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# Not Too Little, But a Little Too Late: The Eleventh Circuit's Refusal to Consider New Issues Raised by Supplemental Authority

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**NOT TOO LITTLE,  
BUT A LITTLE TOO LATE:  
THE ELEVENTH CIRCUIT'S REFUSAL TO  
CONSIDER NEW ISSUES RAISED BY  
SUPPLEMENTAL AUTHORITY**

*Christopher R. Prior\**

*“Orderly rules of procedure do not require sacrifice of  
the rules of fundamental justice.”<sup>1</sup>*

INTRODUCTION

Rule 28(j) of the Federal Rules of Appellate Procedure provide that “[i]f pertinent and significant authorities come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations.”<sup>2</sup> The Rules go on to say that “[t]he letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally.”<sup>3</sup> While Rule 28(j) provides for the consideration of new

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<sup>1</sup> *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

<sup>2</sup> FED. R. APP. P. 28(j).

<sup>3</sup> *Id.*

authority, the general rule<sup>4</sup> is that appellate courts are under no obligation to consider arguments that were not previously raised, either at the trial level or in the appellate brief.<sup>5</sup> This general rule stems from English common law<sup>6</sup> and is said to protect the interests of adverse appellate parties<sup>7</sup> and to conserve judicial resources.<sup>8</sup> However, there is no clear answer or direction when Rule 28(j) and the general rule conflict, and a party attempts to raise a potentially dispositive issue based on newly issued authority.

The Eleventh Circuit Court of Appeals has dealt with several such conflicts, and has consistently declined to consider arguments based on authority not cited in a party's original appellate brief. In one recent case, *United States v. Bordon*,<sup>9</sup> a concurring judge noted that the Eleventh Circuit differs from other Circuit Courts of Appeal in its rejection of relevant authority decided after appellants have handed in their briefs.<sup>10</sup> In *Bordon*, the Eleventh Circuit declined to hear an appeal of a criminal sentence based on a recent United States Supreme Court decision.<sup>11</sup> The *Bordon* decision mirrored the Eleventh

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<sup>4</sup> Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1024 (1987). The "general rule" is that new issues cannot be raised for the first time on appeal. *See id.* at 1024-26.

<sup>5</sup> Sarah M.R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251, 251 (2004).

<sup>6</sup> *See* Martineau, *supra* note 4, at 1026; Rhett R. Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal*, 64 IND. L.J. 985, 985-86 (1989).

<sup>7</sup> *See* Dennerline, *supra* note 6, at 987-88.

<sup>8</sup> Martineau, *supra* note 4, at 1032.

<sup>9</sup> 421 F.3d 1202 (11th Cir. 2005).

<sup>10</sup> *Id.* at 1208 (Hill, J., concurring). Hill concurred only on the doctrine of *stare decisis*. *Id.* at 1208-09.

<sup>11</sup> *Id.* at 1206 n.1. The court declined to hear the Bordons' argument based on *United States v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Supreme Court found that the federal sentencing guidelines were unconstitutional to the extent that they allow sentencing judges to rely on facts not admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 244.

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Circuit's approach to a similar issue in *United States v. Levy*,<sup>12</sup> in which two dissenting judges expressed harsh criticism of the court's rationale.<sup>13</sup> Other circuits have been more flexible, holding that when a relevant case is decided while an appeal is pending, "a 28(j) letter is a perfectly appropriate avenue by which to present" new arguments.<sup>14</sup>

This Note will argue that the Eleventh Circuit's inflexible approach denies litigants due process and frustrates the intent behind recent changes to Rule 28(j). First, this Note will examine the Eleventh Circuit's approach to, and rejection of, 28(j) letters that attempt to raise new arguments based on cases decided after the filing of appellate briefs by discussing several Eleventh Circuit decisions, including *Bordon*, *McGinnis v. Ingram Equipment Co.*<sup>15</sup> and *Levy*. Part I will conclude with a discussion of several cases in which the Eleventh Circuit has maintained its refusal to hear post-brief supplemental authority even when the Supreme Court has remanded the case for resentencing in light of the Court's recent decisions. Part II will analyze the Eleventh Circuit's justification for its rule on new issues raised by supplemental authority. Part III considers the possible due process implications of the Eleventh Circuit's approach, and argues that the Eleventh Circuit's rule is contrary to the congressional intent behind recent changes to Rule 28(j). This Note will then explore approaches of other Circuit Courts of Appeal, most of which allow for new arguments when authority is handed down after the deadline for appellate briefs, and then examine the approach taken by state courts in handling supplemental authority. Finally, this Note will call for an addition to the Federal Rules of Appellate Procedure to ensure that litigants and defendants receive fair adjudication of their claims.

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<sup>12</sup> *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), *reh'g denied* 379 F.3d 1241 (11th Cir. 2004), and *reh'g denied en banc* 391 F.3d 1327 (11th Cir. 2004), *cert. granted, vacated* 545 U.S. 1101 (2005), *remanded to* 416 F.3d 1273 (11th Cir. 2005), *cert. denied* 126 S. Ct. 643 (2005).

<sup>13</sup> *Levy*, 391 F.3d at 1335-56 (Tjoflat and Barkett, JJ., dissenting).

<sup>14</sup> *United States v. Cordoza-Estrada*, 385 F.3d 56, 59 (1st Cir. 2004).

<sup>15</sup> *McGinnis v. Ingram Equipment Co.*, 918 F.2d 1491 (11th Cir. 1990).

### I. THE ELEVENTH CIRCUIT AND REJECTION OF POST-BRIEF SUPPLEMENTAL AUTHORITY

The Eleventh Circuit has heard numerous cases in which parties have attempted to raise a new issue based on post-brief supplemental authority. In addition to cases such as *Bordon*, in which the court declined to hear an argument rooted in the Supreme Court's decision in *United States v. Booker*,<sup>16</sup> the Eleventh Circuit has refused to hear arguments based on *Blakely v. Washington*<sup>17</sup> and *Apprendi v. New Jersey*.<sup>18</sup> *Bordon* was merely the latest case to highlight a dispute between Judge James C. Hill and the majority of the judges on the Eleventh Circuit. The disagreement among the judges of the Eleventh Circuit dates back more than 15 years to *McGinnis v. Ingram Equipment Co., Inc.*,<sup>19</sup> in which Judge Hill dissented from a majority decision applying the Eleventh Circuit's rule rejecting supplemental authority to civil cases.<sup>20</sup> The majority opinion in *McGinnis* articulated several reasons why declining to consider arguments based on authority first raised in a supplemental filing, such as a 28(j) letter, is not a "miscarriage of justice."<sup>21</sup>

Subsequently, the Eleventh Circuit used the reasoning of *McGinnis* and the doctrine of *stare decisis* to justify its rejection of newly raised arguments, even when the Supreme Court has remanded sentencing decisions for reconsideration.<sup>22</sup> The

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<sup>16</sup> 543 U.S. 220 (2005).

<sup>17</sup> 542 U.S. 296 (2004). The *Blakely* Court held that "the prosecutor [must] prove to a jury all facts legally essential to the punishment" and that sentencing determinations that occur without a jury determination of those legally essential facts violate the Sixth Amendment right to a jury trial. *Id.* at 313-14.

<sup>18</sup> 530 U.S. 466 (2000). In *Apprendi*, the Court invalidated a state sentencing guideline scheme that allowed a judge to impose punishment based on facts not admitted to by the defendant or proven to the jury. *Id.* at 491-92.

<sup>19</sup> 918 F.2d 1491 (11th Cir. 1990).

<sup>20</sup> *Id.* at 1498.

<sup>21</sup> *Id.* at 1496-97.

<sup>22</sup> *See, e.g., United States v. Cotney*, 143 F. App'x 290 (11th Cir. 2005); *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005); *United*

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Eleventh Circuit's rule was also the subject of spirited debate in *United States v. Levy*, in which both the majority and dissenting opinions weighed the benefits and drawbacks of the court's strict rule on supplemental authority.

A. *United States v. Bordon*

Luis Adel Bordon and his sons, Luis Bordon and Adel Bordon, were convicted in August 1998 of "conspiring to commit money laundering by conducting financial transactions involving the proceeds of an illegal gambling activity and concealing the nature and proceeds of the illegal gambling activity."<sup>23</sup> A trial court sentenced the senior Bordon to 57 months in prison and his two sons to 46 months each; additionally, all were ordered to forfeit their interest in approximately \$5.8 million.<sup>24</sup>

The district court judge imposed a lower sentence than was required by the federal sentencing guidelines, finding that the nature of the crime "departed from the heartland consideration of the Sentencing Commission."<sup>25</sup> Other mitigating factors also led the trial judge to impose a lesser sentence than that called for in the sentencing guidelines.<sup>26</sup> The Bordons appealed the conviction and forfeiture order, and the government cross-appealed from the trial judge's downward departure from the

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*States v. Ardley*, 242 F.3d 989 (11th Cir. 2001).

<sup>23</sup> 421 F.3d 1202, 1203 (11th Cir. 2005). The Bordons were convicted of violations of 18 U.S.C.A. § 1955 (2005) and 18 U.S.C.A. § 1956(h) (2005). The Bordons were found to have been running a "bolita" operation. *Bordon*, 421 F.3d at 1204. Bolita is "a game of chance having the character of a lottery in which a bag of small numbered balls is tossed about until only one remains or until one is grasped at random, the ball so selected being considered as bearing the winning number." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 248 (Philip Babcock Grove ed., Merriam Webster 1993).

<sup>24</sup> *Bordon*, 421 F.3d at 1204.

<sup>25</sup> *Id.* (internal quotations omitted).

