whether filed as separate documents or combined in a single document, the COA motion and supporting brief/argument collectively may not exceed the maximum length authorized for a party's principal brief under FRAP 32(a)(7). The same applies to a response and brief opposing the COA motion. *See* 11th Cir. R. 22-2.

For more information on the requirements for a COA & *in forma pauperis* status, please review FRAP 22 & the corresponding Eleventh Circuit Rules.

V. INITIAL PAPERWORK

The notice of appeal is filed in the district court, which then sends the notice of appeal to the appellate court. Once the Eleventh Circuit dockets the appeal, the clerk will issue an ECF notice advising counsel that the Appearance of Counsel Form, Certificate of Interested Persons and Corporate Disclosure Statement (CIP), and Transcript Information Form (TIF) must be filed within 14 days.

A. Appearance of Counsel

See IOP 12(2); 11th Cir. R. 46-5

FRAP 12(b) references a "representation statement." In the Eleventh Circuit, however, an appearance of counsel form is used.

Appearance of counsel and admission of new counsel forms can be downloaded from the Eleventh Circuit website.

The appearance of counsel form should be filed as soon as the notice of appeal is docketed in the Eleventh Circuit. If not, the clerk will issue a notice requiring that it be filed within 14 days. *See* 11th Cir. R. 46-5. This is not jurisdictional, but there are possible sanctions. *See* 11th Cir. R. 46-6, 46-9.

The rules provide that court-appointed counsel need not file an appearance of counsel. Instead, the clerk may treat the Eleventh Circuit's order appointing counsel as an appearance form.

In practice, you could run into problems if you have not filed an appearance of counsel form. For example, appointing orders usually appoint *The* Federal Defender, not a specific Assistant Defender. If the individual Assistant Defender does not file a timely appearance of counsel form in the Eleventh Circuit, that individual may not receive notices or be able to upload pleadings under his/her name and password number.

Although it is not required, as a practical matter appellate counsel also should file a notice of appearance in the district court. Otherwise, counsel will not receive appeal-related documents that are docketed in the district court, such as the certificate of readiness and transmittal of the record on appeal.

If the case is scheduled for oral argument, a party must request leave of the court to make "any change in or addition to counsel" in an appeal. *See* Eleventh Circuit General Order 36 (June 16, 2011). A case is considered *scheduled for oral argument* once the clerk has assigned the case to be heard on a specific day of the oral argument week.

A law student may enter a notice of appearance, *inter alia*, in criminal and habeas corpus appellate matters. Among other requirements, the law student must be supervised by an attorney of record and have the written consent of the party on file with the court. The complete rules and procedures are set forth in Eleventh Circuit Rule 46-11.

B. Transcript Information Form (TIF)

See FRAP 10(b); 11th Cir. R. 10-1 & IOP; Addendum Four, § (f)(1)

Appellant has the duty to order the transcript or notify the court that no transcript is necessary, by completing and filing the Transcript Information Form (TIF).

The TIF, which can be downloaded from the district court website, should be filed as soon as the appeal is docketed in the Eleventh Circuit. *See* 11th Cir. R. 10-1.

Once the appeal is docketed in the Eleventh Circuit, the clerk will send counsel a notice requiring that the TIF be filed within 14 days.

→ This is not jurisdictional.

→ If you are having trouble making financial arrangements with the court reporter or just cannot do it in 14 days, call the Eleventh Circuit clerk and ask for more time.

Upload the fully executed TIF in the Eleventh Circuit *and* the district court via ECF, which will serve opposing counsel and counsel for each co-appellant.

{ Filing the TIF will *not* notify the court reporter.
So be sure to send a copy of the TIF to the court reporter(s). }

CJA→ In cases appealed under the CJA or *in forma pauperis* where trial counsel has been appointed by the trial court under the CJA, appointed counsel also shall file with the district court the appropriate **CJA Form 24** for the court reporter to furnish the transcript of testimony at the expense of the United States. *See* Addendum Four, § (f)(1).

FD→ Instead of using the CJA Form 24, Federal Defender Attorneys in the MDFL should follow the our office's internal procedures, e.g., get an estimate and a purchase order.

If appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, appellant must include in the record a transcript of all evidence relevant to that finding or conclusion. *See* FRAP 10(b)(2).

FRAP 10(b)(3) states that if appellant only orders a partial transcript, within 14 days s/he must file a statement of the issues s/he intends to present on appeal and must serve the same on appellee.

{ In the Eleventh Circuit, the only time *we* have seen this provision invoked
is when counsel fails to order the change of plea or sentencing transcript,
in which case the clerk sends a form to complete.
But this does not mean this provision is not used in other circumstances. }

If appellee (for our purposes, this is usually the AUSA) considers it necessary to have a transcript of other parts of the proceedings, appellee must, within 14 days after service of the order or certificate and statement of the issues, file and serve on appellant a designation of additional parts to be ordered. If appellant does *not* order all such parts and notify appellee

within 14 days after service of that designation, then within the following 14 days appellee may either order the parts or move in the district court for an order requiring appellant to do so.

We have never seen this happen,
but that does not mean that it
will not happen in your appeal.
So be aware.

After the TIF is filed, if you need an additional transcript, file a supplemental TIF. If the last transcript has already been filed, a motion to stay pending receipt of the supplemental transcript should be filed in the Eleventh Circuit.

C. Certificate of Interested Persons & Corporate Disclosure Statement (CIP)

See FRAP 26.1 & corresponding Eleventh Circuit Rules

Counsel for each party, as well as counsel for amicus curiae, must comply with Eleventh Circuit Rules 26.1-1 through 26.1-4 or face possible sanctions. *See* 11th Cir. R. 26.1-5.

The "Certificate of Interested Persons and Corporate Disclosure Statement"
is commonly referred to as a "Certificate of Interested Persons" or "CIP."

The CIP alerts the judges to possible conflicts of interest they may have.
For example, if a particular bank is listed because it is a victim, a judge who has a financial interest in that bank will not sit on the panel deciding the case.

The Eleventh Circuit requires counsel to complete two types of CIPs when the appeal is docketed—the web-based CIP and the paper or e-filed CIP. Additionally, all pleadings must contain a CIP.

1. Web-Based CIP

See 11th Cir. R. 26.1-1(b)

You will need your EDF ID and USCA Docket Number to do this.
Your EDF ID is *not* the same as your ECF user name and password.
If you do not know your EDF ID, click on "ID Lookup" under Web-Based CIP and follow the directions.

Within 14 days of the date the appeal is docketed in the Eleventh Circuit, appellant (and cross-appellant) must complete the Eleventh Circuit's web-based CIP online at www.ca11.uscourts.gov (click on "Web-Based CIP").

Unlike the e-filed CIP, the web-based CIP *only* relates to publicly traded corporations interested in the appeal. Counsel must either enter the stock ticker symbols of all publicly traded corporations listed on the e-filed CIP or declare that there are no publicly traded corporations on the e-filed CIP, and so there is nothing to enter.

{ Since most indigent criminal defense appeals do not involve corporate victims with stock ticker symbols, you will typically indicate online that nothing is reportable. }

Pro se parties are not required or authorized to complete the web-based CIP.

Failure to complete the web-based CIP may delay processing of the appeal and pleadings and may result in other sanctions. *See* 11th Cir. R. 26.1-1(b).

2. Initial E-Filed CIP

See 11th Cir. R. 26.1-1(a)

On the same day as the web-based CIP is completed online (within 14 days of the date the appeal is docketed in the Eleventh Circuit), counsel must e-file an initial CIP.

{ If you do not file an initial CIP within 14 days of the docketing of the appeal, you will get a letter from the clerk advising of potential sanctions. }

Appellant: Within 14 days of the docketing of the appeal in the Eleventh Circuit, appellant (and cross-appellant) must e-file the initial CIP. *See* 11th Cir. R. 26.1-2 & 26.1-3.

Appellee: Under the current rules, appellee's initial CIP is due within 14 days after appellant files his/her initial CIP. Effective December 1, 2016, however, Eleventh Circuit Rule 26.1-1(a)(3) is scheduled to be revised to provide that appellees, intervenors, respondents, and all other parties to the appeal must file a CIP *within 28 days after the date the appeal is docketed in the Eleventh Circuit*, regardless of whether appellants and petitioners have filed a CIP. If appellants/petitioners have already filed a CIP, appellees/respondents may file a CIP indicating that either appellant's initial CIP is correct and complete, or adding any interested persons/entities not included in appellant's initial CIP.

3. CIP in Pleadings

See FRAP 26.1; 11th Cir. R. 26.1-1, -2, -3, -4; 11th Cir. R. 27-1(a)(9)

Every motion, petition, brief, answer, response, and reply filed by any party or amicus curiae *must* include a CIP.

The clerk will not submit to the court—and the court will not act on—any brief, petition, answer, motion, response, or reply that does not contain a CIP. The clerk will hold the papers pending supplementation with the proper CIP.

The CIP in the first brief, each motion, and all petitions, must include a *complete* list of all persons/entities known to that party to have an interest in the outcome of the particular appeal.

The CIP in all subsequent briefs and in all responses/answers to motions/petitions only needs to include persons/entities who are not included in the prior brief/motion/petition—*in other words, do not be redundant.* If the CIP in the first brief/motion/petition that counsel is responding/replying to is complete, the CIP need only certify to that effect.

{ Previous versions of the rules were ambiguous about whether a CIP was required in reply briefs. The rules are now clear that even replies must contain a CIP, even if it simply states that the CIP contained in the motion/brief/petition is complete. }

The CIP in a petition for en banc consideration shall include a complete list of all persons and entities listed on all certificates filed in the appeal prior to the date of filing the en banc petition. If the court grants en banc review, the rules for CIPs in "regular" briefs apply to the en banc briefs.

4. Continuing Duty

See 11th Cir. R. 26.1-4

After filing the initial CIP, counsel is required to notify the court immediately of any additions, deletions, corrections, or other changes that should be made to the CIP by filing an amended CIP and by including the amended CIP in all subsequent filings.

The amended CIP must prominently indicate that it has been amended *and* must clearly identify the person/entity who has been added, deleted, corrected, or otherwise changed.

On the same day as an amended CIP is served, that party must also update the web-based CIP to reflect the amendments.

If the amended CIP *deletes* a person or entity from a CIP, the opposing party must file a notice indicating whether or not it agrees that the deletion is proper, within 14 days after the filing of the amended CIP.

5. CIP Format

See 11th Cir. R. 26.1-1 & 26.1-3

The CIP must list all persons and entities with an interest in the case, including: all trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations (including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party). A corporate entity must be identified by its full corporate name as registered with a secretary of state's office and, if its stock is publicly listed, its stock ("ticker") symbol must be provided after the corporate name.

Additionally, in criminal and criminal-related appeals, the CIP must disclose the identity of any victims.

The list must be in alphabetical order, last name first, in one column, and double spaced.

The top of each page of the CIP must note the appellate docket number and short style of the case, i.e., name of first-listed plaintiff/petitioner v. name of first-listed defendant/respondent.

Each page of the CIP must be sequentially numbered and must indicate the total number of pages comprising the certificate, e.g., C-1 of 3, C-2 of 3, C-3 of 3. These pages do not count against any length limitation imposed on the papers filed.

The CIP must immediately follow the cover page in the pleading. If the pleading has no cover page, the CIP must precede the text. *See* 11th Cir. R. 26-3(d).

VI. MOTIONS

See FRAP 27 & the corresponding Eleventh Circuit Rules

The rules governing appellate motions have significant differences from the MDFL Local Rules regarding district court motions. For example, the appellate rules allow for a reply to a response to a motion. The MDFL rules only allow a reply if counsel moves for leave to file a reply. Also, the required contents and formatting differ.

