Note: These standards were originally adopted and approved by the Defender Services Performance Measurement Working Group (PMWG) in March 2019, and by the Defender Services Advisory Group (DSAG) in April 2019. They were updated by PMWG in March 2023 and approved by DSAG.

Standards for Federal Appellate Practice

1. **Scope.** These standards are intended to guide appointed counsel in federal cases litigating direct non-capital criminal appeals from convictions, sentences, and supervised-release revocations. They may be useful to counsel litigating other appeals (capital appeals; postconviction appeals; bail appeals; and so forth), but those appeals have unique procedural requirements and other considerations that are beyond the scope of these standards.

2. **Purpose.** The purpose of these standards is to give counsel an overview of the federal appeal process, an understanding of client rights, and guidance for effective appellate representation.

3. **Resources.** Always check online for the latest version of the applicable rules.

   A. The Federal Rules of Appellate Procedure (FRAP). While these national federal rules are available on the U.S. Courts website, we recommend viewing the version that appears on the relevant circuit's own website. That version is likely to have the circuit's own rules embedded within the national federal rules.

   B. The circuit's own rules. Circuit rules vary considerably from circuit to circuit; it is essential that counsel be familiar with the rules and practices of the circuit in which the appeal is to be litigated.

   C. Any practitioner's guide on the circuit website.

   D. Any guide to electronic filing on the circuit website.

E. The circuit's Criminal Justice Act (CJA) Plan and other CJA-related resources on the circuit website.

F. Circuit court clerks. If you aren't sure whether you've read a rule right, or whether there's a rule you are missing, call the clerk's office. They would rather answer your questions in the first place than have to ask you to correct an error later.

G. Federal Public Defender or Community Defender offices within the circuit. Appellate practitioners in these offices are available to answer your questions and share their expertise with you.

H. In these standards, we will refer to the Model Rules of Professional Conduct (MRPC); check your local rules of professional conduct for your state's version of the rules.

4. **The appellate client.**

A. Communication. MRPC 1.4.

(1) Communicate with the client early—during plea negotiations, at sentencing, and before the notice of appeal is filed, if possible—about the wisdom and objectives of any appeal (see decision-making section below). "[T]he better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal."[1]

(2) Advise the client of all possible outcomes of the appeal (whether, for instance, the result of a successful appeal might be a retrial, a resentencing, or a remand for other proceedings).

(3) Explain the scope and limits of the appellate appointment (see post-decision-representation section below). Let the client know if it is likely that different

[1] *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

counsel will be appointed to represent the client on any remand.

(4) Keep the client informed at every step of the appellate process and respond promptly to requests for information or records. Send copies of all appellate pleadings to the client, but take precautions before sending pleadings containing sensitive information, such as information that might expose the client to others as a sex offender or cooperator. If the client requests a copy of transcripts or other portions of the record on appeal, consult with the BOP facility about sending the documents to the client on a DVD or flash drive. Again, make arrangements to protect any sealed or sensitive information.

(5) Confirm with the client what family members or others you are authorized to communicate with about the appeal.

(6) Check in with the client during long waits ("I am writing to let you know that we are still waiting for the court to issue its decision . . . .").

(7) Determine whether the client is a non-English speaker, and, if so, use an interpreter to translate letters to and telephone conversations with the client. Communicate the substance of the brief and any important procedural matters in language that the client can understand.[2] Be similarly cognizant of illiterate clients, and make arrangements to speak with those clients by telephone in lieu of written communications.

(8) Be just as mindful of confidentiality with appellate clients as with district court clients. MRPC 1.6. Confirm with the facility that any telephone calls with clients are confidential

[2] *See, e.g., United States v. Cervantes*, 795 F.3d 1189 (10th Cir. 2015); *United States v. Moreno–Torres*, 768 F.3d 439 (5th Cir. 2014); *United States v. Leyba*, 379 F.3d 53 (2d Cir. 2004).

and not recorded. Be aware that email communications on the BOP CorrLinks system are not confidential.

B. Decision making. MRPC 1.2.

(1) Whether or not to appeal is the client's decision. "[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable."[3] This is so even if the client's plea agreement includes an appeal waiver.[4] The failure to file a notice of appeal in light of a client's clear request is presumptively prejudicial, and will constitute ineffective assistance of counsel.[5] To help the client make an informed decision about whether or not to appeal, discuss the following, when relevant, with the client:

(a) Whether there are any appealable issues, keeping in mind that counsel may exercise counsel's professional judgment in deciding which nonfrivolous issues to raise in the appeal.[6]

(b) Whether the client waived the right to appeal, and whether any potential appellate issues are within the scope of that waiver.

(c) The time frame of the appeal. Can it be completed before the client's sentence is served, or will any appealable issues be mooted before the case is decided?