<sup>26</sup> *Id.*

sentencing guidelines.<sup>27</sup>

The Eleventh Circuit upheld the Bordons' convictions and the forfeiture order, but remanded the case to the trial court for re-sentencing, ruling that the district court judge had used the wrong "base level" in determining the sentence.<sup>28</sup> On remand, in accordance with the direction of the Court of Appeals, the district court sentenced the senior Bordon to 97 months and his sons to 78 months each.<sup>29</sup> The Bordons appealed, and the Eleventh Circuit again vacated and remanded for new sentencing, holding that the trial court incorrectly interpreted the Court of Appeals' ruling as stripping the judge of discretion to depart downward from the sentencing guidelines.<sup>30</sup>

While the Eleventh Circuit was considering the Bordons' second appeal, Congress passed the PROTECT Act<sup>31</sup> and a revised version of the sentencing guidelines that "probably" would have resulted in a "significantly reduced guideline range" for the Bordons.<sup>32</sup> Section 3742(g)(1) of the PROTECT Act, known as the Feeney Amendment, prevents district courts from retroactively applying revisions to the sentencing guidelines.<sup>33</sup> The district court sentenced the Bordons for a third time in January 2004 based on the Eleventh Circuit's remand and the Feeney Amendment.<sup>34</sup> The court sentenced Luis Adel Bordon to 97 months and Luis and Adel Bordon to 78 months,

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing *United States v. Bordon*, 228 F.3d 412 (11th Cir. 2000) [hereinafter *Bordon I*]).

<sup>29</sup> *United States v. Bordon*, 421 F.3d 1202, 1205 (11th Cir. 2005).

<sup>30</sup> *Id.* (citing *United States v. Bordon*, 48 F. App'x 326 (11th Cir. 2002) [hereinafter *Bordon II*]).

<sup>31</sup> *Id.* PROTECT is an acronym for Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003. Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered sections of 18 and 42 U.S.C.).

<sup>32</sup> *United States v. Bordon*, 421 F.3d 1202, 1205 (11th Cir. 2005).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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respectively.<sup>35</sup> The Bordons appealed to the Eleventh Circuit for a third time.<sup>36</sup>

The Eleventh Circuit rejected the Bordons' arguments in their entirety.<sup>37</sup> The *per curiam* opinion noted that appellants attempted, before oral argument, to assert that the district court's sentence was excessive in light of *Booker*.<sup>38</sup> The court, rejecting the claims first asserted in the supplemental filings, held that the Bordons' "*Booker* claim was not timely and [was] thus subject to [the] court's prudential rule."<sup>39</sup>

Judge Hill concurred "with lack of enthusiasm."<sup>40</sup> Hill noted his dissent in *McGinnis*, where he objected to the Eleventh Circuit's rule on supplemental authority.<sup>41</sup> Hill concurred only on the basis of *stare decisis*, with the hope that the doctrine would be "tempered with *fiat justita ruat coelum*"<sup>42</sup>—a reference to *Hampton v. City of Jacksonville, Fla.*,<sup>43</sup> in which Chief Judge Tuttle declared: "Let justice be done though the heavens may fall."<sup>44</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 1206. The Bordons argued that: (1) the district court erred in applying the Feeney Amendment; (2) the "retroactive application" doctrine of the Feeney Amendment violated the *ex post facto* clause of the United States Constitution (U.S. CONST. art. 1, § 9, cl. 3); (3) the district court miscalculated the monetary loss associated with the crime; and (4) the 17 months between the Eleventh Circuit's decision in *Bordon II* and the re-sentencing violated the Bordons' right to sentencing without unreasonable delay. *Bordon*, 421 F.3d at 1206.

<sup>38</sup> *United States v. Bordon*, 421 F.3d 1202, 1206 n.1 (11th Cir. 2005).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1208 (Hill, J., concurring).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1209.

<sup>43</sup> 304 F.2d 320 (5th Cir. 1962).

<sup>44</sup> *United States v. Bordon*, 421 F.3d 1202, 1209 n.1 (11th Cir. 2005) (Hill, J., concurring) (quoting *Hampton*, 304 F.2d at 330).



B. *McGinnis v. Ingram Equipment Co., Inc.*

In a vital Eleventh Circuit case on this issue, Terrell McGinnis filed a lawsuit against his former employer, Ingram Equipment, following his termination in March 1986.<sup>45</sup> McGinnis alleged discrimination in violation of the Civil Rights Act of 1866<sup>46</sup> and Title VII of the Civil Rights Act of 1964,<sup>47</sup> a total of four claims.<sup>48</sup> After a bench trial, the district court entered a judgment for McGinnis, holding that Ingram Equipment had violated the Civil Rights Act of 1866.<sup>49</sup> Ingram Equipment appealed, presenting four arguments in its brief.<sup>50</sup> At oral argument before a three-judge panel, Ingram argued that *Patterson v. McLean Credit Union*<sup>51</sup>—decided four days before the Eleventh Circuit heard arguments in *McGinnis*—should control and limit federal jurisdiction over § 1981 claims.<sup>52</sup> A majority of the panel agreed with Ingram, vacating the judgment and remanding the case for reconsideration in light of *Patterson*.<sup>53</sup> The Eleventh Circuit vacated the panel's decision and agreed to hear the case *en banc*.<sup>54</sup>

Sitting *en banc*, the Eleventh Circuit rejected Ingram's

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<sup>45</sup> *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1493 (11th Cir. 1990).

<sup>46</sup> Civil Rights Act of 1866, 42 U.S.C.A. § 1981 (2005).

<sup>47</sup> Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (2005).

<sup>48</sup> *McGinnis*, 918 F.2d at 1493.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Ingram asserted that (1) McGinnis failed to prove intentional discrimination; (2) the district court's findings of fact were clearly erroneous and should be set aside; (3) the district court erred in restricting the use of McGinnis's pre-trial deposition at trial; and (4) the trial judge "impermissibly injected himself into the proceedings." *Id.*

<sup>51</sup> 491 U.S. 164 (1989).

<sup>52</sup> *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1493 (11th Cir. 1990).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

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*Patterson* appeal.<sup>55</sup> The court noted that “[a] party normally waives its right to argue issues not raised in its initial brief.”<sup>56</sup> The court rejected Ingram’s argument that it could not have predicted the outcome of *Patterson*, reasoning that the appellant was free to assert a lack of jurisdiction regardless of the Supreme Court’s *Patterson* holding.<sup>57</sup>

Judge Hill dissented, noting, “[t]his is a hard case. The court, today, makes bad law.”<sup>58</sup> Hill argued that the Supreme Court’s decision in *Patterson* limited federal jurisdiction over § 1981 claims.<sup>59</sup> The dissent accused the majority of ignoring the law, and instead seeking the “morally right result”<sup>60</sup> of holding a company liable for discrimination when an employee “suffered many more racial indignities at the hands of the Company than any one citizen should be called upon to bear in a lifetime.”<sup>61</sup>

Additionally, Judge Hill asserted that the Eleventh Circuit put appellate litigants in the uncomfortable position of having to choose between losing an argument to waiver or being subject to possible sanctions under Rule 11 of the Federal Rules of Civil Procedure.<sup>62</sup> Hill expressed concern that the majority’s rule forced appellate counsel to confront a “Hobbesian dilemma:” refrain from making an argument because of existing adverse case law and thus lose that argument in future proceedings, or make the argument and risk Rule 11 sanctions.<sup>63</sup> He whimsically suggested that attorneys facing such a dilemma “consult their local astrologer or psychic to find out whether existing case law

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<sup>55</sup> *Id.* at 1496.

<sup>56</sup> *Id.* (citing *FSLIC v. Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987); *Rogero v. Noone*, 704 F.2d 518, 520 n.1 (11th Cir. 1983)).

<sup>57</sup> *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1496 (11th Cir. 1990).

<sup>58</sup> *Id.* at 1498 (Hill, J., dissenting).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (quoting *McGinnis v. Ingram Equipment Co.*, 685 F. Supp. 224, 228 (N.D. Ala. 1988)).

<sup>62</sup> *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1499 (11th Cir. 1990).

<sup>63</sup> *Id.* at 1500.

in the area will change.”<sup>64</sup> Perhaps more seriously, Hill suggested that attorneys facing the Hobbesian dilemma “consult their malpractice insurers in case their astrologer or psychic’s vision [was] not too clear.”<sup>65</sup>

The majority responded to Judge Hill’s stinging dissent. The court asserted that despite the contrary assertions of Ingram Equipment and Judge Hill, the issue of federal jurisdiction over § 1981 claims was available prior to *Patterson*.<sup>66</sup> The majority noted that *Patterson* was decided by the Fourth Circuit four months before McGinnis’ claims went to trial and the Supreme Court granted certiorari on the § 1981 issue three months before trial.<sup>67</sup>

The majority also dismissed Judge Hill’s concerns about potential Rule 11 sanctions for an appellate attorney that advanced a novel legal argument in the face of adverse precedent.<sup>68</sup> The court, citing advisory committee notes on a 1983 amendment to Rule 11, noted the Rule’s good faith provision, saying that the Rule “is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”<sup>69</sup> The court distinguished the cases Judge Hill cited in support of his concerns about Rule 11 sanctions from *McGinnis*, noting that the attorneys in those cases had misrepresented the law.<sup>70</sup>

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<sup>64</sup> *Id.* at 1501.

<sup>65</sup> *Id.* at 1501 n.11.

<sup>66</sup> *Id.* at 1496.

<sup>67</sup> *Id.*

<sup>68</sup> *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1496 (11th Cir. 1990).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1496-97.