A. Who decides what

See 11th Cir. R. 27-1

The Eleventh Circuit Rules set forth who will resolve certain motions—the clerk or a panel of one, two, or three judges. *See* 11th Cir. R. 27-1(c) & (d).

Before mandatory electronic filing, it was particularly important to know whether your motion would be acted on by the clerk or by a panel of one, two, or three judges, because the number of paper copies you would mail to the clerk depended on who was handling the motion. *See* 11th Cir. R. 27-1(a)(1).
Although mandatory electronic filing lessens the need to know whether the motion will be resolved by the clerk or judge(s), in the rare event that a motion is filed in paper rather than via ECF, refer to 11th Cir. R. 27-1 to determine the number of copies to send.

A ruling on a motion by the clerk or a single judge is subject to review by the court. *See* 11th Cir. R. 27-1(c) & (d).

A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it. *See* 11th Cir. R. 27-1(g).

B. Contents

See FRAP 27(a); 11th Cir. R. 27-1

Although the basic contents of all motions are set forth in FRAP 27(a),
Eleventh Circuit Rule 27-1 sets forth additional matters that must be included.

The additional contents required for particular motions
are discussed in conjunction with the particular motion, ***infra.***

All motions must state: (1) the grounds for the motion, stated with particularity;

(2) the relief sought;

(3) the supporting legal argument;

(4) a brief recitation of prior actions of this or any other court or judge to which the motion, or a substantially similar or related application for relief, has been made;

(5) whether the defendant (in criminal appeals) is incarcerated.

And all motions must contain a CIP, signature, and certificate of service.

All motions for extension of time filed under FRAP 26(b) *shall* state (and other motions *may* state) that opposing counsel has been consulted and either has no objection to the relief sought or will/will not promptly file an objection. *See infra* at VI.F (Motions for Extension of Time).

Documents that are necessary to support the motion—including relevant materials from previous judicial proceedings in the case or appeal—must be filed and served with the motion.

- ► If the motion is accompanied by an affidavit that is necessary to support the motion, the affidavit must contain only factual information, not legal argument.
- ► A party moving for a stay must include a copy of the judgment or order from which relief is sought and any opinion and findings of the district court.

Separate briefs are prohibited.

Notices of motions and proposed orders are *not* required.

C. Formatting the Motion/Response/Reply

See FRAP 27(d)(1)

Cover	Not required, but if one is used, it must be white. *See infra* at VII.A.1 (Covers).
CIP	Must be included with all motions/responses/replies. *See supra* at V.C (Certificate of Interested Persons).
Signature	Required for an attorney (e-signature) or a party proceeding *pro se*.
Paper	8½ x 11 inches.
Margins	At least one inch on all four sides. Page numbers, but no text, may be in the margins.
Spacing	Double-spaced, *except for* quotes longer than two lines, footnotes, and headings.

Type Size & Style Same requirements as for briefs, e.g., New Times Roman, 14-point. *See infra* at VII.A.5 (Type Size & Style).

Length Limit *Until December 1, 2016*: 20 pages for motions and responses, and 10 pages for replies to responses, *not including the CIP and accompanying documents*.

As of December 1, 2016: FRAP 27(d)(2) will be amended to impose word limits rather than page limits, except for handwritten or typewritten motions/responses/replies. If produced using a computer, motions and responses will be limited to 5,200 words, and replies will be limited to 2,600 words, *not including the CIP and accompanying documents*.

D. Due Dates

See FRAP 26 & 27
See also supra at III.A (Computing Due Dates)

{ Most motions have no per se due date; they are filed as appropriate.
The timing of particular motions is discussed with the particular motion below. }

1. Response to Motion

Responses to motions must be filed within **10 days** of the date stated in the certificate of service in the motion, unless the court provides otherwise. *See* FRAP 27(a)(3)(A).

Responses may include a motion for affirmative relief, but the title of the response must alert the court to that request. Responses to such new motions may be filed within **10 days**. *See* FRAP 27(a)(3)(A), 27(a)(3)(B); 27(a)(4).

{ *Until December 1, 2016*, 3 additional days are added
if the motion is served by ECF or postal mail.
As of December 1, 2016, the 3 additional days will *not* be added
if the motion is electronically served via ECF.
See FRAP 26(c); *see also supra* at III.A (Computing Due Dates). }

Limited Exception to the 10-day response time: If the court gives the parties reasonable notice that it intends to act sooner, it may—before the 10-day period runs—grant a motion authorized under Rule 8 (stay or injunction pending appeal), Rule 9 (release in a criminal case), Rule 18 (stay pending review), or Rule 41 (stay mandate). *See* FRAP 27(a)(3)(A).

2. Reply to Response

Replies to responses must be filed within **7 days** of the date stated in the certificate of service in the response, and must not present matters that do not relate to the response. *See* FRAP 27(a)(4).

{ That 7-day deadline is not subject to the additional 3 mailings days
as of December 1, 2016, unless the response was served by postal mail. }

Example

Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.
	Motion Uploaded via ECF	Day 1 *for Response*	Day 2	Day 3	Day 4	Day 5
Day 6	Day 7	Day 8	Day 9	Day 10 **After 12/1/16: Upload Response today**	Day 11 *1st Mailing Day*	Day 12 *2nd Mailing Day 2*
Before 12/1/16: Upload Response today (*3rd Mailing Day*)	Day 1 *for Reply*	Day 2	Day 3	Day 4	Day 5	Day 6
Day 7 **After 12/1/16: Upload Response today**	Day 8 *1st Mailing Day*	Day 9 *2nd Mailing Day*	**Before 12/1/16: Upload Response today** (*3rd Mailing Day*)			

E. Motions that Toll the Briefing Schedule

See 11th Cir. R. 31-1(b), (c).

Although pending motions do not normally toll the briefing schedule, Eleventh Circuit Rule 31-1(c) lists the following motions that will toll the briefing schedule:

- motion for appointment and/or withdrawal of counsel;
- motion for determination of excusable neglect or good cause under FRAP 4(a)(5)(A) (civil cases);
- motion of a type specified in FRAP 4(a)(4)(A) (civil cases);
- motion of a type specified in FRAP 4(b)(3)(A) (judgment of acquittal, newly discovered evidence, or arrest of judgment in criminal cases);
- motion to proceed *in forma pauperis*;

- ► motion for a certificate of appealability or a motion to expand a certificate of appealability (habeas corpus cases);
- ► request for transcript at government expense;
- ► request for additional transcripts by appellee, *see* FRAP 10(b)(3)(B) & (C);
- ► assessment of fees pursuant to the Prisoner Litigation Act;
- ► motion to consolidate appeals, if the motion is filed by the date the appellant's brief is due in any of the appeals at issue;
- ► motion to dismiss the appeal based on an appeal waiver in a plea agreement (postpones the due date for filing appellee's brief until the court rules on the motion);
- ► motion to file a replacement brief (postpones the due date for filing of an opposing party's response brief or reply brief until the court rules on the motion).

If a motion listed above is pending after appellant's initial brief has been filed, appellee's brief is due 30 days after the date that the court rules on the motion and the appeal is allowed to proceed, or within 30 days after the date on which the supplemental record is deemed filed as provided by 11th Cir. R. 12-1, whichever is later.

If a motion is not listed above, it does not postpone or toll the due date.
Motions for extension of time are *not* on the list.
Motions for extension of time, therefore, do *not* toll the due date.

Other than the motions in the above list, a pending motion does *not* postpone the time for serving and filing a brief. For example, appellee's brief remains due within 30 days after service of appellant's brief even if a motion to file appellant's brief out of time or a motion to file a brief that does not comply with the court's rules is pending. *See* 11th Cir. R. 31-1(c).

If the court orders counsel to answer a jurisdictional question, the time for filing appellant's brief is *not* stayed/tolled. However, appellee's brief shall be postponed until the court determines whether the appeal shall proceed or directs counsel to address the jurisdictional questions in their briefs on the merits. When the court rules on a jurisdictional question, a new due date will be set for filing appellee's brief if the appeal is allowed to proceed. *See* 11th Cir. R. 31-1(d).

Pay special attention to any order on any motion
listed in Eleventh Circuit Rules 31-1(b) & (c).
If the court grants (or denies) one of those motions,
the order might change the briefing schedule,
e.g., it might make your brief due in 30 days, rather than the usual 40 days.

F. Motions for Extensions of Time

See FRAP 26(b) & corresponding Eleventh Circuit Rules
See also 11th Cir. R. 31-2

Motions for more time to file documents, especially briefs, seem to be the most commonly filed motions in appellate practice. Although FRAP 26(b) authorizes courts to extend deadlines, the Eleventh Circuit's disfavor of motions for extension of time is evident from its rules and practice. *See, e.g.*, IOP 26(1).

1. Extensions to File Any Document

Motions to extend *any* deadline are subject to all the requirements for motions in general, e.g., they must contain a CIP and certificate of service, and they must state whether the defendant is incarcerated. *See* 11th Cir. R. 27-1(a); *supra* at VI. B. Additionally, they must state that opposing counsel has been consulted and either has no objection to the relief sought or will or will not promptly file an objection. *See* 11th Cir. R. 26-1, 27-1(a)(5).

2. Extensions to File a Brief

See 11th Cir. R. 31-2

Motions to extend the time to file a brief and motions to correct a deficiency in a brief are subject to *additional* requirements regarding timing and content. Also, they are handled differently depending on how much time is requested and whether the motion is a first or second request for more time. *See* 11th Cir. R. 31-2.

► All motions to extend the due date for a brief must be filed before the brief's due date. *See* 11th Cir. R. 31-2(e).

If the clerk receives a motion for extension after the brief's due date, the motion will be returned unfiled; the brief will then be late; and counsel must file it with a motion for leave to file out of time.

At this point, counsel must move quickly, lest sanctions be imposed. For example, the clerk has the authority to dismiss the appeal or to refer the matter to the Chief Judge for consideration of possible disciplinary action in lieu of dismissal if the appellant is represented by court-appointed counsel. *See* 11th Cir. R. 42-1, 42-2.

Likewise, a motion for extension of time to correct a deficiency in a brief or appendix pursuant to FRAP 31 must be filed within 14 days of the clerk's notice, as provided in 11th Cir. R. 42-3. The clerk is not authorized to file an appellant's motion for an extension of time to correct a deficiency in a brief or appendix received by the clerk after the expiration of the 14-day period provided by that rule. *See* 11th Cir. R. 42-2 & 42-3 (concerning dismissal for failure to prosecute in a civil appeal).

- At any time before the close of business on the date the brief is due, the clerk may telephonically grant a first request to extend the brief's due date for 14 days or less, *provided* that the briefing schedule was set by the docketing of the appeal or filing of the last transcript, as opposed to a court order setting it.

Eleventh Circuit Rule 31-2(a), (c), was amended December 1, 2015, to provide that such first requests for an extension of 14 days or less may be requested over the telephone and granted by the clerk, without the need to consult opposing counsel about his/her opinion. Though not required, we notify the AUSA a matter of courtesy.

If the court has issued an order setting the briefing schedule—e.g., if the case was consolidated and an order issued setting a new briefing date—the clerk is not authorized to grant a telephonic extension. Nor is the clerk authorized to telephonically grant more than a 14-day extension. In either circumstance, a written motion must be filed.

The Eleventh Circuit Rules regarding petitions for rehearing caution that "[c]ounsel should not request extensions of time except for the most compelling reasons." *See* 11th Cir. R. 35-2, 40-3. But no mention is made of telephonically requesting an extension of 14 days or less. The clerk therefore can grant a 14-day telephonic extension for petitions for rehearing if the opinion was not published.

- A party's first *written* motion to extend the brief's due date *must be filed at least 7 days before the brief due date*. If it is received by the clerk less than 7 days before the brief due date, it will generally be denied by the court, unless the motion demonstrates good cause on which the motion is based did not exist earlier or was not and with due diligence could not have been known and communicated to the court earlier.