---

[3] *Flores-Ortega*, 528 U.S. at 477.

[4] *Garza v. Idaho*, ___ S.Ct. ___, ___ (2019).

[5] *Id*. at ___.

[6] *Jones v. Barnes*, 463 U.S. 745, 752 (1983) ("Appellate counsel is not obligated to assert all nonfrivolous issues on appeal; there is hardly any question about the importance of examining the record and having appellate counsel select the most promising issues for review.").

(d) The risk of appealing. Is there a risk that filing a notice of appeal will provoke the government to appeal, for instance, a sentencing issue that the district court decided in the client's favor? Is there a risk that the client will end up in a worse position if the client wins an issue that the client wishes to appeal (by, for instance, triggering the withdrawal of a favorable plea agreement)? Is there a risk that appealing an issue arguably within the scope of an appeal waiver will prompt the government to move to undo a favorable plea agreement on grounds that the client has breached that agreement?[7]

(e) What remedy the client seeks, and whether that remedy is a possible outcome of the appeal, or whether a collateral attack is the better vehicle.

(2) Whether or not to dismiss an appeal once a notice of appeal is filed is also the client's decision.

5. **Getting started.**

A. Become a member of the relevant circuit's bar and register to file with the circuit's ECF system. This is different from registration in district court. Make sure your circuit membership and registration are in place before your first due date.

B. When reviewing the rules regarding initial appellate documents (see below section on initiating the appeal), note that some documents must be filed in the district court (sometimes with

[7] *See Garza*, ___ S.Ct. at ___ ("While we do not address what constitutes a defendant's breach of an appeal waiver or any responsibility counsel may have to discuss the potential consequences of such a breach, it should be clear from the foregoing that simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope.").

copies to the circuit court), and some documents must be filed in the circuit court.

C. Become familiar with the circuit's rules regarding fonts, word limits, certificates of service, certificates of compliance, and other pleading requirements.

D. Calculations of time are governed by FRAP 26.

6. **Initiating and litigating an appeal.** The following sections cover the appellate process in four stages: (A) initiating the appeal; (B) briefing; (C) oral argument; and (C) post-decision representation.

A. Initiating the appeal. Each circuit has its own requirements for initiating an appeal, and provides its own forms for many of the required documents. Look for circuit rules and forms covering the following matters:

(1) Notice of appeal. A timely notice of appeal must be filed in the district court. This is required in every circuit. FRAP 3; FRAP 4(b)(1).

(a) The notice of appeal should broadly state that the defendant is appealing to the circuit court from the judgment entered on [date]. Specifying that the defendant is appealing from any particular ruling preceding the judgment is unnecessary, and may cause the circuit court to limit the appeal to that ruling.

(b) If a restitution or forfeiture ruling is delayed until after the judgment is entered, do not wait to file the notice of appeal. File a timely notice of appeal from the judgment. If the client wishes to appeal a later ruling, file a second notice of appeal from that ruling, and move to consolidate the appeals in the circuit.

(c) The district court may, upon a finding of excusable neglect or good cause, extend the time to file a notice of

appeal. FRAP 4(b)(4). If a client files an untimely notice of appeal pro se, it may be necessary to file a request for an extension of time.

(2) Entry of appearance in the circuit court.

(3) Certificate of interested parties.

(4) Motion to continue appointment (or to withdraw). Some circuits automatically continue counsel's district court appointment; others require a motion requesting continuance of the appointment. Most (if not all) circuits obligate counsel to make an initial appearance in the circuit court and complete some initial tasks (such as those listed below) before moving to withdraw.

(5) Motion to proceed in forma pauperis. FRAP 24. Take note of any order in the district court finding the client eligible for appointment of counsel under the CJA.

(6) Record on appeal (form). Consult circuit rules to determine whether the record on appeal is generated by filing a designation of record at the outset of the appeal, by filing an appendix with the brief, or by some other method. Consult the rules or circuit clerks or appellate practitioners at the local Federal Public Defender or Community Defender office to determine how to add exhibits and other necessary items that don't appear on PACER to the record on appeal. Look for and comply with rules regarding required redactions and sealed materials.

(7) Record on appeal (content). Review the pleadings on PACER to determine, as well as possible at this early stage, which motions and orders might be relevant to the appeal. Routine motions that were decided in the client's favor, for instance, need not be included unless there is reason to believe that they will be relevant to an issue on appeal. Ask district court counsel about the relevance of sealed documents if you are

not able to access those documents. Ask district court counsel for copies of all government and defense exhibits that were admitted at hearings, trial, and sentencing so that you can determine whether to add them to the record on appeal.