*ELEVENTH CIRCUIT & SUPPLEMENTAL AUTHORITY 259**C. The Eleventh Circuit's New Issue Dispute Revisited:*  
United States v. Levy*1. Background*

The Eleventh Circuit's rule against hearing new issues based on supplemental filings was a matter of debate in *United States v. Levy*.<sup>71</sup> Levy's first appeal to the Eleventh Circuit recounted the facts of his case. A federal grand jury indicted Raphael Levy and 12 others on 52 counts of various offenses related to a large fraud scheme.<sup>72</sup> Levy and his codefendants were accused of soliciting funds for investing in viatical settlements—schemes which involve the purchase of life insurance policies or benefits thereof at a discounted rate from terminally ill persons—then misappropriating funds for their own use.<sup>73</sup>

Levy was charged with multiple counts of mail fraud, conspiracy to commit money laundering, and money laundering.<sup>74</sup> In a written plea agreement, Levy pled guilty to conspiracy to commit mail fraud and conspiracy to commit money laundering.<sup>75</sup> The plea agreement stated Levy could be sentenced to any term provided for by the sentencing guidelines, and that he waived his right to appeal any sentence imposed.<sup>76</sup>

In exchange for his plea, the government dismissed the remaining counts against Levy.<sup>77</sup> The government further agreed not to oppose Levy's request for sentence reduction based on his acceptance of responsibility, to consider filing a sentence reduction motion pursuant to § 5K1.1 of the United States

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<sup>71</sup> *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), *reh'g denied* 379 F.3d 1241 (11th Cir. 2004), *and reh'g denied en banc* 391 F.3d 1327 (11th Cir. 2004), *cert. granted, vacated* 545 U.S. 1101 (2005), *remanded to* 416 F.3d 1273 (11th Cir. 2005), *cert. denied* 126 S. Ct. 643 (2005).

<sup>72</sup> *Levy*, 374 F.3d at 1024.

<sup>73</sup> *Id.* at 1024-25.

<sup>74</sup> *Id.* at 1025.

<sup>75</sup> *Id.*

<sup>76</sup> *United States v. Levy*, 374 F.3d 1023, 1025-26 (11th Cir. 2004).

<sup>77</sup> *Id.* at 1025.

Sentencing Guidelines, and to stipulate that Levy derived approximately \$10.9 million from the scheme.<sup>78</sup> The government also agreed to recommend that the district court impose concurrent sentences on the counts to which Levy pled guilty.<sup>79</sup>

The Pre-sentence Investigation Report (“PSI”) filed by a probation officer recommended numerous enhancements to Levy’s sentence based on the amount of money involved in the scheme, the level of planning and sophistication, the vulnerability of the victims, and Levy’s leadership role.<sup>80</sup> Based on Levy’s criminal history and terms of his plea agreement, he was eligible for a sentence of between 135 and 168 months.<sup>81</sup> The PSI noted that under the sentencing guidelines, a concurrent sentence is proper unless the highest maximum sentence is less than the total punishment recommended by the guidelines.<sup>82</sup> Aware that such a situation existed in Levy’s case, the PSI recommended consecutive sentences.<sup>83</sup> Upset with the possible deviation from the sentencing guidelines, Levy objected to the PSI on several occasions.<sup>84</sup>

At Levy’s sentencing hearing, the district court, despite Levy’s objections, heard evidence regarding the vulnerability of the victims of the scheme.<sup>85</sup> The government fulfilled its obligation and recommended concurrent sentences.<sup>86</sup> Nevertheless, the district court sentenced Levy to 120- and 48-

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1026.

<sup>81</sup> *United States v. Levy*, 374 F.3d 1023, 1026 (11th Cir. 2004).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* The highest maximum sentence for the most serious crime to which Levy pled guilty was 120 months—15 months less than the 135-month minimum required by the sentencing guidelines. *Id.*

<sup>84</sup> *Id.* at 1027-28.

<sup>85</sup> *Id.* at 1028-29. The government, citing the terms of the plea agreement, noted that it could not itself offer any evidence on the vulnerability of Levy’s victims. *Id.* at 1028. Instead, the court heard testimony from an attorney representing three victims in bankruptcy proceedings and from varied victims. *Id.* at 1028-29.

<sup>86</sup> *United States v. Levy*, 374 F.3d 1023, 1029 (11th Cir. 2004).

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month sentences to be served consecutively, a total of 168 months.<sup>87</sup> Levy appealed his sentence to the Eleventh Circuit, contending that the government breached the plea agreement and that the district court deprived him of due process by hearing evidence regarding the vulnerability of his victims.<sup>88</sup>

The Eleventh Circuit rejected Levy's appeals.<sup>89</sup> Levy petitioned for re-hearing, arguing in part that the Supreme Court's decision in *Blakely*, requiring all facts relevant to a sentence under the federal guidelines, was controlling.<sup>90</sup> The Eleventh Circuit rejected his *Blakely* claim, holding that Levy waived that argument by not "timely rais[ing] it in his initial brief on appeal."<sup>91</sup> The court conceded Levy's inability to predict the Supreme Court's ruling in *Blakely*, but noted that the argument that sentences based on facts not determined by a jury violate the Sixth Amendment was available to Levy before the Court's decision.<sup>92</sup> In short, the Eleventh Circuit held that the *Blakely* issue was available to Levy before his petition for rehearing.<sup>93</sup>

### 2. Levy's Petition for *En Banc* Rehearing

Levy requested an *en banc* hearing of his appeal on the *Blakely* issue.<sup>94</sup> Once again, the Eleventh Circuit rejected his argument as untimely.<sup>95</sup> The court reiterated its "long-standing rule that issues raised for the first time in a petition for rehearing and not raised in an appellant's initial brief will not be considered."<sup>96</sup> This section will first analyze the arguments of the two dissenting opinions—filed by Judge Tjoflat and Judge

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<sup>87</sup> *Id.* 1029.

<sup>88</sup> *Id.* at 1029-30.

<sup>89</sup> *Id.* at 1030-35.

<sup>90</sup> *United States v. Levy*, 379 F.3d 1241, 1241-42 (11th Cir. 2004).

<sup>91</sup> *Id.* at 1242.

<sup>92</sup> *Id.* at 1243 n.3.

<sup>93</sup> *Id.* at 1243.

<sup>94</sup> *United States v. Levy*, 391 F.3d 1327, 1328 (11th Cir. 2004).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

Barkett—and then discuss the majority’s approach.<sup>97</sup>

*a. The Dissenting Opinions*

The two dissenting opinions raised four objections to the majority’s rule: (1) the Eleventh Circuit’s rule, as it applies to criminal cases, limits the principles of retroactivity when new law is handed down while a criminal case is pending; (2) the Eleventh Circuit erred by deeming Levy’s *Blakely* argument as waived rather than forfeited; (3) it left the Eleventh Circuit alone among Circuit Courts of Appeal; and (4) it encouraged appellate counsel to brief every possible issue for fear of losing an unraised issue to Eleventh Circuit procedural rules.<sup>98</sup>

Judge Tjoflat first argued the majority’s decision conflicted with Supreme Court precedent on retroactivity.<sup>99</sup> In *Griffith v. Kentucky*,<sup>100</sup> the Supreme Court held that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.”<sup>101</sup> Tjoflat noted that the Supreme Court said that failure to apply decisions retroactively “violates basic norms of constitutional adjudication.”<sup>102</sup> He further claimed that the Eleventh Circuit “essentially superimposed an additional requirement onto retroactivity determinations”—a requirement that the defendant had previously raised the issue upon which the Supreme Court subsequently ruled.<sup>103</sup>

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<sup>97</sup> Judge Tjoflat, joined by Judge Barkett, dissented from a similar ruling using similar rationale. See *United States v. Ardley*, 273 F.3d 991, 995-1006 (11th Cir. 2001) (Tjoflat, J., dissenting).

<sup>98</sup> *Levy*, 391 F.3d at 1336-37 (Tjoflat, J., dissenting).

<sup>99</sup> *Id.* at 1337-38.

<sup>100</sup> 479 U.S. 314 (1987).

<sup>101</sup> *Id.* at 328. A criminal judgment is final when “a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” *Id.* at 321 n.6.

<sup>102</sup> *United States v. Levy*, 391 F.3d 1327, 127 (11th Cir. 2004) (Tjoflat, J., dissenting) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)).

<sup>103</sup> *Id.* at 1340-41 (citations omitted).

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The dissent also took issue with what Judge Tjoflat perceived as the court's mischaracterization of Levy's *Blakely* argument as "waived."<sup>104</sup> Tjoflat distinguished "waiver," the "intentional relinquishment or abandonment of a known right,"<sup>105</sup> from "forfeiture," "the failure to make the timely assertion of a right,"<sup>106</sup> and argued that Levy could only have forfeited a *Blakely* argument because he was unaware of any such argument.<sup>107</sup> Tjoflat noted that Levy's first appellate brief was filed with the Eleventh Circuit more than a year before the Supreme Court even granted certiorari in *Blakely*.<sup>108</sup> In addition, Tjoflat noted that the Eleventh Circuit precedent regarding the constitutionality of the federal sentencing guidelines was squarely against Levy.<sup>109</sup> In effect, Tjoflat asserted that the Eleventh Circuit had ruled that Levy knowingly relinquished a right he did not know existed.<sup>110</sup>

Judge Tjoflat also criticized the majority's statement that its rule against hearing new issues was a long-standing one.<sup>111</sup> The dissent cited Eleventh Circuit opinions in which the court considered previously unraised objections based on new case law.<sup>112</sup> Tjoflat pointed to other circuits which consistently follow a different rule concerning arguments based on newly issued

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<sup>104</sup> *Id.* at 1342.

<sup>105</sup> *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

<sup>106</sup> *Id.* at 733.

<sup>107</sup> *Levy*, 391 F.3d at 1341 (Tjoflat, J., dissenting).

<sup>108</sup> *United States v. Levy*, 391 F.3d 1327, 1341-42 (11th Cir. 2004).

<sup>109</sup> *Id.* at 1342. The Eleventh Circuit had previously rejected an argument that the Sixth Amendment precluded a judicial determination, without a jury finding, of facts that would increase a defendant's sentence. *United States v. Sanchez*, 269 F.3d 1250, 1262 (11th Cir. 2001).

<sup>110</sup> *Levy*, 391 F.3d at 1342 (Tjoflat, J., dissenting).

<sup>111</sup> *Id.* at 1343.