For example, a motion for a 2-week extension filed 5 days before the brief is due because counsel is sick and cannot complete the brief should be acceptable, but simply relying on a caseload issues counsel knew about weeks before, without more, probably would not be acceptable.

- If a party's first written motion to extend the brief's due date is *filed at least 14 days before the brief's due date*, and if the requested extension is denied in full 7 or fewer days before the due date or any time after the due date has passed, then the time for filing the brief will be extended an additional 7 days beyond the initial due date or the date the court order is issued, whichever is later, unless the court orders otherwise.

One of the questions we are asked most frequently is what to do if your motion for extension of time to file a brief is not is not ruled on before the brief's due date. Unfortunately, the answer will not ease your stress level.
The safest thing to do is file the motion for extension at least 14 days before the brief's due date. Alternatively, you can either file your brief by the due date or file it by the extended date you requested and run the risk of the motion for extension being denied. If the motion for extension is denied, your brief is out of time. You can then move to file it out of time. But there is always the risk of sanctions.

► Second requests for more time are "disfavored" and are granted "rarely" and "only upon a showing of extraordinary circumstances that were not foreseeable at the time the first request was made." *See* 11th Cir. R. 31-2(d).

{ You *cannot* get a second extension over the phone.
You must file a written motion that will only be acted upon by the court. }

G. Motions for Release in Criminal Cases

See FRAP 9*;* 11th Cir. R. 9-1

FRAP 9 addresses the procedure for seeking review of an order regarding the release or detention of a defendant in a criminal case, before or after judgment of conviction.

Motions for release *before* the judgment of conviction must be filed within 7 days of the notice of appeal and must set out the reasons the party believes the district court order should be reversed. Responses are due within 10 days of the motion, and replies are due within 7 days of the response. *See* FRAP 9(a); 11th Cir. R. 9-1.

All motions for release or modification of conditions of release must include a copy of the judgment or order from which relief is sought and any opinion or findings by the district court. *See* 11th Cir. R. 9-1.

H. Motions to Withdraw as Counsel

See 11th Cir. R. 27-1(a)(7)-(8)

Eleventh Circuit Rule 27-1(a)(8) is dedicated to the requirements for filing a motion to withdraw from representation in a criminal case pursuant to *Anders v. California*, 386 U.S. 738 (1967). If counsel contemplates filing an *Anders* brief and a motion to withdraw under this rule, counsel must ensure that the record contains the transcript of all relevant proceedings and that the brief is served on all parties and counsel's client.

On a more general note, Eleventh Circuit Rule 27-1(a)(7) provides that any attorney seeking to withdraw from a criminal appeal must state in the motion that the client has been informed of the motion and either approves or disapproves of the relief requested. Also, the motion must be served on the client. *See also supra* at II.F.

I. Motions to Voluntarily Dismiss a Criminal Appeal

See FRAP 42 & corresponding Eleventh Circuit Rules; 11th Cir. R. 27-1(a)(7)

Before the appeal is docketed by the appellate clerk, the district court may dismiss it upon a stipulation signed by all parties or upon appellant's motion with notice to all parties.

After the appeal is docketed in the appellate court, the motion for voluntary dismissal must be filed in the appellate court.

The motion to dismiss the appeal must state that the client has been consulted and consents to the motion. The client must be listed in the certificate of service as well. *See* 11th Cir. R. 27-1(a)(7).

Effective August 1, 2016, the Eleventh Circuit Rules were amended to no longer require that the motion for voluntary dismissal state whether said motion is sought with or without prejudice.

If appellant files an unopposed motions to dismiss the appeal, or if both parties file a joint motion to dismiss, the clerk may clerically dismiss the appeal *as long as* the matter has not yet been assigned to a panel on the merits.

→ If the motion is opposed, it will be submitted to the court for ruling.

→ If the appeal has been signed to a merits panel, the motion will be submitted to the panel.

A joint motion to dismiss must be signed by counsel for each party joining in the motion.

A CIP must be filed with motions to dismiss.

J. Emergency Motions

See 11th Cir. R. 27-1(b), IOP 27(2)

Except in capital cases in which execution has been scheduled, a motion will be treated as an emergency motion only when both of the following conditions are present:

(1) The motion will be moot unless a ruling is obtained within seven days; and

(2) If the order sought to be reviewed is a district court order or action, the motion is being filed within 7 days of the filing of the district court order or action sought to be reviewed.

Motions that do not meet these two conditions, but require a ruling by a date certain, may be treated as "time sensitive" motions.

Emergency motions must be labeled "Emergency Motion," and must state the nature of the emergency, the date by which action is necessary, and the reasons for granting the requested relief. Additionally, the motion must specifically discuss:

(i) the likelihood the moving party will prevail on the merits;

(ii) the prospect of irreparable injury to the moving party if relief is withheld;

(iii) the possibility of harm to other parties if relief is granted; and

(iv) the public interest.

If the emergency motion raises any issue previously raised in the district court, counsel for the moving party shall furnish copies of all pleadings, briefs, memoranda or other papers filed in the district court supporting or opposing the position taken by the moving party in the motion, and copies of any order or memorandum decision of the district court relating thereto. If compliance

is impossible or impractical due to time restraints or otherwise, the reason for non-compliance shall be stated.

K. Motions for Reconsideration

See 11th Cir. R. 22-1(c), 27-2, 27-3

A motion to reconsider, vacate, or modify an order must be filed within 21 days of entry of such order. No additional time for mailing is allowed. *See* 11th Cir. R. 27-2.

A party may only file one motion for reconsideration with respect to the same order. A party may not request reconsideration of an order disposing of a previously-filed motion for reconsideration. *See* 11th Cir. R. 27-3.

In post-conviction proceedings, such as cases brought under 28 U.S.C. § 2254 or § 2255, the denial of a certificate of appealability by a single circuit judge may not be the subject of a petition for panel rehearing or petition for rehearing *en banc*, but may be the subject of a motion for reconsideration. *See* 11th Cir. R. 22-1(c).

L. Motions to Expedite

An appeal may be expedited only by the court upon motion and for good cause shown. Unless the court otherwise specifies, the clerk will fix an appropriate briefing schedule which will permit the appeal to be heard at an early date. *See* IOP 27(3).

Although the Eleventh Circuit Internal Operating Procedure under Rule 27 states that appeals "may be expedited only by the court upon motion,"
Eleventh Circuit Rule 34-4(e) states the motion may be the court's motion.

M. Motions to File Briefs in Excess of Word/Line Limitations of Rule 32

See 11th Cir. R. 32-4

The general rule is that shorter is better.
And the courts like that rule.
Hence, effective December 1, 2016, the FRAP will be amended to reduce the word limit in briefs and other pleadings.

FRAP 32(a)(7) and 11th Cir. R. 32-4 impose strict word/line limitations on briefs. *See infra* at VII.A.5. Motions to exceed these limitations are disfavored and will only be granted upon extraordinary and compelling reasons. The motion must be filed no later than 7 days before the brief is due.

N. Motions to File Documents under Seal

See Guide at 9.1

A motion to file documents under seal may be filed electronically unless prohibited by law, circuit rule, or court order. Do not attach to the motion the sealed documents or documents requested to be sealed. Documents requested to be sealed must be submitted in paper format in a

sealed envelope, and must be received by the clerk within 10 days of filing the motion. The face of the envelope containing such documents must contain a conspicuous notation that it contains "DOCUMENTS UNDER SEAL," or substantially similar language.

Documents filed under seal in the district court will continue to be filed under seal on appeal in the Eleventh Circuit. *See* Guide at 9.2.

O. Motions to Publish Unpublished Opinions

See 11th Cir. R. 36-3

At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published.

The timely filing of a motion to publish stays issuance of the mandate until disposition of the motion, unless otherwise ordered by the court.

The time for issuance of the mandate and for filing a petition for rehearing or petition for rehearing en banc shall begin running anew from the date of any order directing publication.

P. Frivolous Motions

See 11th Cir. R. 27-4

The court may impose sanctions upon a party, attorney, or both for filing a frivolous motion. *See* 11th Cir. R. 27-4 (defining frivolous and explaining sanctions). When a motion to impose sanctions is filed under this rule, the court may, if warranted, award the prevailing party reasonable attorney fees and expenses incurred in presenting or opposing the motion.

Q. The Motions Panel

The judge/panel deciding a motion is not necessarily the same as the one deciding the appeal on the merits. The merits panel is not bound by the ruling on a motion entered by a single judge or a panel. The merits panel can alter, amend, or vacate that ruling. *See* 11th Cir. R. 27-1(g).

R. Oral Argument for Motions

See 11th Cir. R. 27-1(f)

Unless ordered by the court, no motion shall be orally argued.

S. Motions to Withdraw a Motion

See IOP 27(7)

The amendments scheduled to take effect December 1, 2016, include a new Internal Operating Procedure that states: "If a party no longer requires a ruling by the court on a pending motion, the filing party should file a motion to withdraw the motion."

VII. BRIEFS & APPENDICES

Date, Cover, Binding, & Paper Copy Requirements for Briefs & Appendices

PLEADING	DEADLINE →TO UPLOAD & POSTMARK COPIES BY←	COVER	BINDING	COPIES
APPELLANT'S INITIAL BRIEF	40 days after either: (a) the date the last transcript is filed in the district court —or— (b) if no transcripts are ordered, the date the appeal is docketed in the 11th Circuit	Blue 90#	Bound on Left	7 to court; 1 to client
APPELLANT'S APPENDIX	Within 7 days of appellant's initial brief; But if OA is granted, 3 additional copies are due within 7 days of the OA classification notice	White 90#	Bound on Top	2 to court; & 3 more to court if OA is granted; 1 to client
APPELLEE'S ANSWER BRIEF	→30 (or 33) days← 30 days after service of Appellant's Brief, + 3 days if brief was served by mail (or by ECF before December 1, 2016)*	Red 90#	Bound on Left	7 to court; 1 to client
SUPP'L APPENDIX	**SUPPLEMENTAL APPENDIX**—optional, within 7 days after filing of answer brief.	White 90#	Bound on Top	2 to court; & 3 more to court if OA is granted; 1 to client
APPELLANT'S REPLY BRIEF	→14 (or 17) days← 14 days after service of Appellee's Brief + 3 days if brief served by mail (or by ECF before December 1, 2016)*	Gray 90#	Bound on Left	7 to court 1 to client

* *Until December 1, 2016*, 3 additional days are added if the motion is served by ECF or postal mail.
As of December 1, 2016, the 3 additional days will *not* be added if the motion is electronically served via ECF.
See FRAP 26(c); *see also supra* at III.A (Computing Due Dates).

A. General Requirements for Briefs

See FRAP 28-FRAP 32 & corresponding Eleventh Circuit Rules

In addition to the general requirements for all briefs discussed in this subsection, please refer to the General Rules for Appellate Pleadings, *supra* at III, and the specific requirements for different types of briefs, *infra* at VII.B–G.

1. Covers

See FRAP 32(a)(2); 11th Cir. R. 32-2

Cover Contents

- Appeal Number, *centered at the top*
- Name of the Court
- Title of the Case
- Nature of the Proceeding
- Name of the Court Below
- Title of the Brief, *identifying the party for whom the brief is filed*
- Counsel's Name, Office Address, and Telephone Number

Cover Colors

Appellant's Initial Brief	Blue
Appendix on Appeal (Appendix)	White
Appellee's Response Brief	Red
Appellant's Reply Brief	Gray
Appellant (Cross-appellee) Response Brief	Yellow
Supplemental Brief	Tan
Petitions for Rehearing	White
Amicus & Appellate Intervenor	Green

Cover Paper Weight
See 11th Cir. R. 32-2

The cover must be of durable quality—at least 90#—on the front and back of the brief.