<sup>112</sup> *Id.* at 1343-44. Justice Tjoflat cited *United States v. Candelario*, 240 F.3d 1300, 1311 (11th Cir. 2001) (holding that the court would review a previously unraised *Apprendi* argument for plain error) and *United States v. Calhoun*, 97 F.3d 518, 529 (11th Cir. 1996) (stating that the court would review an issue raised first in defendant's reply brief and relying upon a recent Supreme Court decision for plain error).



authority.<sup>113</sup> In his decision, Judge Tjoflat included two footnotes spanning most of three pages discussing pre- and post-*Blakely* decisions from other circuit courts in which the courts considered a new issue based on recent authority.<sup>114</sup> Tjoflat chided the Eleventh Circuit, saying that he “[did] not understand how this court [could] continue to reject the sound reasoning of our sister circuits without any sort of explanation or even an acknowledgment of those cases.”<sup>115</sup>

Finally, Judge Tjoflat expressed concern that the Eleventh Circuit’s rule would “[send] a clear message to appellate counsel that they should brief any claim that passes the laugh test regardless of whether it has any support in, or is even squarely foreclosed by, our own precedent.”<sup>116</sup> He cited Supreme Court and Eleventh Circuit precedent expressing concern that if appellate courts have too strict a rule on hearing arguments, counsel would have incentive to raise every conceivable issue at every point in the judicial process.<sup>117</sup>

For example, Judge Tjoflat noted *Johnson v. United States*,<sup>118</sup> the Supreme Court worried that an inflexible rule against hearing new issues, especially issues that might conceivably be foreclosed by the Eleventh Circuit’s *Bordon/Levy* rule, “would result in counsel’s inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent.”<sup>119</sup> Similarly, Judge Tjoflat pointed out that the Eleventh Circuit has warned attorneys “to be highly selective about the issues to be argued on appeal.”<sup>120</sup> The court advised attorneys to “select with

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<sup>113</sup> *United States v. Levy*, 391 F.3d 1327, 1345 (11th Cir. 2004) (Tjoflat, J., dissenting).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1348.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1348-50.

<sup>118</sup> 520 U.S. 461 (1997).

<sup>119</sup> *Id.* at 468.

<sup>120</sup> *United States v. Levy*, 391 F.3d 1327, 1349 (11th Cir. 2004) (Tjoflat, J., dissenting) (citing *United States v. Battle*, 163 F.3d 1, 1-2 (11th Cir. 1998)).

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dispassionate and detached mind[s] the issues that common sense and experience tell [them] are likely to be dispositive. [They] must reject other issues or give them short treatment.”<sup>121</sup>

Judge Tjoflat worried that the Eleventh Circuit’s virtual blanket rule rejecting new issues raised in supplemental authority “essentially tell[s] counsel that they *should* ‘raise every colorable claim on appeal,’ and that if they are too ‘highly selective about the issues to be argued on appeal’ they may do a great injury to their clients.”<sup>122</sup> Tjoflat expressed concern that “counsel [would] raise more claims on appeal . . . and that the arguments supporting those claims [would] necessarily be less clear and specific.”<sup>123</sup> The effect on the justice system would be severe: “Such kitchen-sink briefs will, of course, make this court’s work more difficult and waste judicial resources, not to mention counsel’s own time.”<sup>124</sup>

Judge Barkett joined Judge Tjoflat in dissenting. Barkett noted that “Levy could *not* have raised a Sixth Amendment objection to his sentencing because in *United States v. Sanchez*, [decided] three years before *Blakely* was handed down, [the Eleventh Circuit] held that *Apprendi* does not apply to the Federal Sentencing Guidelines.”<sup>125</sup> Noting that “[o]ur internal circuit rules for how and whether an issue can be raised on appeal cannot override the concerns about fundamental fairness and the integrity of judicial review that the Supreme Court identified in *Griffith*,”<sup>126</sup> Judge Barkett said the Eleventh Circuit might be “violat[ing] constitutional norms.”<sup>127</sup>

Finally, Barkett agreed with Tjoflat on the potential impact

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<sup>121</sup> *Battle*, 163 F.3d at 2 (quoting John C. Godbold, *Twenty Pages and Twenty Minutes Revisited* 14 (1987) (revised version of *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801 (1976)).

<sup>122</sup> *Levy*, 391 F.3d at 1349-50 (Tjoflat, J., dissenting) (emphasis in original).

<sup>123</sup> *Id.* at 1350.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1351 (Barkett, J., dissenting) (citations omitted) (emphasis in original).

<sup>126</sup> *United States v. Levy*, 391 F.3d 1327, 1351 (11th Cir. 2004).

<sup>127</sup> *Id.*

of the Eleventh Circuit's rule on the judicial system.<sup>128</sup> Barkett argued that the court's rule gives litigants "an incentive to flood the federal courts with countless claims that are clearly foreclosed by current precedent . . . . The district courts (and this court) will then be forced to address those claims over and over again. This is not a very effective way of conserving scarce judicial resources."<sup>129</sup>

*b. The Majority Response*

The majority opinion defended its rule against the dissent's arguments. The court narrowly construed *Griffith*, saying that the decision did not affect procedural rules on unpreserved or unraised issues,<sup>130</sup> dismissed concerns about overburdened courts,<sup>131</sup> and addressed concerns that the majority had confused waiver and forfeiture.<sup>132</sup>

While acknowledging that the Supreme Court's decision in *Griffith* applied new law to pending criminal prosecutions, the *Levy* majority found that "nothing in *Griffith* saved an unpreserved error in a direct appeal."<sup>133</sup> Additionally, the *Levy* court noted that the Supreme Court itself had limited retroactivity, saying that application of new rules should be "subject, of course, to established principles of waiver, harmless error, and the like."<sup>134</sup>

The majority distinguished the Court's retroactive application of a new rule in *Griffith* from *Levy*. In *Griffith*, the Eleventh Circuit explained, the defendants repeatedly challenged the government's use of preemptory challenges to prospective jurors.<sup>135</sup> The *Levy* court noted that the "defendants properly

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<sup>128</sup> *Id.* at 1356 (Barkett, J., dissenting).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1329.

<sup>131</sup> *Id.* at 1332.

<sup>132</sup> *United States v. Levy*, 391 F.3d 1327, 1334-35 (11th Cir. 2004).

<sup>133</sup> *Id.* at 1329.

<sup>134</sup> *Id.* at 1331 (citing *Shea v. Louisiana*, 470 U.S. 51, 59 n.4 (1985)).

<sup>135</sup> *Id.* at 1330.

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presented and preserved their constitutional challenges to the prosecution's use of preemptory strikes *both during trial and throughout direct review.*"<sup>136</sup> The opinion employed a narrow reading of *Griffith*, saying that the Supreme Court's holding in that case "cannot, and does not, control a situation in which the defendant, such as Levy, never raised nor preserved a constitutional challenge, but, instead, raises it for the first time in a petition for rehearing after this Court has affirmed his conviction and sentence."<sup>137</sup>

The *Levy* majority also dismissed concerns about overburdened courts forced to consider every conceivable claim. The court noted that attorneys already have a procedural incentive to raise all claims, yet refrain from doing so. "If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review by this Court, rather than plain-error review."<sup>138</sup> The majority also claimed that any concerns regarding over-burdened trial courts were unfounded because the Eleventh Circuit's rule allows for issues to be raised in the initial brief to the court.<sup>139</sup>

Finally, the majority opinion said that the dissent misunderstood the waiver/forfeiture distinction. The majority argued that "the issue is whether this Court will apply its well-established procedural rules" and not consider claims not raised in an initial brief, rather than the distinction between waiver, forfeiture or abandonment.<sup>140</sup>

The court accused the dissent of being "internally inconsistent" by recognizing that procedural rules can and should be enforced when considering issues not raised at trial, but denying the circuit court the power to apply procedural rules to issues not properly raised early in the appellate process.<sup>141</sup>

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<sup>136</sup> *Id.* (emphasis in original).

<sup>137</sup> *Id.* at 1331.

<sup>138</sup> *United States v. Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1334.

<sup>141</sup> *Id.* at 1335.

The majority questioned why “[t]he dissent never explain[ed] why enforcing trial-level procedural default rules by limiting appellate review to plain error is somehow permissible under the Supreme Court’s retroactivity doctrine, but enforcing appellate-level procedural default rules is not.”<sup>142</sup> In closing, the Eleventh Circuit majority defended its rule, saying “[t]his Court’s application of well-established procedural rules is prudent and well-established.”<sup>143</sup>

Despite being rebuffed twice by the Eleventh Circuit, Levy continued to press his appeal. The Supreme Court vacated his sentence and remanded to the Eleventh Circuit for further consideration in light of *Booker*.<sup>144</sup> The Eleventh Circuit’s response to the remand highlights the court’s unrelenting rejection of new issues raised after appellate briefs are filed.

*D. The Eleventh Circuit and Remands From the United States Supreme Court*

The Eleventh Circuit, in its third hearing of Levy’s claims, declined to allow for review of his *Booker* claim.<sup>145</sup> This marked one of several occasions where the Eleventh Circuit has enforced its procedural rule against hearing post-brief supplemental authority even when expressly ordered by the Supreme Court to reconsider a case.

In *United States v. Ardley*,<sup>146</sup> the Eleventh Circuit declined to hear an appeal of a criminal sentence based on the High Court’s ruling in *Apprendi*, saying “[n]othing in the *Apprendi* decision suggests that we are obligated to consider an issue not raised in any of the briefs that appellant has filed with us.”<sup>147</sup>

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *United States v. Levy*, 125 S. Ct. 2542 (2005).

<sup>145</sup> *United States v. Levy*, 416 F.3d 1273, 1279-80 (11th Cir. 2005).

<sup>146</sup> *United States v. Ardley*, 202 F.3d 287 (11th Cir. 1999), *cert. granted, vacated* 531 U.S. 1063 (2001), *remanded to* 242 F.3d 989 (11th Cir. 2001), *cert. denied* 533 U.S. 962 (2001), *reh’g denied en banc* 273 F.3d 991 (11th Cir. 2001), *cert. denied* 535 U.S. 979 (2002).

<sup>147</sup> *Ardley*, 242 F.3d at 990.