We have only been able to find blue and white paper at that weight.
The best we have been able to find the other colors is 65# or 67#.
But we have been advised to use the 90# for blue (initial brief)
and white (Appendix on Appeal), and the best we can get for the rest.
Thus, logic and common sense prevail.
The main concern is that the covers and binding be secure enough to prevent the covers/briefs from loosening or falling apart during shipping or use.

2. Binding

See FRAP 32(a)(3); 11th Cir. R. 32-1 & 32-2 (Briefs)
11th Cir. R. 30-1 & IOP30(1) (Appendix on Appeal)

Briefs must be bound on the left side in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open. Stapling is permitted. Exposed metal prong paper fasteners are prohibited.

The Appendix is bound at the top. *See infra* at VII.I.2.

3. Paper Size & Spacing

See FRAP 32(a)(4); 11th Cir. R. 32-3

The paper must be 8½ x 11 inches, with at least one-inch margins on all four sides. Page numbers, but no text, may be in the margins. *See* FRAP 32(a)(4).

All text—including the table of contents and table of citations— must be double-spaced, *except* that direct quotes of more than two lines, the cover page, the certificate of service, footnotes, and headings may be single-spaced. *See* FRAP 32(a)(4); 11th Cir. R. 32-3.

The court may reject or require recomposition of a brief for failure to comply with these requirements. *See* 11th Cir. R. 32-3.

4. Typeface & Style

See FRAP 32(a)(5)

If the text is monospaced (like Courier), the typeface must be at least 12-point and no more than 10 ½ characters per inch.

```
This is Courier New, 12-point, 10½
characters per inch, non-proportionally
spaced.
```

If the text is proportionally spaced (like Times New Roman), the typeface must be at least 14-point.

This is Times New Roman in proportionally spaced type, 14-point.

The permissible length of the brief and the need to include a Certificate of Compliance depend on the Type Size and Style used. *See* FRAP 32(a)(7).

5. Page/Line/Word Limits & Certificate of Compliance

See FRAP 32(a)(7); 11th Cir. R. 32-4; FRAP Form 6

Briefs are limited to a certain number of words if a proportionally spaced font is used or a certain number of lines if a monospaced font is used. Briefs are *not* limited to a certain number of pages.

Once a brief reaches a certain number of pages, however, it must contain a certificate of compliance in which counsel certifies the brief/document complies Fed. R. App. P. 32(a)(5), (6), and (7)(B); the number of words (or lines) in the brief/document; and the type style and font used in the brief/document. FRAP Form 6 is a sample certificate of compliance form.

The person preparing the certificate of compliance may rely on the word or line count of the word-processing system used to prepare the document.

We use three types of page numbers in briefs.

C1 of 1.....CIP

C[Arabic page number] of [total pages in CIP]
See supra at V.C.5.

These pages do not count toward page/line/word limitations.

Roman Numerals .....Pages beginning with the Statement Regarding Oral Argument through the Statement of Subject-Matter and Appellate Jurisdiction.

These pages do not count toward page/line/word limitations.

Arabic Numbers.....Pages beginning with the Statement of the Issue through the Conclusion

Arabic Numbers can continue through the pages with the Certificate of Compliance (if needed) and Certificate of Service, but the pages with those certificates do not count toward page/line/word limitations.

The following chart sets forth the page/line/word limitations for particular types of briefs. The requirements for briefs in cross-appeals are addressed *infra* at VII.F.

Page/Line/Word Limitations for Briefs

Brief *See* FRAP 32(a)(7)	Proportional Font (Times New Roman, 14-pt)	Monospaced Font (`Courier New, 12-pt`)	Certificate of Compliance Required if Brief Exceeds
Appellant's Initial Brief	13,000 words*	1,300 lines	30 pages
Appellee's Answer Brief	13,000 words*	1,300 lines	30 pages
Appellant's Reply Brief	6,500 words*	650 lines	15 pages

Sections of the Brief that Do NOT Count	**Sections of the Brief that Do Count**
Cover CIP Statement Regarding Oral Argument Table of Contents Table of Authorities Statement Regarding Adoption of Briefs of Other Parties Statement of Subject-Matter and Appellate Jurisdiction	
	Statement of the Issues Statement of the Case Course of Proceedings Statement of Facts Standard of Review Summary of the Argument Argument & Citations of Authority Conclusion *Including* Headings, Footnotes, Quotations
Signature Block Certificate of Compliance Certificate of Service	

* Until December 1, 2016, principal briefs may contain no more than 14,000 words, and reply briefs may contain no more than 7,000 words.
Effective December 1, 2016, FRAP 32 will be amended to reduce those limits to 13,000 words for principal briefs and 6,500 words for reply briefs.

6. Filing and Mailing

See 11th Cir. R. 31-3; 11th Cir. R. 30-1(c).

The filing and copying requirements for briefs are set forth *supra* in the Chart in III.B.

A brief filed (uploaded) via ECF is considered the "official record copy of the brief," but the Eleventh Circuit still requires paper copies as well.

Counsel must send 7 paper copies of the brief to the Eleventh Circuit and 1 copy to the client. *See supra* at III.B.5 (paper copies) & Chart: Date, Cover, Binding, & Copy Requirements for Briefs, Appendices, & Rehearing Petitions; *see also infra* at VII.I (addressing copies of Appendix).

Given that pleadings electronically filed contain an electronic signature (not a "wet signature"), 7 "copies" are required (instead of an "original" and 6 copies).

Also send the defendant a copy;
and it is a good idea to retain a paper copy of the uploaded brief in your file.

With mandatory ECF, opposing counsel and counsel for co-appellants, if any, are served briefs electronically. No paper copy of the brief need be sent.

7. References to Parties in the Brief

See FRAP 28(d)

In briefs and at oral argument, terms like "appellant" and "appellee" should be used sparingly. Instead, parties should be referred to by their names (John Smith), their designation in the district court (Defendant), or other descriptive terms (the taxpayer).

8. References to the Record in the Brief

See FRAP 28(e); 11th Cir. R. 28-5.

When citing to the record on appeal in the brief, cite to the district court document number, and the page number if relevant.

Different writers have different styles. Some prefer to reference pages 15 through 23 in document number 50 as "Doc. 50 at 15–23," while others prefer "Doc 50–Pgs 15-23." Some enclose the reference in parenthesis, others do not. Whatever your preference, be consistent throughout your pleading.

The full or abbreviated name of the document may be included, but is not required, e.g., Doc. 50 (sentencing transcript).

9. Legal Citations

See FRAP 32, 11th Cir. R. 28-1(k), & 11th Cir. R. 36-2

The Eleventh Circuit requires that citations of authority in briefs comply with the rules of citation in the latest edition of either the "Bluebook" (A Uniform System of Citation) or the "ALWD Guide" (Association of Legal Writing Directors' Guide to Legal Citation).

{ We use the Bluebook. The 20th edition is the latest edition. }

Citations must include the specific page number(s) that relate to the proposition for which the case is cited.

For state reported cases the national reporter series should be cross referenced (e.g., Southern Reporter, Southeast Reporter).

{ The Eleventh Circuit Rules were amended effective August 1, 2016, to ***delete*** the requirement that citations to U.S. Supreme Court decisions include *both* the United States Reports and the Supreme Court Reporter. }

Case names must be underlined or italicized. *See* FRAP 32(a)(6).

Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of the cited opinion is not available on the internet, the opinion must be attached to or incorporated within the pleading in which it is cited. *See* 11th Cir. R. 36-2.

B. Briefs in Appeals Involving Multiple Appellants or Appellees

See FRAP 28(i), 11th Cir. R. 28-1(f), IOP 28(2), (3), (7)

In consolidated appeals, the party who filed the first notice of appeal is considered the appellant for purposes of FRAP 28 (Briefs), 30 (Appendix), and 31 (Serving and Filing Briefs), unless the parties otherwise agree or the court otherwise orders. *See* IOP 28(7).

In appeals involving more than one appellant or appellee—e.g., consolidated appeals—any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. *See* FRAP 28(i).

If another attorney or attorneys join in a brief, the brief must list the names of other attorney signatories by means of an "s/[attorney's name]" block for each. Counsel filing such a brief certifies that each of the other attorneys has expressly agreed to the form and substance of the document, and that the filer has their authority to submit the document electronically. *See* Guide at 3.2 (Multiple attorney signatures).

The brief for a party who adopts by reference any part of the brief of another party pursuant to FRAP 28(i) shall include a statement describing in detail which briefs and which portions of those briefs are adopted. *See* 11th Cir. R. 28-1(f).

The adoption by reference of part of another party's brief does *not* fulfill counsel's obligation to file a separate brief that conforms to 11th Cir. R. 28-1, except upon written motion granted by the court. *See* IOP 28(3).

If you want to adopt part of a brief that is filed after your brief, you can file a motion to adopt.

If one attorney represents more than one party in an appeal—e.g., in consolidated appeals—the attorney may only file one principal brief and one reply brief, that includes argument as to all of the parties represented by that attorney in that appeal, and one (combined) appendix. A single party responding to more than one brief, or represented by more than one attorney, is similarly bound. *See* IOP 28(2).

C. Appellant's Initial Brief

1. Due Date for Appellant's Initial Brief

See FRAP 12 & 31 & corresponding Eleventh Circuit Rules

Appellant's initial brief is due within 40 days after "the record is deemed filed" in the district court.

If the appeal is a cold record appeal,
and you were appointed after the transcripts were filed,
you *should* be granted 40 days from the order of appointment.

When "the record is deemed filed" depends on whether transcripts are ordered.

- If transcripts are ordered, the record is deemed filed when the court reporter files the **last** transcript in the district court.

- If no transcripts are ordered, or if all transcripts are already on file, the record is deemed filed on the date the appeal is docketed by the Eleventh Circuit Clerk.

See 11th Cir. R. 12-1 & 31-1.

The brief is due 40 days from the date the last transcript is filed in the district court regardless of when counsel receives the transcript. You should check PACER for the date the transcript was filed in case it was not filed on the same day it was sent to you.

Sometimes transcripts are filed piecemeal. For example, if you request transcripts from more than one court reporter, one court reporter may file a transcript before the other court reporter. If you receive transcripts piecemeal and a briefing schedule issues while one or more transcripts remain outstanding, you can call the clerk and ask that the briefing schedule be rescinded. Otherwise, you may have to file a motion to rescind.

Be sure to keep track of which transcripts you have requested and mark them off as you receive them. The clerk does not always issue a briefing schedule as soon as the last transcript is filed, so you may not receive a notice stating when your brief is due until shortly before the due date. It is your responsibility to keep track of when the transcripts are filed. *See* IOP 31(1) ("The clerk's office will send counsel and *pro se* parties a letter confirming the due date for filing appellant's brief consistent with the provisions of 11th Cir. R. 12-1 and 11th Cir. R. 31-1, but delay in or failure to receive such a letter does not affect the obligation of counsel and *pro se* parties to file the brief within the time permitted by 11th Cir. R. 31-1.").

Motions that postpone the brief due date are listed *supra* at VI.E.

The rules regarding computing due dates are discussed *supra* at III.A. In computing the 40-day period from the last transcript to the brief's due date, keep in mind the following:

- Day one is the day after the date the last transcript is filed in the district clerk's office, *regardless of when you receive the transcript*.
- Count every day, including Saturdays, Sundays, and legal holidays. But if the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.
- Do **not** add the three additional mailing days.

Example

Monday	**Tuesday**	**Wed.**	**Thurs.**	**Friday**	**Sat.**	**Sun.**
Last transcript filed in D. Ct.	Day 1 of briefing schedule	Day 2	Day 3	Day 4	Day 5	Day 6
***	***	***	***	***	***	***
Day 35	Day 36	Day 37	Day 38	Day 39	Day 40	Day 41
Must upload brief **TODAY**	*Relax*					

If faced with an issue of "exceptional importance," *see* FRAP 35, that is currently foreclosed by Eleventh Circuit precedent, counsel might consider filing a petition for *initial hearing* en banc, rather than waiting for an adverse panel decision to file a petition for *rehearing* en banc. Petitions for *initial hearing* en banc are due by the date when appellee's brief is due, i.e., 30 days after service of appellant's initial brief.