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The Eleventh Circuit stuck by its rule on supplemental authority in *Ardley* even after a remand order in the case from the Supreme Court. The court held the *Apprendi* decision did not require consideration of an issue that had not been raised in any of the appellant's briefs.<sup>148</sup> The Eleventh Circuit decided there was nothing in the Supreme Court's remand order "requiring that [it] treat the case as though the *Apprendi* issue had been timely raised in this Court."<sup>149</sup> Noting its own precedent, the court held that a remand order does not mandate a specific outcome.<sup>150</sup>

Similarly, when Raphael Levy came before the Eleventh Circuit for the third time in 2005 on remand from the Supreme Court the Eleventh Circuit rejected his *Booker* appeal, saying that the Supreme Court's remand did not "mandate any particular outcome as to the defendant's sentence, nor [did the remand] preclude this Court from applying its prudential rules in a uniform and consistent manner."<sup>151</sup> The Eleventh Circuit again noted that principles of retroactivity are subject to procedural rules.<sup>152</sup> The court pointed to *Shea*, where the Supreme Court held that retroactivity is subject "to established principles of waiver, harmless error, and the like."<sup>153</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* See *United States v. Miller*, 492 F.2d 37, 40 (5th Cir. 1974) (holding that if the Supreme Court expected a specific result, "certiorari could have been granted and [the] case summarily reversed . . . rather than being remanded for further consideration"). The Fifth Circuit decision predated that circuit's split and is binding on the Eleventh Circuit. See *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) ("This is the first case to be heard by the United States Court of Appeals for the Eleventh Circuit . . . . We hold that the decisions of the United States Court of Appeals for the Fifth Circuit . . . shall be binding as precedent in the Eleventh Circuit").

<sup>151</sup> *United States v. Levy*, 416 F.3d 1273, 1280 (11th Cir. 2005).

<sup>152</sup> *Id.* at 1277. The *Booker* court expected "reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Booker*, 543 U.S. at 225.

<sup>153</sup> *Levy*, 416 F.3d at 1277 (quoting *Shea*, 451 U.S. at 58 n.4).

The Eleventh Circuit also relied on recent Supreme Court precedent that arguably matches the circuit court's approach to supplemental authority. Specifically, the *Levy* court noted<sup>154</sup> the Supreme Court's decision in *Pasquantino v. United States*,<sup>155</sup> in which the Court declined to consider a *Blakely* claim not raised in the defendant's petition for certiorari.<sup>156</sup> Just as in the Eleventh Circuit, the High Court's ruling was subject to criticism in the dissent, with Justice Ginsburg asserting that the failure to raise a *Blakely/Booker* claim "was no fault of the defendant's . . . as the petition in this case was filed and granted well before the Court decided *Blakely*."<sup>157</sup> Though the Supreme Court's rule in *Pasquantino* seems to lend an air of legitimacy to the Eleventh Circuit's approach to supplement authority, the High Court's rule is both distinguishable from the Eleventh Circuit's rule and contrary to the Supreme Court's own established precedent.

To begin, a petition for certiorari to the Supreme Court serves a different purpose than an appellate brief. An appellate brief lists all issues presented for review,<sup>158</sup> but is filed after a circuit court has agreed to hear a case. A petition to the Supreme Court for certiorari requires a similar statement of issues.<sup>159</sup> However, the Supreme Court, as the court of last review, has limited jurisdiction and uses petitions for certiorari to weed out cases and issues it will not review.<sup>160</sup> Unlike a

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<sup>154</sup> *Id.*

<sup>155</sup> 544 U.S. 349 (2005).

<sup>156</sup> *Id.* at 372 n.14.

<sup>157</sup> *Id.* at 377 n.5 (Ginsburg, J., dissenting).

<sup>158</sup> See FED. R. APP. P. 28(a)(5).

<sup>159</sup> See SUP. CT. R. 14.1(a).

<sup>160</sup> See *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 520-21 (1992).

The Court held that Rule 14.1 "provides the respondent with notice of the grounds on which certiorari is sought, thus relieving him of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unrepresented questions. It also assists the Court in selecting the cases in which certiorari will be granted." *Id.* The Court further noted that "[b]y forcing the parties to focus on the questions the Court views as particularly important, the Rule enables the Court to use its resources efficiently." *Id.* at 521.

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circuit court, the Supreme Court is not concerned with the outcome of a particular case, but instead with expansive legal issues.<sup>161</sup> Therefore, the Court has more leeway to reject claims that may be dispositive in a particular case if the issue does not present the Court with a chance to hand down broad, binding precedent. For that reason, the Court has stated that denying review of claims not presented in the petition for certiorari “help[s] to maintain the integrity of the process of certiorari.”<sup>162</sup>

The Supreme Court’s approach to new issues raised after petitions for certiorari are filed is somewhat inconsistent. The rule in *Pasquantino* is in conflict with its own precedent. The Court has held that it may review issues not raised in a certiorari petition for plain error.<sup>163</sup> Therefore, rather than establishing a broad rule, the *Pasquantino* disposition of a new issue could be seen as a legitimate exercise of the Supreme Court’s discretion to adjudicate only cases addressing broad issues. At worst, the Supreme Court has a division within its ranks on this issue similar to that in the Tenth Circuit, which is the only circuit that has dealt with the problem of new issues raised after the filing of appellate briefs in the same manner as the Eleventh Circuit.<sup>164</sup>

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<sup>161</sup> Martin Guggenheim, *State Intervention in the Family: Making a Federal Case Out of It*, 45 OHIO ST. L. J. 399, 410 (1984) (“correction of error in any particular case is not and should not be the primary purpose of the Supreme Court”). See also Howard S. Chasanow, *Petitions for Certiorari-View from the Bench*, APML MD-CLE 24-307 (2001) (“The purpose of the petition for certiorari is not to argue the merits of the appeal, but to convince the court that the case requires review because of the public interest or public importance of the issues involved.”).

<sup>162</sup> *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). The Court also points out the Supreme Court Rules expressly forbid raising issues not raised in a petition for certiorari. *Id.* at 645 (quoting SUP. CT. R. 24.1(a)).

<sup>163</sup> See *Silber v. United States*, 370 U.S. 717, 717-18 (1962) (“While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception. The Court has the power to notice a plain error.”) (internal quotations omitted); *Kessler v. Strecker*, 307 U.S. 22, 34 (1939) (“We have the power [to hear unraised issues] in the case of plain error.”)

<sup>164</sup> See *infra* Part V.



## II. JUSTIFICATIONS FOR THE ELEVENTH CIRCUIT'S REJECTION OF NEW ISSUES BASED ON POST-BRIEF AUTHORITY

The Eleventh Circuit's approach to new issues raised in supplemental filings may be in conflict with other circuits, but it is not completely unjustifiable. Though the court has rarely seen fit to explain its rule, an evaluation of circumstances in which the Eleventh Circuit has deviated from the general rule against hearing new issues raised on appeal but not raised in the trial court is helpful in explaining its rationale for rejecting unbriefed issues. When discussing its reasoning, the court has put forth the same justifications that have been used to justify the "general rule,"<sup>165</sup> including judicial economy and avoidance of prejudice to appellate parties.<sup>166</sup> The Eleventh Circuit has further noted that allowing new issues to be raised in supplemental filings would conflict with the language of Rules 28(a)(5) and 28(j) of the Federal Rules of Appellate Procedure.<sup>167</sup>

### *A. New Issues That Do Not Require Additional Facts*

Though the court has never explicitly said so, perhaps the Eleventh Circuit rejects new issues raised in supplemental filings because of the problems that arise when an appeals court tries to review an incomplete factual record. Often, when the Eleventh Circuit has departed from the general rule, it has done so only when additional facts would not aid the court's determination of a new issue.<sup>168</sup>

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<sup>165</sup> For a full discussion of the rationale for the general rule, see Martineau, *supra* note 4, at 1026 and Dennerline, *supra* note 6, at 987-92. For a discussion of exceptions to the general rule, see Martineau, *supra* note 4, at 1045-56 and Dennerline, *supra* note 6, at 996-1003.

<sup>166</sup> McGinnis v. Ingram Equipment Co., 918 F.2d 1491, 1495 (11th Cir. 1990).

<sup>167</sup> United States v. Smith, 416 F.3d 1350, 1352 n.1 (11th Cir. 2005); United States v. Levy, 379 F.3d 1241, 1243-44 (11th Cir. 2004). The Federal Rules of Appellate Procedure state that a brief must contain "a statement of the issues presented for review." FED. R. APP. P. 28(a)(5).

<sup>168</sup> In passing, the court has noted that hearing of new issues on appeal is

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For example, in *Higginbotham v. Ford Motor Co.*,<sup>169</sup> the court agreed to hear an automobile manufacturer's argument that Georgia law did not provide for a wrongful death action under theories of breach of warranty or strict liability.<sup>170</sup> The Eleventh Circuit held that "the new theory raises a purely legal question" and that "[n]o facts could have been developed to aid our resolution of the issue."<sup>171</sup> The court said under such circumstances, "it would be unjust now to refuse to consider the new argument."<sup>172</sup>

The Eleventh Circuit's concern for an adequately developed factual record has been stated in numerous other cases, and pre-dates the split of the Fifth Circuit and creation of the Eleventh Circuit. In *Evans v. Triple R Welding & Oil Field Maintenance Corp.*,<sup>173</sup> the Fifth Circuit heard an appeal based on an alternate reading of the language of a contract.<sup>174</sup> The third-party plaintiff in *Evans*, J. Ray McDermott & Co., Inc., sought indemnification in a lawsuit brought by a McDermott employee based on an express warranty contained in the contract between McDermott and Triple R.<sup>175</sup> The Fifth Circuit noted that "[a]ll of the evidence pertaining to the case [was] in the record, including the contract between McDermott and Triple R, and there [was] no failure therefore to have adequate evidence before the Court."<sup>176</sup>

The Fifth Circuit emphasized the need for a complete factual

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especially appropriate when the court below has granted summary judgment. *Fane v. Edenfield*, 945 F.2d 1514, 1519 n.11 (11th Cir. 1991). While the court declined to articulate a reason, presumably the court feels that the potential for a miscarriage of justice is greater when a pre-trial remedy removes a party's ability to develop legal theories or factual underpinnings.