2. Contents of Appellant's Initial Brief

See FRAP 28, 11th Cir. R. 28-1

Eleventh Circuit Rule 28-1(a)–(n) specify the sections that must be included in principal briefs—e.g., Appellant's Initial Brief and Appellee's Answer Brief—and the order in which each section must appear in the brief. Those sections are set forth in the chart below, together with some matters that must be included in each section.

Contents of Appellant's Initial Brief

Section	Must Include	11th Cir. R.
Cover Page	*See supra* at VII.A.1.	28-1(a)
Certificate of Interested Persons	*See supra* at V.C.	28-1(b)
Statement Regarding Oral Argument	Short statement of whether Oral Argument is requested and if so why, *see also infra* at X (discussing the impact of requesting oral argument on the post-briefing process).	28-1(c)
Table of Contents	Page references to each section required by this rule, as well as each heading & sub-heading of each issue argued	28-1(d)
Table of Citations	Page references to every citation in the brief Full citations (without pinpoint page numbers in citations) Asterisks in the margin beside all citations primarily relied on	28-1(e)
Statement Regarding Adoption of Brief of Other Parties (*only required if adopting part of another party's brief by reference*)	Detailed description of which brief(s) and which portion(s) thereof are adopted	28-1(f)
Statement of Subject-Matter and Appellate Jurisdiction	Citations to statute(s) and relevant facts establishing district court's jurisdiction, (e.g., 18 U.S.C. § 3231) Citations to statute(s) and relevant facts establishing Eleventh Circuit's jurisdiction, (e.g., 28 U.S.C. § 1291 and 18 U.S.C. § 3742) Filing dates establishing the timeliness of the appeal Assertion that the appeal is from a final order or judgment	28-1(g)
Statement of the Issue(s)		28-1(h)

Section	Must Include	11th Cir. R.
Statement of the Case	Record cite to support every assertion Brief recitation of the nature of the case	28-1(i)
Course of Proceedings and Disposition Below	Statement that the defendant is/is not incarcerated (only in criminal cases)	28-1(i)(i)
Statement of the Facts	State relevant facts accurately Include favorable and unfavorable facts Identify inferences drawn from facts as such	28-1(i)(ii)
Standard(s) of Review		28-1(i)(iii)
Summary of the Argument(s)	Clear, accurate, succinct condensation of argument actually made in next section of the brief, not just repetition of headings in argument section Seldom more than 2 pages and never more than 5 pages	28-1(j)
Argument(s) and Citations of Authority		28-1(k)
Conclusion		28-1(l)
Certificate of Compliance	Only include if principal brief is more than 30 pages (or reply brief is more than 15 pages); *See supra* at VII.A.5	28-1(m)
Certificate of Service		28-1(n)

D. Appellee's Answer Brief

1. Due Date for Appellee's Answer Brief

Appellee's answer brief is due within 30 from service of the last appellant's initial brief. *See* 11th Cir. R. 31-1. Add 3 days (to total 33 days) if appellant's brief is served by mail (or by ECF until December 1, 2016). The 3 days are not added if the appellant's brief is hand-delivered. *See* FRAP 26(c); *see also supra* at III.A.

Example

Monday	Tuesday	Wed.	Thurs.	Friday	Sat.	Sun.
Appellant's Brief e-filed/ e-served	Day 1	Day 2	Day 3	Day 4	Day 5	Day 6
***	***	***	***	***	***	***
Day 28	Day 29	Day 30 **Upload Appellee's Brief Today *(unless 3 mailing days apply)***	*Mail Day 1 = Day 31* *	*Mail Day 2 = Day 32* *	Weekend (brief due on next business day)	
Upload Appellee's Brief TODAY*	*Relax*		** The 3 mailing days only apply if appellant's brief is served by postal mail (or by ECF until December 1, 2016)*			

Motions that postpone the brief due date are listed *supra* at VI.E.

The due date for filing an appellee's brief is postponed by a motion to dismiss the appeal based on an appeal waiver in a plea agreement and motion to consolidate appeals pending after appellant's brief has been filed in one of the appeals subject to consolidation. But appellee's due date is *not* postponed when a motion to file appellant's brief out of time or to file a brief that does not comply with the court's rules is pending. *See* 11th Cir. R. 31-1(b), (c).

2. Contents of Appellee's Answer Brief

See 11th Cir. R. 28-1 & 28-2

The required contents for Appellee's Answer Brief are the same as those of Appellant's Initial Brief—*except* that if appellee is satisfied with appellant's statement of subject-matter and appellate jurisdiction, statement of the issues, and statement of case (including course of proceedings, statement of facts, and standard of review), then Appellee's Answer Brief need not include those sections. *See supra* at VII.C.2.

E. Appellant's Reply Brief

1. Due Date for Appellant's Reply Brief

Appellant's reply brief is due within 14 days after service of the last appellee's answer brief. Add 3 days if appellee's answer brief is served by mail (or by ECF until December 1, 2016). The three days are not added if the brief is hand delivered. *See* 11th Cir. R. 31-1(a); FRAP 26(c); *see also supra* at III.A.

Example

Monday	Tues.	Wed.	Thurs.	Friday	Sat.	Sun.
Appellee e-serves answer brief	Day 1	Day 2	Day 3	Day 4	Day 5	Day 6
Day7	Day 8	Day 9	Day 10	Day 11	Day12	Day13
Day 14 **Upload Reply Brief Today** ***(unless 3 mailing days apply)***	Mail day1 = Day 15	Mail day 2 = Day 16	Mail day 3 = Day 17 **Upload reply brief today if 3 mailing days apply**	*Relax*		

Reply briefs are not mandatory. A party may waive the right to file a reply brief. Although it is not required, immediately notifying the clerk that you are waiving that right will expedite submission of the appeal to the court. IOP 28(4).

2. Contents of Appellant's Reply Brief

See 11th Cir. R. 28-1 & 28-3

Appellant's reply brief is meant to reply to appellee's answer brief, rather than to just replicate appellant's initial brief. The reply brief *must* contain the sections set forth in the chart below. Other sections, e.g., Statement of Facts or Standard of Review, also *may* be included if relevant to the reply.

Contents of Appellant's Reply Brief

11th Cir. R.	Section	Reply Brief Must Include
28-1 (a)	Cover Page (gray)	*See supra* at VII.A.1.
28-1(b)	Certificate of Interested Persons	Only list additional interested persons or certify prior CIP is complete; *See supra* at V.C.
28-1(d)	Table of Contents	Page references to each section required by this Rule, as well as each heading & sub-heading of each issue argued.

11th Cir. R.	Section	Reply Brief Must Include
28-1(e)	Table of Citations	Page references to every citation in the brief. Full citations (without pinpoint page numbers in citations) Asterisks in the margin beside all citations primarily relied on.
28-1(k)	Argument(s) and Citations of Authority	
28-1(l)	Conclusion	
28-1(m)	Certificate of Compliance	Only include if reply brief is more than 15 pages; *See supra* at VII.A.5.
28-1(n)	Certificate of Service	

F. Briefs in Cross-Appeals

See FRAP 28.1 & corresponding Eleventh Circuit Rules

Although you may not have a lot of cross appeals, it is important to read the appellate rules regarding cross-appeals—in particular, FRAP 28.1 and related Eleventh Circuit Rules and Internal Operating Procedures—*before* filing your next notice of cross-appeal. The rules contain nuances that may prove stressful if not heeded in advance. For example, if you are an appellant/cross-appellee in a pending cross-appeal, be sure to have some yellow cover paper on hand before the due date for your brief of cross-appellee and reply brief for appellant.

The party who files a notice of appeal first is the appellant for the purposes of Rules 28.1, 30, and 34. *See* FRAP 28.1(b).

If notices are filed on the same day, the plaintiff in the district court is the appellant.

The parties may agree to modify the designation of appellant, but if they do, they must notify the clerk in writing upon commencement of the briefing schedule as to which party will file the first brief. *See* IOP 28.1(1).

Briefs in Cross-Appeals

DOCUMENT	DUE DATE	LENGTH	COVER
Appellant Principal Brief	40 days after record filed (40 days after last transcript filed in district court or appeal docketed if no transcripts ordered) FRAP28-1(f);11th Cir. R. 12-1, & 28.1-2	13,000 words*/ 1,300 lines FRAP28-1(e)(2)(A)	Blue IOP 28.1(2)
Appellee (cross-appellant) principal & response brief	30 days after date of service of last appellant's brief +3 days if brief served by mail (or by ECF until 12/1/2016), FRAP28-1(f);11th Cir. R. 12-1, & 28.1-2	15,300 words*/ 1,500 lines FRAP28-1(e)(2)(B)	Red IOP 28.1(2)
Appellant (cross-appellee) response & reply brief	30 days after date of service of last appellee/cross-appellant's brief +3 days if brief served by mail (or by ECF until 12/1/2016), FRAP28-1(f);11th Cir. R. 12-1, & 28.1-2	13,000 words*/ 1,300 lines FRAP28-1(e)(2)(A)	Yellow IOP 28.1(2)
Appellee (cross-appellant) reply brief	14 days after date of service of last appellant/cross-appellee's second brief +3 days if brief served by mail (or by ECF until 12/1/2016), FRAP28-1(f);11th Cir. R. 12-1, & 28.1-2	6,500 words*/ 650 lines FRAP28-1(e)(2)(C)	Gray IOP 28.1(2)

Further briefing in cross-appeals is prohibited, unless the court allows otherwise. *See* FRAP 28.1(c)(5).

* Until December 1, 2016, the word limit
for appellant's principal brief and response/reply brief is 14,000 words,
for appellee's principal & response brief is 16,500 words,
and reply briefs may contain no more than 7,000 words.
Effective December 1, 2016, FRAP 28.1 will be amended to reduce those limits
as reflected in the chart above.

G. Supplemental Briefs

See IOP 28(5)

If the court allows additional briefing after appellant's initial brief is filed—e.g., a new issue arises after the filing of the initial brief—that second brief is a "supplemental" brief with a tan cover.

► Supplemental briefs may only be filed with leave of the court.

Until 2015, the Eleventh Circuit rarely granted such leave to file a supplemental brief because this Circuit's "longstanding case law rule [was] that an appellant who does not raise an issue in his opening brief may not do so in his reply brief, in a supplemental brief, in a rehearing petition, or on a remand from the Supreme Court, even if the issue is based on an intervening decision of

the Supreme Court." *United States v. Durham*, 795 F.3d 1329, 1330 (11th Cir. 2015) (en banc) (citing, e.g., *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 830–31 (11th Cir. 2000)).

In 2015, the Eleventh Circuit, sitting en banc, abrogated that "longstanding case law rule" and held: "Where precedent that is binding in this circuit is overturned by an intervening decision of the Supreme Court, we will permit an appellant to raise in a timely fashion thereafter an issue or theory based on that new decision while his direct appeal is still pending in this Court." *Id*.

The court's order authorizing the supplemental brief may limit the page/word count to less than what the rules allow. So be sure to read that order carefully.

H. Replacement Briefs

See 11th Cir. R. 31-6

If you are appointed to represent a *pro se* defendant who has already filed a *pro se* brief, you must file a new brief entitled "Replacement Brief" that will replace the *pro se* brief. *See* 11th Cir. R. 31-6(a). The page/word limit (and everything else) is the same as the initial brief.

Upon appointment, the clerk's office will send counsel a letter confirming the date for filing the replacement brief.

A replacement brief may be filed by a newly retained or appointed attorney in other circumstances only upon motion and with leave of court. If the court grants leave, the brief previously filed by the *pro se* party or prior counsel will not be considered by the court and no portion of the prior brief may be adopted by reference, although any portion of the prior brief may be replicated in the replacement brief. A motion to file a replacement brief generally will be denied if an opposing party has already filed an appellee's principal brief or an appellant's reply brief, or if the appeal has already been submitted to a non-argument panel or assigned to an oral argument panel. *See* 11th Cir. R. 31-6(b).

I. Appendix

See 11th Cir. R. 30-1 & IOP 30(1); General Order 39

FRAP 30 discusses an "Appendix" to the brief. The Eleventh Circuit has always referred to it as "Record Excerpts." Then came the Expanded Appendix on Appeal under the Electronic Records on Appeal Pilot Program (General Order 35) and the flurry of activity in 2013. And on June 26, 2013, the Eleventh Circuit issued General Order 39, which vacated General Order 35 and adopted the "Appendix on Appeal" requirements, set forth below, for all appeals where the district court is now filing only an electronic record on appeal.

1. Due Date & Number filed

Parties represented by counsel must file 2 copies of the *paper* Appendix or Supplemental Appendix within 7 days of filing the party's brief.

If the appeal is set for oral argument, 3 more identical copies of the *paper* appendices must be filed within 7 days of the date of the clerk's notice of oral argument.

A copy should be sent to the client, but do not send a copy to opposing counsel or co-appellants' attorneys as they will be served via the NDA.

Do not send a client who is incarcerated the sealed portion of the Appendix, e.g., the pre-sentence report, as the Bureau of Prisons prohibits inmates from possessing such documents.

Multiple parties on one side of an appeal are strongly urged to file a joint appendix.

2. Binding/Tabbing

The Appendix must be securely fastened at the top.

The first page of each item/document in the appendix must be tabbed on the right side with the number that corresponds to the docket number on the district court docket sheet.

The tab for the docket sheet in the Appendix can be labeled "Dkt."

In electronic appendices, separator pages showing the appropriate tab numbers should be used in place of indexing tabs. IOP 30(1).

If the appendix exceeds 250 pages, it must be filed in multiple volumes, containing no more than 250 sheets of paper per volume.

3. Contents

Other than FRAP 30(a)(1), Eleventh Circuit Rule 30-1(a) provides that the requirements in FRAP 30 do **not** apply in the Eleventh Circuit.

FRAP 30(a)(1) requires that appellants file an appendix containing the following:

(A) the relevant docket entries in the proceeding below;
(B) the relevant portions of the pleadings, charge, findings, or opinion;
(C) judgment, order, or decision in question; and
(D) other parts of the record to which the parties wish to direct the court's attention.

The Eleventh Circuit has determined that the items listed in Eleventh Circuit Rule 30-1(a)—and reflected in the chart below—are either relevant docket entries or relevant portions of the record in the types of appeals specified, and thus they must be included in the appendix. *See* 11th Cir. R. 30-1(a).

In addition to specific contents required for specific appendices discussed *infra*, *all* appendices must contain a Cover Page, Index, District Court Docket Sheet, and Certificate of Service.

Appendix Required Contents

Cover Page Captioned "Appendix"	Front and back pages of durable (at least 90#) white paper
Index	When multiple volumes are filed, the index must indicate the volume in which each document is found. Include the style of the case and the case number at the top of index page
District Court Docket Sheet	
All other documents listed below	Documents must be arranged chronologically by date of entry into the record
	Indictment, information, complaint, or petition (as amended or superseded)
	Any pretrial orders that are being appealed, e.g., order denying motion to suppress or dismiss
	Judgment (as amended or superseded)
	Any other order being reviewed on appeal, e.g., orders denying judgment of acquittal or new trial
	Any transcript pages containing oral findings of fact or conclusions of law relevant to issues on appeal
	Any jury instruction challenged on appeal and relevant part of jury charge
	Magistrate Judge's report and recommendation, if the District Judge adopted it in whole or in part
	Transcript of guilty plea colloquy and any written plea agreement, if appealing any issue related to the guilty plea
	Transcript of the sentencing proceeding and the pre-sentence report and addenda (under seal in a separate envelope), if appealing any issue related to the sentence
	Any other pleadings, transcripts, documents, exhibits, etc., that any one of the parties believes will be helpful to the Eleventh Circuit in deciding the appeal

In Habeas Corpus Appeals Challenging a State Conviction Under 28 U.S.C. § 2254	All opinions by any state court previously rendered in the criminal prosecution and related collateral proceedings and appeals, and any state court orders addressing any claims and defenses brought by the petitioner in the federal action. These are the only documents that may be included in the appendix even if they are not contained in the district court record. *See* 11th Cir. R. 30-1(a)(7).*
Certificate of Service	*See* FRAP 25(d)

*Except as otherwise permitted by Eleventh Circuit Rule 30-1(a)(7), under no circumstances should a document that was not submitted to the district court be included in the appendix.

4. Appellee's Responsibility

See 11th Cir. R. 30-1(b)

If appellant's appendix is deficient or if appellee's brief relies on parts of the record not in appellant's brief, then appellee must file its own "Supplemental Appendix" within 7 days of filing its brief.

The supplemental appendix must not duplicate any documents in appellant's appendix.

Appellee must submit an appendix in an appeal by an incarcerated *pro se* party.

In cross-appeals, appellees/cross-appellants may (but are not required to) file an appendix when they file their first brief. *See* IOP 30(2).

VIII. SUPPLEMENTAL AUTHORITY

See FRAP 28(j), IOP 28(6), IOP 29, & 11th Cir. R. 40-5

If you come across a pertinent and significant case after filing your brief, or after oral argument, but before the decision, you should promptly file it as supplemental authority.

Either party, as well as amicus curiae, may submit supplemental authority by letter addressed to the Eleventh Circuit Clerk of Court any time before the decision issues. If a petition for rehearing is pending, a supplemental authority letter to the clerk may be filed any time before court rules on the rehearing petition.

The supplemental authority letter must:

(a) cite the new authority;

(b) state why it is relevant, referring either to the page of the brief or to a point argued orally; and

(c) make a brief argument.

If opposing counsel files supplemental authority, any response must be made "promptly" by letter to the clerk.

The body of the supplemental authority letter and the response letter is limited to 350 words.

If a new case is not reported, a copy should be appended. *See* IOP 28(6).

Counsel who intends to cite to new supplemental authorities during oral argument (the day of oral argument) must provide sufficient paper copies of the opinion being cited for distribution to the court and opposing counsel. *See* 11th Cir. R. 34-4(h).

Supplemental authority letters are not required to have a cover, but if one is used it must be white.

No paper copies of the supplemental authority letter are required, except that the client should be sent a copy.

IX. POST-BRIEFING PROCESS

See FRAP 34 & corresponding Eleventh Circuit Rules, especially IOP 34(1)

FRAP 34(a)(2) requires oral argument "in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary" because:

(a) "the appeal is frivolous";

(b) "the dispositive issue or issues have been authoritatively decided"; or

(c) "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

See also 11th Cir. R. 34-3(b).

The Eleventh Circuit maintains a "two-calendar" system. *See* 11th Cir. R. 34-3(a). Eleventh Circuit Rules 34-3 and 34-4 explain the "Non-Argument Calendar" and "Oral Argument Calendar," respectively. When the last brief is filed, appeals are sent to the Eleventh Circuit staff attorneys, who recommend which calendar the appeal should be assigned to. *See* IOP 34(1).

{ In appeals involving multiple parties, oral argument may be recommended for some parties but not for others. }

Argument Calendar: If the staff attorney opines that oral argument is warranted, the staff attorney may recommend that an appeal be assigned to the oral argument calendar, subject to later review by the assigned oral argument panel. *See* IOP 34(1).

Non-Argument Calendar: If the staff attorney opines that oral argument is not warranted, a brief memorandum is prepared and the appeal is returned to the clerk for routing to an active Eleventh Circuit judge, selected in rotation. If the judge agrees that oral argument is not warranted, that judge forwards the briefs, together with a proposed opinion, to the two other judges on the non-argument panel. If, after reviewing the briefs and the record on appeal, those judges agree that the proposed opinion should issue without oral argument, they can issue a decision on the record. At any time before decision, if a judge on the non-argument panel concludes that oral argument is desired, that appeal will be transferred to the oral argument calendar. *See* 11th Cir. R. 34-3(b); IOP 34(1).

Unanimity: Eleventh Circuit Rule 34-3(b) is similar to FRAP 34(a)(2), which mandates oral argument unless all three judges on the panel unanimously agree that oral argument is not warranted for one of three reasons listed therein. Eleventh Circuit Rule 34-3(b), however, requires not only that the panel judges unanimously agree that oral argument is not warranted, but also that no dissenting or special concurring opinion may be filed; the Rule then sets forth two exceptions. *See* 11th Cir. R. 34-3(b), (d), (f).

The first exception, provided in Eleventh Circuit Rule 34-3(d), states:

> Pursuant to FRAP 34(f), if parties state that they do not desire oral argument or otherwise agree that an appeal shall be submitted on briefs, that appeal may be placed on the non-argument calendar even it does not fall within one of the requirements of FRAP 34(a). The decision in that appeal need not be unanimous and a dissent or special concurrence may be filed.

11th Cir. R. 34-3(d).

FRAP 34(f) provides that the parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

The second exception provided in Eleventh Circuit Rule 34-3(f), requires a unanimous vote, but permits a dissenting or special concurring opinion when an appeal is assigned to an oral argument panel, and the oral argument panel unanimously votes that the appeal will be decided by the panel without oral argument or transfers the appeal to the non-argument calendar. *See* 11th Cir. R. 34-3(f).

X. ORAL ARGUMENT

See FRAP 34 & and corresponding Eleventh Circuit Rules

Appeals to be assigned to oral argument sessions are, if possible, selected from the area where the session is to be held. *See* IOP 34(4).

The Eleventh Circuit usually holds oral argument in Atlanta, Georgia; Montgomery, Alabama; or Miami or Jacksonville, Florida; but the court also may hold regular or special sections in Tallahassee and Tampa, Florida.

If oral argument is granted, the parties receive notice several months in advance of the week the argument is scheduled.

In an appeal involving multiple parties, a screening judge may schedule fewer than all parties for oral argument, and submit the remaining parties to the oral argument panel for decision on the briefs. *See* 11th Cir. R. 34-3(e). Similarly, in multiple party appeals, an oral argument panel may decide the appeals of fewer than all parties on the briefs, and schedule the remaining parties for oral argument. *See* 11th Cir. R. 34-3(f).

The parties are not informed who was on the screening panel or who voted to refer the case to oral argument. The oral argument panel is not necessarily the same as the screening panel.

Counsel can call the calendaring clerk two weeks prior to the oral argument to find out who the members of the oral argument panel will be. *See* IOP 34(7).

It is a good idea to research those judges
(and any decisions they have rendered on your issue)
and fashion your argument accordingly.

Upon receipt of the notice advising that the case has been set for oral argument, counsel may call the calendaring clerk to request a certain day during that week.

Once oral argument has been scheduled for a particular day of the oral argument week, any change in or addition to counsel in an appeal requires leave of the court. *See* IOP 34(3e).

Oral arguments are recorded for the court's use. Copies of the court's audio recordings of oral arguments held after August 1, 2012, are available for purchase on CD from the Eleventh Circuit Clerk of Court. Further information is available at http://www.ca11.uscourts.gov/cd-recordings-oral-arguments. *See also* IOP 34(16)

XI. DECISION & MANDATE

FRAP 36 & 41 & corresponding Eleventh Circuit Rules

Eleventh Circuit policy favors concise, unpublished decisions. As explained in Internal Operating Procedure 6 under Rule 36:

> The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law. To meet this serious problem it is declared to be the basic policy of this court to exercise imaginative and innovative resourcefulness in fashioning new methods to increase judicial efficiency and reduce the volume of published opinions. Judges of this court will exercise appropriate discipline to reduce the length of opinions by the use of those techniques which result in brevity without sacrifice of quality.