<sup>169</sup> 540 F.2d 762 (11th Cir. 1976).

<sup>170</sup> *Id.* at 767-68.

<sup>171</sup> *Id.* at 768 n.10. The issue was raised in the original appellate briefs as per the court's request. *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 472 F.2d 713 (5th Cir. 1973).

<sup>174</sup> *Id.* at 716.

<sup>175</sup> *Id.* at 715-16.

<sup>176</sup> *Id.* at 716.

record even concerning meritorious new arguments. For example, in *Empire Life Insurance Co. of America v. Valdak Corp.*,<sup>177</sup> the Fifth Circuit remanded for additional proceedings in order to develop facts related to a newly raised issue.<sup>178</sup> The Eleventh Circuit, following pre-split precedent, allowed a new issue related to choice of law to be heard upon appeal in *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*,<sup>179</sup> and remanded for additional fact-finding so a new issue could be fairly litigated in *Caban-Wheeler v. Elsea*.<sup>180</sup>

*B. Allowing New Issues to Be Presented on Appeal Violates Rule 28*

Though it is difficult to discern whether the Eleventh Circuit refrains from hearing new issues on appeal specifically because of the potential for an inadequate factual record, the court has specifically stated that adherence to the language of Rules 28(a)(5) and 28(j) of the Federal Rules of Appellate Procedure requires that new issues not be heard on appeal. In *United States v. Levy*, the court noted that “[t]o allow a new issue to be raised in a petition for rehearing circumvents Federal Rule of Appellate Procedure 28(a)(5), which requires that an appellant’s initial brief must contain ‘a statement of the issues presented for review.’”<sup>181</sup> The court stuck to its interpretation, and quoted *Levy*, in *United States v. Smith*.<sup>182</sup> The Eleventh Circuit further elaborated its position in *United States v. Nealy*, stating once again, “[p]arties must submit all issues on appeal in their initial briefs.”<sup>183</sup> The court admitted that supplemental filings have their role, but that role does not include raising new issues: “When new authority arises after a brief is filed, this circuit

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<sup>177</sup> 468 F.2d 330 (5th Cir. 1972).

<sup>178</sup> *Id.* at 334.

<sup>179</sup> 689 F.2d 982, 989-91 (11th Cir. 1982).

<sup>180</sup> 904 F.2d 1549, 1557 (11th Cir. 1990).

<sup>181</sup> *United States v. Levy*, 416 F.3d 1273, 1276 (11th Cir. 2005).

<sup>182</sup> 416 F.3d 1350, 1352, n.1 (11th Cir. 2005).

<sup>183</sup> *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

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permits parties to submit supplemental authority on ‘*intervening* decisions or *new* developments’ regarding issues already properly raised in the initial briefs.”<sup>184</sup> The court concluded, “parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority.”<sup>185</sup>

The court supported its argument with a strict interpretation of Rule 28(j). In an earlier hearing of Levy’s appeal, the Eleventh Circuit held that new issues may not be raised in a 28(j) letter because the rule “specifically states that a party must ‘state the reasons for the supplemental citations, *referring either to the page of the brief or to a point argued orally.*’”<sup>186</sup> The court, in a crushing blow to those hoping to raise a new issue based on post-brief authority, held that the language of Rule 28(j) “underscores that an appellant’s supplemental authority must relate to an issue previously raised in a proper fashion, and that an appellant cannot raise a wholly new issue in a supplemental authority or brief.”<sup>187</sup> For those reasons, the court has retained a strict rule against hearing new issues raised late in the appellate process—one that raises questions of fairness to both civil litigants and criminal defendants.

### III. PROBLEMS WITH THE ELEVENTH CIRCUIT’S APPROACH

While the Eleventh Circuit is acting lawfully when it enforces its procedural rules, two problems with the court’s approach require a change in the circuit’s position. First, the Eleventh Circuit’s rule has potential due process implications. It could be argued that the court deprives litigants of the “opportunity to present [their] case and be heard,”<sup>188</sup> and

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<sup>184</sup> *Id.* (quoting 11th Cir. R. 28-1 I.O.P. 6) (emphasis in original).

<sup>185</sup> *Id.*

<sup>186</sup> *United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004) (quoting FED. R. APP. P. 28(j)) (emphasis in original).

<sup>187</sup> *Id.* at 1244.

<sup>188</sup> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681

thereby robs them of due process. Second, the Eleventh Circuit's rule operates contrary to the intent behind recent changes to Rule 28(j) of the Federal Rules of Appellate Procedure which allow argument in filings noting supplemental authority.<sup>189</sup>

#### *A. Due Process and the Right to Be Heard*

The Fifth and Fourteenth Amendments to the U.S. Constitution protect citizens from deprivations of life, liberty or property without due process of law.<sup>190</sup> The Supreme Court has noted the due process guarantee extends to judicial proceedings,<sup>191</sup> holding that due process, in its "primary sense," means "an opportunity to be heard and to defend [a] substantive right."<sup>192</sup> The Court later said that "[t]he fundamental requisite of due process of law is the opportunity to be heard."<sup>193</sup>

While the Bordons and other litigants who face rejection of a new issue have not been entirely deprived of their right to be heard, they have been barred from arguing a potentially dispositive issue. Professors Adam Milani and Michael Smith argue that "being denied an opportunity that ultimately proves dispositive of a case is no different than a complete denial of an

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(1930).

<sup>189</sup> Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, at 46, available at <http://www.uscourts.gov/rules/comment2001/amendments/toc.htm>.

<sup>190</sup> U.S. CONST. amends. V, XIX, § 1. See also Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 262 (2002).

<sup>191</sup> *Brinkerhoff-Faris Trust & Savings*, 281 U.S. at 680 ("The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.").

<sup>192</sup> *Id.* at 678.

<sup>193</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). See also *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466 (2000) (holding that a litigant's opportunity to be heard on his claims is "fundamental to due process.").

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opportunity to be heard.”<sup>194</sup> Milani and Smith note that without the chance to present arguments on a dispositive issue, “the opportunity to be heard is but a ‘teasing illusion.’”<sup>195</sup> Additionally, Professor Robert Martineau has argued that “[f]ailure to hear the parties on the issue that determines their case comes close to a basic denial of due process.”<sup>196</sup>

Though the Eleventh Circuit seems to have carved out occasional exceptions to its rule,<sup>197</sup> those exceptions are insufficient to protect litigants’ due process rights. The exceptions are rare,<sup>198</sup> and virtually all recent Eleventh Circuit decisions reject new issues.<sup>199</sup> The court has thus moved toward a blanket rule eliminating all consideration of new issues, thereby denying litigants their constitutional right to be heard.

In particular, criminal defendants are harmed by the Eleventh Circuit’s rule. The due process guarantees in criminal trials are stronger than in civil cases.<sup>200</sup> Indeed, “there is no question that in criminal cases the requirements of due process outweigh the principles of waiver.”<sup>201</sup> Criminal appellants in the Eleventh Circuit are essentially at a due-process disadvantage. Even though the Bordons got their day in court, dismissal of an issue based on the barest procedural concerns “comes close to a basic denial of due process.”<sup>202</sup>

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<sup>194</sup> Milani & Smith, *supra* note 190, at 268.

<sup>195</sup> *Id.* (quoting *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring)). Milani and Smith discuss due process concerns in a somewhat different context: the failure to hear arguments on the dispositive issue because a court has raised the issue *sua sponte*. *Id.*

<sup>196</sup> ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE* 40 (1983).

<sup>197</sup> *See supra* note 112, discussing instances where the Eleventh Circuit has considered previously unraised issues for plain error.

<sup>198</sup> In his *Levy* dissent, Judge Tjoflat cited only two cases in support of his proposition that the Eleventh Circuit allowed for plain-error review of new issues. *United States v. Levy*, 391 F.3d 1327, 1343-44 (11th Cir. 2004) (Tjoflat, J., dissenting).

<sup>199</sup> *See supra* Part I.

<sup>200</sup> Martineau, *supra* note 4, at 1055.

<sup>201</sup> *Id.*

<sup>202</sup> MARTINEAU, *supra* note 196, at 40.

*B. Recent Changes to Rule 28(j)*

Apart from the potential due process problems, the Eleventh Circuit's rule barring new issues to be raised in a Rule 28(j) letter conflicts with recent changes to the rule. The previous version of the rule "required parties to describe supplemental authorities 'without argument.'"<sup>203</sup> Rule 28(j) was changed because "[e]nforcement of the restriction has been lax" due to difficulty distinguishing between a required statement explaining the need for supplemental authority and "argument."<sup>204</sup> Public comments supported the change to Rule 28(j), noting that the prohibition on argument was "frequently flouted."<sup>205</sup> The Rules Committee recommended changing the Rule to drop the prohibition on argument.<sup>206</sup> The new rule—adopted in December 2002—was designed to "permit[] parties to decide for themselves what they wish to say about supplemental authority."<sup>207</sup>

While the new version of Rule 28(j) is similar to older versions, the Rules Committee clearly intended that parties be allowed to present arguments based on new authority. While the Committee made no mention of intentionally disturbing the general rule, the allowance for argument indicates intent to use 28(j) letters for advocacy. That intent, combined with the due process concerns and the willingness of other circuits to hear

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<sup>203</sup> Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, at 46. *See also* Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987) (sanctioning appellant's counsel in part because he "violated Fed. R. App. P. 28(j) by making additional arguments in letters which ostensibly provided the court with supplemental authorities. Such arguments are improper and further burden the court and counsel.").

<sup>204</sup> Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, at 46.

<sup>205</sup> *See* Proposed Amendments to the Federal Rules of Appellate Procedure and Form 6, at 103-05, *available at* <http://www.uscourts.gov/rules/jc0901.html>.

<sup>206</sup> *Id.* at 103.

<sup>207</sup> Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, at 46.

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new arguments in 28(j) letters, indicates that the Eleventh Circuit erroneously dismisses new arguments based on supplemental authority.