IOP 36(5).

Published opinions are binding precedent, regardless of whether the mandate has issued. *See* IOP 36(2); *see also Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992).

For information concerning the precedential value of opinions of the former Fifth Circuit, *see Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (en banc), and *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982).

Unpublished opinions have no precedential value; they may only be cited as persuasive authority. *See* 11th Cir. R. 36-2; IOP 36(6); *see also supra* at VI.O (Motions to Publish Unpublished Opinions).

If you notice a typographical or printing error in an opinion, please notify the clerk's office. *See* IOP 36(8).

The mandate should issue 7 days after the time to file a petition for rehearing expires, i.e., 7 + 21 = 28 days after the opinion.

This same time period applies if the Eleventh Circuit dismisses the appeal in a published order; but if the Eleventh Circuit does not publish the order dismissing the appeal, the unpublished order serves as the mandate. *See* 11th Cir. R. 41-4.

The mandate is stayed by the timely filing of a petition for rehearing or motion to stay. If the petition or motion is denied, the mandate will issue 7 days later. *See* FRAP 41(b), (d)(1).

See also 11th Cir. R. 41-1, 41-2 (concerning motions to stay, recall, and expedite the mandate).

XII. PETITIONS FOR REHEARING

See FRAP 35 & corresponding Eleventh Circuit Rules (En Banc Consideration)
FRAP 40 & corresponding Eleventh Circuit Rules (Panel Rehearing)

Rehearing may be granted upon motion of a party or upon the court's own motion.

If the Eleventh Circuit decides the appeal adversely to the defendant, counsel *must inform* the defendant of the right to seek further review through a petition for rehearing by the panel, a petition for rehearing by the court en banc, or a petition for a writ of certiorari.

Counsel's *duty to file* a rehearing petition *depends on whether, in counsel's considered judgment, sufficient grounds for the petition exist*. *See* 11th Cir. R. 35-3; IOP 40(1); Addendum Four, § (f)(5); *see also supra* at II.K.

Petitions for panel rehearing are intended to bring to the panel's attention errors of fact or law in the opinion. They are *not* to be used to simply reargue the issues previously presented or to attack the court's non-argument calendar procedures.

Petitions for en banc rehearing are intended to bring to the entire court's attention an error of exceptional importance or a panel opinion in direct conflict with precedent of the Supreme Court or the Eleventh Circuit. *See* 11th Cir. R. 35-3.

A petition for *rehearing* en banc is not the only way to seek en banc consideration. Rather than waiting for an adverse panel decision to file a petition for *rehearing* en banc, a petition for *initial hearing* en banc may be filed within 30 days of appellant's initial brief. The requirements for petitions for *rehearing* en banc, discussed *infra* at XII.C., also apply to petitions for *initial hearing* en banc.

The requirements for petitions for panel rehearing, petitions for en banc rehearing, and petitions for both panel and en banc rehearing are summarized in the chart, *infra* at XII. The two subsections that follow provide further details about due dates and en banc petitions. Subsection B contains additional information regarding computing the deadline listed in the chart. Subsection C addresses special considerations relating to en banc consideration, including a chart of the contents required in en banc petitions.

A. Requirements for Rehearing Petitions

A party may file a petition for panel rehearing or a petition for en banc rehearing, or may combine a petition for panel rehearing with a petition for en banc rehearing. The requirements for all three types of rehearing petitions are set forth in the chart below.

Requirements for Petitions for Panel Rehearing, for En Banc Rehearing, and for Both

Petition	Panel Rehearing Only	Panel Rehearing & En Banc Rehearing	En Banc Rehearing
Considered By	Panel only *See* FRAP 40(a)(2); IOP 40(2).	Entire Court IOP 35(3) • Eleventh Circuit judges in active service & panel, including any visiting judges and non-active Eleventh Circuit judges on the panel • The panel retains plenary control and may grant panel rehearing on its own	
Due Date E-File & Postmark Copies	Criminal Appeals. . . . . .21 days from Opinion Civil appeals in which the United States is NOT a party. . . . . 21 days from Opinion e.g., § 2254 Appeals Civil appeals in which the United States is a party. . . . . .45 days from Opinion e.g., § 2241 & § 2255 Appeals *See* FRAP 35(c), 11th Cir. R.35-2; FRAP 40(a)(1), 11th Cir. R 40-3		

<table>
<tr><th>Petition</th><th>Panel Rehearing Only</th><th>Panel Rehearing
&
En Banc Rehearing</th><th>En Banc Rehearing</th></tr>
<tr><td colspan="4"></td></tr>
<tr><td>Grounds</td><td>The panel overlooked or misapprehended the law or facts</td><td>Include Grounds for Both
Panel Rehearing
&
En Banc Rehearing</td><td>• The panel opinion conflicts with Supreme Court or Eleventh Circuit precedent and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.
↑and/or↓
• The appeal involves a question(s) of exceptional importance.</td></tr>
<tr><td colspan="4"></td></tr>
<tr><td>Paper Size & Spacing</td><td colspan="3">8½ x 11 inches; Double Spaced
→Same as Briefs. See FRAP 32(a)(4)–(6); see also supra at VII.A.4←</td></tr>
<tr><td>Margins</td><td colspan="3">1 inch on all sides; page numbers but no text in margins
→Same as Briefs. See FRAP 32(a)(4); see also supra at VII.A.2–4←</td></tr>
<tr><td>Typeface & Style</td><td colspan="3">Proportionally spaced (Times New Roman) 14 pt.;
Monospaced (Courier New) 12 pt.
→Same as Briefs. See FRAP 32(a)(5) & (6); see also supra at VII.A.2←</td></tr>
<tr><td colspan="4"></td></tr>
<tr><td rowspan="2">Length</td><td colspan="3">See FRAP 35(b)(2), 11th Cir. R. 35-1, FRAP 40(b), & 11th Cir. R. 40-1</td></tr>
<tr><td colspan="3">Effective 12/1/2016,
3,900 words
(15 pages if handwritten or typewritten)
from Statement of the Issues through Conclusion
See supra at VII.A.5, & infra at XII.C</td></tr>
<tr><td colspan="4"></td></tr>
<tr><td>Contents</td><td>FRAP 40 provides no real detail</td><td colspan="2">11th Cir. R. 35-5 provides a detailed list set forth infra at XII.C.</td></tr>
<tr><td>Cover</td><td>Optional
White 90# if used</td><td colspan="2">Required→White90#</td></tr>
<tr><td colspan="4"></td></tr>
<tr><td>Certificate of Service</td><td colspan="3">A certificate of service is required for all pleadings.</td></tr>
<tr><td colspan="4"></td></tr>
</table>

Petition	Panel Rehearing Only	Panel Rehearing & En Banc Rehearing	En Banc Rehearing
Addendum (panel opinion)	A copy of the panel opinion must be included in the petition as an addendum, after the certificate of service. The opinion does not count toward the page limit. *See* 11th Cir. R. 35-5(k); 11th Cir. R. 40-1.		
Binding	On Left →Same as Briefs. *See* FRAP 32(a)(3); *supra* at VII.A.2←		
Copies	4 to court 1 to client	15 to court 1 to client	15 to court 1 to client
Response	Not allowed unless requested by the court *See* FRAP 35(e); 11th Cir. R. 35-7; FRAP 40(a)(3)		

B. Due Date—Additional Information

See FRAP 35(c), 11th Cir. R.35-2,
FRAP 40(a)(1), 11th Cir. R 40-3

In criminal appeals and state habeas corpus appeals under 28 U.S.C. § 2254, the Federal Rules of Appellate Procedure state that rehearing petitions must be filed within 14 days after entry of judgment, *unless a local rule prescribes a different period*. *See* FRAP 35(c), 40(a)(1). The Eleventh Circuit Rules prescribe a different period—21 days instead of 14 days. *See* 11th Cir. R 35-2, 40-3. The Eleventh Circuit Rules control.

In computing the due date for a petition for rehearing, apply the rules discussed *supra* at III.A (Computing Due Dates).

► Entry of the Eleventh Circuit judgment—***not*** *the mandate*—is the triggering event.

► The judgment is "entered" on the day the opinion is filed.

► No additional time is allowed for mailing.

Example

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
11th Circuit opinion filed	Day 1	Day 2	Day 3	Day 4	Day 5	Day 6
Day 7	Day 8	Day 9	Day 10	Day 11	Day 12	Day 13
Day 14	Day 15	Day 16	Day 17	Day 18	Day 19	Day 20
Day 21 must upload petition today	*Relax*					

Extensions of time are only granted for compelling reasons. *See* 11th Cir. R. 35-2; 11th Cir. R. 40-3.

But see supra VI.F (regarding 14-day telephonic extension for petitions for rehearing if the opinion was not published).

If a motion to publish a previously unpublished opinion is granted, the time for filing a petition for panel and/or en banc rehearing shall begin running anew from the date of the order directing publication. *See* 11th Cir. R. 36-3.

A timely filed petition for rehearing stays the mandate until the disposition of the petition. *See* FRAP 41(d).

C. En Banc Petitions— Special Requirements

See FRAP 35 & corresponding Eleventh Circuit Rules

Counsel may seek en banc consideration of an issue of exceptional importance by filing a petition for *initial hearing* en banc or a petition for *rehearing* en banc.

By way of illustration, if an appeal presents an issue that meets the standard for en banc consideration, but is currently foreclosed by Eleventh Circuit precedent, counsel might consider filing a petition for hearing en banc, rather than waiting to file a petition for rehearing en banc until after the panel affirms, as it must, based on binding precedent.

The primary difference between a petition for *initial hearing en banc* and a petition for *rehearing en banc* is timing. Petitions for *initial hearing en banc*—as opposed to rehearing en banc—are due by the date when appellee's brief is due, i.e., 30 days after service of appellant's initial brief. *See* FRAP 35(c). Other than the due date, the requirements for an initial hearing en banc and a rehearing en banc are essentially the same.

A petition for en banc consideration "is an extraordinary procedure intended to bring to the attention of the entire court" questions of "exceptional importance" and/or panel opinions in conflict with Supreme Court or Eleventh Circuit precedent. *See* 11th Cir. R. 35-3.

En banc consideration is *not* available to review:

- Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence);
- Alleged errors asserted in the panel's misapplication of correct precedent to the facts of the case; or
- Administrative and interim matters, such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal *in forma pauperis*, and leave to appeal from a non-final order.

En banc petitions in such matters will be referred as a request for rehearing or reconsideration to the judge or panel that entered the order or opinion sought to be reheard. *See* 11th Cir. R. 35-4.

A petition for en banc consideration must contain the items listed in the chart that follows in the order they are listed.

Contents Required for En Banc Consideration

Section	Must Include	11th Cir. R.
Cover—White 90#	Titled "Petition for Rehearing [or Hearing] En Banc" *See also supra* at VII.A.1	35-5(a)
Certificate of Interested Persons	Complete list of all persons and entities listed on all CIPs filed by any party in the appeal. *See supra* at V.C	26-1.1; 35-5(b)
Statement of Counsel	I express a belief, based on a reasonable and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: [cite specifically the case or cases] ***↑and/or↓*** I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence] *E-Signature*	35-5(c)
Table of Contents	*See supra* at VII.C	35-5(d)
Table of Citations	*See supra* at VII.A.9	35-5(d)

Section	Must Include	11th Cir. R.
Statement of the Issue(s)	Issues asserted to merit en banc consideration	35-5(e)
Course of Proceedings and Disposition of the Case	*See supra* at VII.C	35-5(f)
Statement of the Facts	Facts necessary to argument of the issues	35-5(g)
Argument and Authorities	Argument must specifically address the merit of the issues *and* why they are worthy of en banc consideration	35-5(h)
Conclusion	Followed by e-signature block	35-5(i)
Certificate of Service	Followed by e-signature	35-5(j)
Panel Opinion	Must be appended if Rehearing is sought	35-5(k)

If rehearing en banc is granted,

- ► the panel opinion will be vacated and the mandate stayed;
- ► the clerk will set the en banc briefing and argument schedules;
- ► 20 copies of en banc briefs must be sent to the clerk;
  - en banc briefs should be prepared in the same manner and form as opening briefs and conform to the requirements of FRAP 28 and 32;
  - en banc brief covers must be the color required by FRAP 32 and must be titled "En Banc Brief";
  - en banc briefs must conform to the page and type-volume limitations required by FRAP 32(a)(7), unless otherwise directed by the court;
- ► 20 additional copies of each brief previously filed by counsel also must be sent to the clerk.