#### IV. HOW OTHER JURISDICTIONS APPROACH SUPPLEMENTAL AUTHORITY

While the Eleventh Circuit has been able to support its procedural rule, other circuits have presented a more flexible approach to supplemental authority. Both the First and Sixth Circuits have clearly articulated rules on allowing post-brief, supplemental authority as a source of new arguments.<sup>208</sup> Other circuits have heard arguments based on cases decided post-brief,<sup>209</sup> or expressed a willingness to do so had an appellant properly filed a 28(j) letter.<sup>210</sup> Additionally, numerous states have interpreted their rules of appellate procedure as being flexible enough to allow for review of post-brief supplemental authority.<sup>211</sup>

##### *A. The First Circuit: United States v. Cordoza-Estrada*

Silvierio Cordoza-Estrada was convicted of re-entering the United States after being deported and sentenced to 18 months in prison and three years of supervised release.<sup>212</sup> Cordoza-Estrada was deported in 2001 after being convicted in New Hampshire

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<sup>208</sup> See *United States v. Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005); *United States v. Cheal*, 389 F.3d 35, 45 n.10 (1st Cir. 2004).

<sup>209</sup> See *United States v. Soy*, 413 F.3d 594, 615 (7th Cir. 2005).

<sup>210</sup> *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1369 (Fed. Cir. 2004).

<sup>211</sup> See, e.g., *State v. Resendis-Felix*, 100 P.3d 457, 459 (Ariz. Ct. App. 2004) *review granted, remanded to* No. CR-05-0031-PR, 2005 WL 2414769 (Ariz. Sep. 27, 2005) *remanded to* No. 2 CA-CR 2003-0114-PR, 2005 WL 2787475 (Ariz. Ct. App. Oct. 25, 2005); *Rolling v. State*, 619 So. 2d 20, 23 (Fla. Dist. Ct. App. 1993); *Rochelle v. State*, 791 S.W.2d 121, 124-25 (Tex. Crim. App. 1990).

<sup>212</sup> *United States v. Cordoza-Estrada*, 385 F.3d 56, 57 (1st Cir. 2004).



of simple assault.<sup>213</sup> His assault conviction in state court was treated as an aggravated felony for the purpose of his federal sentence for the crime of re-entering the United States.<sup>214</sup> Cordoza-Estrada appealed the determination that his New Hampshire conviction was an “aggravated felony” under the meaning of the federal sentencing guidelines that mandated an increased sentence.<sup>215</sup> He later appealed his sentence based on the Supreme Court’s holding in *Blakely*.<sup>216</sup>

Cordoza-Estrada’s *Blakely* appeal was filed in a 28(j) letter.<sup>217</sup> The court agreed to consider the *Blakely* argument, saying that “since appellant’s argument depends upon a decision that did not exist at the time of briefing, a 28(j) letter is a perfectly appropriate avenue by which to present it—such letters are intended to provide the court with new authority.”<sup>218</sup> The court eventually rejected Cordoza-Estrada’s arguments on the merits.<sup>219</sup>

The First Circuit has also agreed to hear arguments based on post-brief authority under the “plain error” jurisdiction available to appellate courts.<sup>220</sup> The court observed that “where a party is raising a new issue in response to a potentially crucial Supreme Court decision that issued only after briefing and oral argument were completed,” a different analysis applies than would if the party had waived or forfeited the issue.<sup>221</sup> Additionally, the First Circuit has indicated a willingness to consider arguments first put forth in a 28(j) letter where the parties have failed to file such letters.<sup>222</sup>

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 59.

<sup>217</sup> *Id.*

<sup>218</sup> *United States v. Cordoza-Estrada*, 385 F.3d 56, 59 (1st Cir. 2004).

<sup>219</sup> *Id.*

<sup>220</sup> *United States v. Morgan*, 384 F.3d 1, 8 (1st Cir. 2004).

<sup>221</sup> *Id.* at 7-8.

<sup>222</sup> *United States v. Cheal*, 389 F.3d 35, 45 n.10 (1st Cir. 2004) (“The Supreme Court decided *Blakely v. Washington* after oral argument in this case. Cheal has not submitted a letter of supplemental authority under Fed.

*ELEVENTH CIRCUIT & SUPPLEMENTAL AUTHORITY 281**B. The Sixth Circuit: United States v. Oliver*

David Oliver was convicted of conspiracy to possess methamphetamine with intent to distribute and sentenced to 180 months in prison and five years of supervised release.<sup>223</sup> Oliver appealed his conviction, asserting several errors in the district court.<sup>224</sup> He also initially appealed his sentence, saying his flight from a drug-treatment program was improperly considered an obstruction of justice.<sup>225</sup> Oliver later filed a 28(j) letter citing *Blakely* and asserting that the sentence imposed violated his Sixth Amendment rights.<sup>226</sup> He also filed a second letter seeking relief under *Booker*.<sup>227</sup>

The Sixth Circuit agreed to consider Oliver's *Blakely* and *Booker* claims, citing the First Circuit's rule in *Cordoza-Estrada* that a 28(j) letter is the appropriate filing for relevant post-brief authority that raises new issues.<sup>228</sup> The court ruled that "the steps taken by Oliver both before and after oral argument were sufficient to raise on appeal the issue of the constitutionality of Oliver's sentence."<sup>229</sup> In a strong statement supporting the First Circuit's understanding of Rule 28(j), the court held that Oliver "complied with [the] requirements of Rule 28(j)" and properly brought the *Blakely/Booker* claims before the court.<sup>230</sup> The Sixth Circuit vacated Oliver's sentence based on *Booker* and remanded to the district court for re-sentencing.<sup>231</sup>

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R. App. P. 28(j) challenging her sentence based on *Blakely*'s possible application to the federal sentencing guidelines. Consequently, we do not address the issue.") (citations omitted).

<sup>223</sup> *United States v. Oliver*, 397 F.3d 369, 374 (6th Cir. 2005).

<sup>224</sup> *Id.* at 374.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 377 n.1.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *United States v. Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 381-82.

*C. State Court Approaches to Post-Brief Authority*

Numerous states have dealt with the issue of relevant authority decided after the submission of appellate briefs. For example, Kostia Ivan Resendis-Felix pled guilty to aggravated robbery in Arizona.<sup>232</sup> Resendis-Felix appealed his sentence, saying the trial court failed to take into account mitigating factors.<sup>233</sup> While his appeal was pending, Resendis-Felix filed a notice of supplemental authority arguing that his sentence should be vacated in light of *Blakely*.<sup>234</sup> The State objected to Resendis-Felix's *Blakely* claim, arguing that any such claim had been waived because it had not been raised.<sup>235</sup> Nonetheless, the Arizona Court of Appeals held the *Blakely* arguments raised by Resendis-Felix amounted to fundamental error, and as such could be heard by the court regardless of issues of waiver.<sup>236</sup> The court vacated Resendis-Felix's sentence and remanded for re-sentencing pursuant to *Blakely*.<sup>237</sup>

Similarly, in Florida—the site of the Bordons' ill-fated gambling and money-laundering operation—the state courts have considered post-brief supplemental authority on numerous occasions. In 1993, a Florida appeals court vacated a sentence based on a recent Florida Supreme Court ruling raised by appellant in a supplemental briefing.<sup>238</sup> Likewise, a Florida appeals court heard but rejected an argument by the State based on supplemental authority in an appeal of final orders in a juvenile delinquency hearing.<sup>239</sup> Finally, the Florida Supreme Court considered an appeal of a criminal sentence based on

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<sup>232</sup> *State v. Resendis-Felix*, 100 P.3d 457, 458 (Ariz. Ct. App. 2004).

<sup>233</sup> *Id.* at 459.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *State v. Resendis-Felix*, 100 P.3d 457, 460 (Ariz. Ct. App. 2004). Resendis-Felix's sentence was later reinstated because he admitted to facts that increased his sentence. *Resendis-Felix*, 2005 WL 2787475 at \*1.

<sup>238</sup> *Rolling v. State*, 619 So. 2d 20, 23 (Fla. Dist. Ct. App. 1993).

<sup>239</sup> *J.M.J. v. State*, 742 So. 2d 261, 262 (Fla. Dist. Ct. App. 1997).

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supplemental authority—*Blakely* and *Ring v. Arizona*<sup>240</sup>—but rejected the arguments on their merits.<sup>241</sup>

Hawaii seems to have the most expansive rule on acceptance of post-brief new issues. The Hawaii Supreme Court considered post-brief authority *sua sponte*, though the court ultimately held that the authority (*Booker*) was not applicable to the case before it.<sup>242</sup> A dissenting opinion held that the court improperly considered *Booker* and should have applied it to the instant case only if raised by the parties in Hawaii's equivalent of a 28(j) letter.<sup>243</sup>

*D. Split Within the Circuit: The Tenth Circuit's Rule on Post-Brief Supplemental Authority Mirrors That of the Eleventh Circuit*

While most jurisdictions are willing to hear arguments based on new issues, the Eleventh Circuit's approach is mirrored by a divided Supreme Court,<sup>244</sup> with greater authority to dispose of issues, and the Tenth Circuit Court of Appeals, which has a somewhat muddled rule concerning the consideration of new issues, but seems to rely on the Eleventh Circuit for guidance. The Tenth Circuit has barred new issues raised first in a 28(j) letter but not in a party's appellate brief while apparently allowing new issues when presented in an appellate brief.<sup>245</sup> The court based its rule regarding 28(j) letters in part on Eleventh Circuit precedent.<sup>246</sup>

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<sup>240</sup> 536 U.S. 584 (2002). In *Ring*, the Supreme Court held that a death sentence imposed after determinations of fact made by a trial judge and not the jury violated the Sixth Amendment. *Id.* at 609.

<sup>241</sup> *Conahan v. State*, 844 So. 2d 629, 642 n.9 (Fla. 2003).

<sup>242</sup> *State v. Maugaotega*, 114 P.3d 905, 913-16 (Haw. 2005).

<sup>243</sup> *Id.* at 916-17 (Acoba, J., dissenting).

<sup>244</sup> *See supra* Part I.

<sup>245</sup> *See United States v. Levy*, 391 F.3d 1327, 1346 n.16 (11th Cir. 2004) (Tjoflat, J., dissenting). A seemingly conflicting line of decisions was explained by opining that "the court was holding only that a Rule 28(j) letter is not a proper venue for raising a new *argument*." *Id.* (emphasis in original).

<sup>246</sup> *United States v. Rosales*, 112 F. App'x 685, 692 (10th Cir. 2004).

In *United States v. Rosales*, the Tenth Circuit declined to consider appellant's arguments based on *Blakely*, rejecting a 28(j) letter raising Sixth Amendment claims.<sup>247</sup> The court reached a similar conclusion in *United States v. Horn*,<sup>248</sup> rejecting a 28(j) letter asserting a *Blakely* claim because, "prior to the letter, Mr. Horn did not challenge the district court's ability to determine the facts resulting in his sentencing calculation . . . . In that Mr. Horn did not seek permission to file a brief properly raising the *Blakely* issue, we decline to consider the matter further."<sup>249</sup> Similarly, in *United States v. Taing*,<sup>250</sup> the Tenth Circuit rejected a *Booker* argument as waived.<sup>251</sup>

The Tenth Circuit's rejection of new issues seems to be based on the filing in which they are presented. For example, in *United States v. Badilla*,<sup>252</sup> the court reviewed a *Blakely* claim that was presented in a Motion for Post-Submission Consideration.<sup>253</sup> The court reviewed for plain error but found that any error stemming from a failure to consider Badilla's claims that his sentence was enhanced by factual issues not determined by a jury did not "seriously affect[] the fairness, integrity, or public reputation of the judicial proceedings."<sup>254</sup>

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<sup>247</sup> *Id.*

<sup>248</sup> 113 F. App'x 355 (10th Cir. 2004).

<sup>249</sup> *Id.* at 358.

<sup>250</sup> 135 F. App'x 177 (10th Cir. 2005).

<sup>251</sup> *Id.* at 181.

<sup>252</sup> 383 F.3d 1137 (10th Cir. 2004).

<sup>253</sup> *Id.* at 1142 n.2.

<sup>254</sup> *Id.* The Tenth Circuit reviewed its decision in *Badilla* upon remand from the Supreme Court. *See* *Badilla v. United States*, 543 U.S. 1098 (2005). On remand, the court of appeals reinstated all portions of its prior opinion except note 2, finding that because Badilla

failed to establish that his substantial rights were affected by the district court's application of the obstruction of justice enhancement, there [was] no need to proceed on to the fourth prong of the plain error analysis [of whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings].

*United States v. Badilla*, 419 F.3d 1128, 1135 (10th Cir. 2005).

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Similarly, in *United States v. Westover*, the Tenth Circuit similarly granted a defendant's motion to supplement his appellate brief to raise a *Blakely* claim.<sup>255</sup> The court rejected a number of challenges to Westover's conviction, but retained jurisdiction to address *Blakely* issues raised in a supplemental brief.<sup>256</sup> Eleventh Circuit Judge Tjoflat, discussing the apparent conflict between the Tenth Circuit's rulings in cases such as *Horn*, *Taing* and *Rosales*, and its willingness to allow new issues in *Badilla* and *Westover*, noted:

the court was only holding that a Rule 28(j) letter is not a proper vehicle for raising a new *argument*—i.e., Rule 28(j) letters should be used only to identify new authority relating to arguments already raised—and that the defendant waived his right to raise a *Blakely* claim by not properly seeking permission to file a supplemental brief.<sup>257</sup>

The Tenth Circuit thus leaves the door open—if only slightly—for new issues in a way that the Eleventh Circuit does not. However, the split among the circuits calls for a change to the Federal Rules of Appellate Procedure to bring all circuits in line with notions of fairness to appellate litigants.

**V. PROPOSED SOLUTION: RULE 28(J)(2)**

While the Eleventh Circuit's rule on hearing new issues based on post-brief authority is supported by the Tenth Circuit's less stringent rule, the Eleventh Circuit's approach conflicts with the law in other federal jurisdictions. This inconsistency results in unpredictable outcomes for litigants and deprives parties appearing before the Eleventh Circuit of their right to be heard. In order to standardize how federal appeals courts deal with new issues that derive from supplemental authority, an addition to the Federal Rules of Appellate Procedure is necessary.

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<sup>255</sup> *United States v. Westover*, 107 F. App'x 840, 847 (10th Cir. 2004).

<sup>256</sup> *Id.*

<sup>257</sup> *United States v. Levy*, 391 F.3d 1327, 1346 n.16 (11th Cir. 2004) (Tjoflat, J., dissenting).

Appellate parties seeking to introduce new issues based on recent authority rely now on Rule 28(j) of the Federal Rule of Appellate Procedure. That rule reads:

If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.<sup>258</sup>

The command that a 28(j) letter refer to the relevant “page of the brief or to a point argued orally” when declaring why the supplemental authority is relevant has been cited as justification for declining to hear new issues in supplementary filings.<sup>259</sup> Thus, by tying consideration of new authority to issues previously raised, Rule 28(j) could be said to limit how a filing under the rule can bring to the court's attention new law that will be dispositive.<sup>260</sup> The solution is a new subsection to Rule 28(j) which will provide a limited vehicle for addressing new issues based on recently issued controlling authority.

The current Rule 28(j) should become subparagraph (1) of the Rule. A new addition to the rule, Rule 28(j)(2), should read:

If significant authorities representing a change in existing law come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party should promptly advise

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<sup>258</sup> FED. R. APP. P. 28(j).

<sup>259</sup> *See supra* Part III.

<sup>260</sup> *See* *United States v. Smith*, 416 F.3d 1350, 1352 n.1 (11th Cir. 2005) (holding that allowing a Rule 28(j) letter to raise a new issue would circumvent the requirements of Rule 28(a)(5); *United States v. Levy*, 416 F.3d 1273, 1276 (11th Cir. 2005) (“To allow a new issue to be raised in a petition for rehearing circumvents Federal Rule of Appellate Procedure 28(a)(5).”).

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the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the significance of the new authority and briefly list any new issues raised by such authority. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

The proposed Rule 28(j)(2) guarantees at least some review of any new law that is handed down while an appeal is pending, but still allows a court of appeals to set procedural rules. By requiring that new issues raised in a 28(j)(2) letter be raised by supplemental authority, the new subparagraph would not serve as a last chance for appellate counsel to raise issues previously waived, forfeited or abandoned. Instead, Rule 28(j)(2) would allow for intervening case law to raise a new, pertinent and possibly dispositive issue in keeping with the due process rights of defendants and appellants.

This addition to Rule 28(j) protects the interests of adverse appellate parties. The proposed rule mirrors the existing language of Rule 28(j), which allows for a response that “must be made promptly and must be similarly limited.”<sup>261</sup> Allowing an adverse appellate party to argue new authority within the same limitation preserves that party’s due process rights. Additionally, a party which finds itself on the wrong side of newly decided authority has the option to petition for a re-hearing by the full panel of a court of appeals.<sup>262</sup> Therefore, prejudice to adverse parties will not be a concern if Rule 28(j) is modified.

A potential drawback to Rule 28(j)(2) is the possibility of overburdening courts with new issues that need to be decided very late in the appellate process—including, possibly, after a panel has heard and discussed the case. While such concerns are valid, the Rule would protect the judicial system by limiting the parties to 350 words. The limitation—which is just as strict as that which appears in the current Rule 28(j)—gives the party

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<sup>261</sup> Limited, that is, to 350 words.

<sup>262</sup> See FED. R. APP. P. 40.



seeking review of new authority a chance to present relevant case law without requiring the court to delve into an entirely new brief. Of course, the court retains the option of ordering supplemental briefing on any issue where additional filings would be helpful.

It is possible that courts might be burdened by the raising of numerous or frivolous issues in 28(j)(2) letters. However, the concern is a minor one, at worst. Ironically, the Eleventh Circuit's defense of its rule on hearing new issues demonstrates why frivolous 28(j)(2) claims will be rare. As the court pointed out in *Levy*, attorneys already have an incentive to raise all possible claims at various stages of the trial and appellate process—to preserve issues for *de novo* review.<sup>263</sup> Attorneys have refrained from doing so, likely because they recognize the futility of raising long-shot issues and the possibility of Rule 11 sanctions for raising frivolous claims. It is unlikely that attorneys will suddenly become emboldened by a last chance to raise an issue, especially since the proposed language of Rule 28(j)(2) requires that any supplemental authority cited in a filing under this Rule “represent . . . a change in existing law.” This limiting clause, along with the 350-word limit, will reduce any burden on appellate courts while still affording appellants the opportunity to raise new case law that could prove dispositive.

#### CONCLUSION

The general rule against hearing previously unraised issues on appeal is a sound principle of appellate procedure that does much to safeguard the interests of all parties. However, like virtually every other rule, the general rule has sound exceptions, including an intervening change in the law. The Eleventh Circuit Court of Appeals, to the dismay of several of its judges, has ignored this exception to the general rule when considering new issues raised in supplemental filings. It is the most restrictive of all circuits that have dealt with this issue in recent years, and is the only circuit with a blanket rule rejecting new issues raised

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<sup>263</sup> *United States v. Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004).

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by supplemental authority. The Eleventh Circuit's approach is unfair to litigants and criminal defendants. The court's ban on new issues raised in supplemental authority has due process implications and runs contrary to the intent of recent changes to Federal Rule of Appellate Procedure 28.

An addition to Rule 28(j) would bring the Eleventh Circuit in line with other courts of appeal. If the Rule were modified to allow appellate parties to raise supplemental authority "representing a change in existing law," circuit courts would be required to give some sort of review to new issues raised in 28(j) letters. The language of the proposed Rule 28(j)(2) will sufficiently limit the burden on appellate courts, and will protect adverse parties by allowing a chance for reply. This change to Rule 28(j) will ensure justice for the Bordons, Raphael Levy and all defendants and litigants who see a dispositive issue decided just a little too late.