See 11th Cir. R. 35-8, 11th Cir. R. 35-11, IOP 35(10).

XIII. CERTIORARI PETITIONS

{ Counsel's appointment by the district or circuit court carries over to the Supreme Court. }

If the Eleventh Circuit decision is adverse to the defendant, counsel *must inform* the defendant of the right to petition the Supreme Court of the United States for a writ of certiorari.

Counsel's *duty to file* a certiorari petition *depends on whether, in counsel's considered judgment, sufficient grounds for the petition exist*. *See* S. Ct. R. 10; Eleventh Circuit Addendum Four, § (f)(5); *see also supra* at II.K.

Certiorari review by the Supreme Court is not a matter of right, but of judicial discretion. The Supreme Court's primary concern is not to correct errors in the decision below, but to decide cases presenting issues of importance beyond the particular facts and parties involved.

The Supreme Court grants certiorari and hears argument in about 1% of the cases. Most petitions are denied by the Court without comment or explanation. The denial of a petition for a writ of certiorari signifies only that the Court has chosen not to accept the case for review; it does not express the Court's view of the merits of the case.

Please let us know if your certiorari petition is granted so we can put you in contact with the Defender's Supreme Court Resource & Assistance Panel (DSCRAP).

A. Supreme Court Overview

Justices	The Honorable John G. Roberts, Chief Justice The Honorable Anthony M. Kennedy The Honorable Clarence Thomas (assigned to 11th Circuit) The Honorable Ruth Bader Ginsburg The Honorable Stephen G. Breyer The Honorable Samuel A. Alito, Jr. The Honorable Sonia M. Sotomayor The Honorable Elena Kagan

One seat is currently vacant due to the untimely demise of the late Justice Antonin Scalia.

Clerk of Court	Scott S. Harris
Main Telephone Number	(202) 479-3211
Mailing Address	Supreme Court of the United States One First Street, NE Washington, DC 20543

B. Supreme Court Rules

Available at http://www.supremecourt.gov

The Supreme Court Rules govern petitions for writ of certiorari. Counsel considering filing a certiorari petition should be familiar, at a minimum, with the following rules:

- Supreme Court Rules 10–16 (petitioning for certiorari review);
- Supreme Court Rule 29 (filing and service);
- Supreme Court Rule 30 (computing time);
- Supreme Court Rules 33.2 & 34 (preparing pleadings on 8½- x 11-inch paper);
- Supreme Court Rule 39 (proceeding in forma pauperis).

C. Certiorari Proceedings Overview

See S. Ct. R. 12, 13, 14, 15

The certiorari petition is due within *90 days* of the Eleventh Circuit decision or the order denying a petition for rehearing if one was filed, whichever is later. *See* S. Ct. R. 13. An extension of time to file a certiorari petition is possible but "not favored." *See* S. Ct. R. 13.5

The 90-day period is triggered by the decision or order denying rehearing. The date of the mandate is *not* relevant.

The petition, motion for leave to proceed *in forma pauperis*, and proof of service must be mailed to the Supreme Court and postmarked no later than the 90th day. *See supra* at III.A (explaining how to calculate due dates).

The Supreme Court Clerk will mail counsel a written notice when the petition is received and docketed. The notice will include a form for counsel to complete and send to the Solicitor General. The Solicitor General may file a response to the certiorari petition within 30 days of the date the petition is docketed in the Supreme Court. The response is called a "Brief in Opposition" (BIO). If the Solicitor General files a BIO, petitioner may file a reply. *See* S. Ct. R. 15.

The Supreme Court Rules do not provide a specific date by which any reply must be filed. Rather, the Rules explain that "the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 14 days after the brief in opposition is filed, unless the petitioner expressly waives the 14-day waiting period." S. Ct. R. 15.5. A reply may be filed after the 14 days expire, but the Clerk's distribution and the Court's consideration of the case will not be stayed pending receipt of the reply. *See* S. Ct. R. 15.6.

Instead of filing a BIO, the Solicitor General may file a notice stating that it is waiving the government's right to respond. If the Solicitor General waives its response, as it usually does, the Court can review the petition without a response. *See* S. Ct. R. 15.5.

The case is then scheduled for conferencing. After the conference, the Court will enter "an appropriate order." *See* S. Ct. R. 16. For example, the Court might grant or deny certiorari, require the Solicitor General to file a BIO, or schedule another conference.

If the certiorari petition is granted, briefing and oral argument will be scheduled. DSCRAP will assist court-appointed counsel from there.

D. Grounds for Certiorari

See S. Ct. R. 10.

Supreme Court Rule 10 addresses the types of considerations that govern certiorari review. While "neither controlling nor fully measuring the Court's discretion," the following examples are indicative of "the character of the reasons the Court considers" for certiorari review:

- ► The Eleventh Circuit decision conflicts with the decision of another U.S. Court of Appeals on the same important matter.

- ► The Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of the Supreme Court's supervisory power.

- ► The Eleventh Circuit has decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

- ► The Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

E. Formatting the *In Forma Pauperis* Certiorari Petition

See S. Ct. R. 33.2.

A petitioner proceeding *in forma pauperis* may file the certiorari petition in the "8½ by 11 Inch Paper Format" set forth in Supreme Court Rule 33.2, as opposed to the "Booklet Format" described in Rule 33.1.

- ► 8½- x 11-inch paper
- ► Double spaced, *except* that indented quotations may be single spaced
- ► Stapled or bound at the upper left-hand corner
- ► Original signed by counsel of record

If appointed under the CJA, counsel of record need not be a member of the Supreme Court Bar.

- ► Limited to 40 pages (15 pages for a reply to the Solicitor General's BIO),
  - including footnotes, but . . .
  - *not* including the question(s) presented, the list of parties, the table of contents, the table of cited authorities, verbatim quotations required under Rule 14.1(f) set out in the text of a brief, the listing of counsel at the end of the document, or the appendix

You can say a lot in 40 pages. But sometimes saying a lot is not beneficial, especially given that the Supreme Court reviews thousands of petitions a year. The petition is only meant to get your foot in the door. If certiorari is granted, you will be able to expound.

F. Contents

See S. Ct. R. 14

A petition for a writ of certiorari should be stated briefly and in plain terms.
This is not a brief. It is a petition to get your foot in the door.
Say enough, but be concise.

Contents of Certiorari Petition

Section	Must Include (as relevant to our purposes)	S.Ct.R. 14(1)
Cover Page	*See supra* at VII.A.1.	
Question(s) Presented	Concisely express the questions presented in relation to the circumstances of the case, without unnecessary detail and not argumentative or repetitive Set out the questions on the first page following the cover No information other than the questions presented may appear on that page The statement of any question presented is deemed to comprise every subsidiary question fairly included therein Only the questions set out in the petition, or fairly included therein, will be considered by the Court	(a)
List of Parties	List all parties to the proceeding in the Court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a corporate disclosure statement as required by Rule 29.6	(b)
Table of Contents	Only required if petition exceeds 5 pages Include the items contained in the appendix	(c)
Table of Citations	Only required if petition exceeds 5 pages Citations of the official and unofficial reports of the opinions and orders entered in the case by Courts or administrative agencies.	(d)
Basis for Jurisdiction	Concise statement of the basis for Supreme Court jurisdiction, including: • the date the judgment sought to be reviewed and any order on rehearing were entered, and • the statutory provision conferring certiorari jurisdiction on the Supreme Court to review a the judgment or order in question	(e)
Constitutional/ Statutory Provisions Involved	Constitutional provisions, treaties, statutes, ordinances, and regulations set out verbatim with appropriate citation If the provisions are lengthy, just cite here and set out their pertinent text in the appendix *See* S. Ct. R. 14(1)(i)	(f)

Section	Must Include (as relevant to our purposes)	S.Ct.R. 14(1)
Statement of the Case	Concise statement of the case, including: • facts material to consideration of the questions presented, and • basis for federal jurisdiction in the Court of first instance	(g)
Reasons/Argument	Direct and concise argument amplifying the reasons relied on for allowance of the writ, *see* S. Ct. R. 10 No separate brief is allowed, *see* S. Ct. R. 14(2)	(h)
Appendix	• Eleventh Circuit opinion sought to be reviewed • Order on rehearing, if any • Pertinent text of constitutional provisions, treaties, statutes, ordinances, and regulations that are too lengthy to set out verbatim above, *see* S. Ct. R. 14(1)(f) • Any other material the petitioner believes essential to understand the petition • If this material is voluminous, it may be presented in a separate volume or volumes with appropriate covers	(i)

G. Motion for Leave to Proceed *In Forma Pauperis*

See S. Ct. R. 12.2, 39

If the Court below appointed counsel in the current proceeding, no affidavit or declaration is required, but the *in forma pauperis* motion should cite the provision of law under which counsel was appointed, or a copy of the order of appointment should be appended to the motion. *See* S. Ct. R. 39.1.

A copy of the motion must be attached (stapled) to the front cover of each copy of the petition. *See* S. Ct. R. 12.2, 29.

H. Proof of Service

See S. Ct. R. 12.3, 29,

Unlike appellate briefs, certiorari petitions do *not* contain a certificate of service. Instead, counsel must file a separate document to affirm that the petition and *in forma pauperis* motion were served, i.e., mailed to, the Solicitor General and any other person required to be served.

I. Filing & Copies

See S. Ct. R. 14, 29, 39

A petitioner proceeding *in forma pauperis* need only file the original and 10 copies of the certiorari petition on 8½- x 11-inch paper, together with the original and 10 copies of the motion for leave to proceed *in forma pauperis* and the original proof of service. A copy of the motion is attached (stapled) to the front cover of each copy of the petition. *See* S. Ct. R. 12.2, 29.

{ Counsel representing petitioners who are *not* proceeding *in forma pauperis* must file 40 copies of the petition in booklet format. }

The petition for writ of certiorari and accompanying documents are "filed" by sending them to the Supreme Court Clerk through the U.S. Postal Service by first-class mail (including express or priority mail), postage prepaid, with a postmark other than a commercial postage meter label, showing that the document was mailed. Alternatively, third-party commercial carrier may be used. *See* S. Ct. R. 29.2.

To be timely filed, the following must be mailed to the Supreme Court on or before the 90th day after entry of the Eleventh Circuit judgment or denial of rehearing, whichever is later, *see supra* at III.A (explaining how to calculate due dates):

	Petition for Writ of Certiorari	**Motion for Leave to Proceed *In Forma Pauperis***	**Proof of Service**
SCOTUS	▪ Original (with wet signature) ▪ 10 copies	▪ Original (with wet signature) ▪ 10 copies stapled to the front cover of each copy of the petition	Original (no copies)
Solicitor General	▪ 1 copy	1 copy stapled to the front cover of each copy of the petition	1 copy
Client	▪ 1 copy	1 copy	1 copy

The Supreme Court website has information and forms relating to certiorari petitions, *in forma pauperis* motions, and proof of service. Also, you may contact any member of our appellate division concerning samples and questions.

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