(8) Transcripts (and payment arrangements for transcripts). Err on the side of requesting transcripts of all substantive proceedings. In appeals from jury trials, include the voir dire transcript—it may reveal prosecutorial misconduct, erroneous introductory instructions, or jury-selection issues (including *Batson* issues). (Some districts may require a court order to obtain the voir dire transcript.) CJA counsel should check the Guide to Judiciary Policy or CJA resource counsel for instructions on the preferred method for making payment arrangements for transcripts. "In multi-defendant cases involving CJA defendants, no more than one certified transcript should be purchased from the court reporter on behalf of CJA defendants."[8] "CJA defendants" includes defendants represented by a Federal Public Defender or Community Defender.[9]

(9) Docketing statement. The circuit court "dockets" an appeal by opening a case and assigning an appeal number. Some circuits also require counsel to file a "docketing statement" on a circuit-approved form.

B. Briefing. The Federal Rules of Appellate Procedure provide a timeline for briefing. Check individual circuit rules and any scheduling order to determine if different deadlines apply.

(1) Timing of briefing. FRAP 31.

(a) Appellant's opening brief (40 days).

[8] *Guide to Judiciary Policy*, Vol. 6, Ch. 5, § 550.40.30(a).

[9] *Id.* at § 550.40.30(a)(5).

(b) Appellee's response brief (30 days).

(c) Appellant's reply brief (21 days).

(d) Motions for extension of time. Consult with local appellate practitioners to determine how many extensions of time the circuit might grant, and under what circumstances. Keep in mind the client's desired appellate remedy—and whether it risks being mooted by appellate delays—when deciding whether to seek extensions of time.

(e) Calendar briefing time in chunks to avoid last-minute cramming. Briefing tasks include reviewing the record; consulting with the client about the issues; researching the issues; drafting the statement of facts; organizing and drafting the arguments; peer review; and editing.

(2) Technical requirements of briefing.

(a) Check FRAP 28, FRAP 31, FRAP 32, and your circuit's local briefing rules for required brief contents (including tables of contents and tables of authorities, statements of related cases, and required attachments), organization, page or word limits, required or preferred fonts, how to cite to the record, how to request oral argument, brief cover requirements, required certificates, and filing and service details. Do not underestimate the importance of every one of these requirements.[10]

[10] *See, e.g., Lu Zhang v. Sessions*, 738 Fed. Appx. 303, 304 (5th Cir. 2018) (ordering counsel to show cause why he should not be sanctioned for repeated rules violations, including fact that his "table of authorities does not list two of the seven cases cited in the body of the amended brief"); *Allejandre-Gallegos v. Holder*, 598 Fed. Appx. 604, 605 (10th Cir. 2015) (referring counsel for disciplinary proceedings where, among other repeated rules violations, "[h]e hasn't even bothered to 'alphabetically arrange[ ]' his table of authorities") (citing FRAP 28(a)(3)).

(b) Every appellant's brief must include "a short conclusion stating the precise relief sought." FRAP 28(a)(9). Is the remedy sought withdrawal of the plea agreement? A new trial? A remand for further proceedings? Clearly define the scope of the desired mandate.

(3) Reviewing the record and issue spotting. Keep an open mind and don't let district-court counsel's identification and winnowing of issues limit your independent appellate review. Consider reading the record "backwards"—that is, starting with the judgment, sentencing (including the presentence report), any motion for new trial, the verdict, and closing arguments. That way, you will have a sense of which issues and themes ultimately mattered as you work your way through the pretrial proceedings and trial.

(4) Writing the facts.

(a) Accuracy: Accountability is crucial when it comes to the statement of facts. Record citations should be meticulous, and to the primary record source—the exhibit or testimony that supports the stated fact.

(b) Completeness: Acknowledge and contextualize bad facts. Simply ignoring them may raise credibility questions and undermine the legal argument.

(c) Relevancy: Take care not to distract the reader with irrelevant facts and procedural details.

(d) Readability: Tell the story of the case in narrative form, incorporating quotes from the record as useful. Consider alternatives to using chronology as the primary structure in the factual recitation.

(5) Using standards of review.[11] Every appellate argument is conscribed by the applicable standard of review. Know the standard, state it clearly in the brief, and argue the issue within the framework of the standard.

(a) Consult circuit precedent to determine whether to argue the issue in the alternative under any other possibly applicable, more onerous, standard of review.[12] Try to avoid conceding a plain error standard of review.

(b) If the government argues in its response that a different standard applies, defend your proposed standard in reply. But if there is a chance that the appellate court will apply the government's proposed standard, reargue the issue in the alternative within the framework of that standard.

(6) Using legal precedent. Know the sources of authority for each appellate issue. Is the potential issue one of constitutional law? Statute? Rule? Regulation? Common law? Is it one issue (constitutional, say), or two (constitutional *and* statutory)? Consider the entire text of the source.[13] Set out each claim and its distinct authority separately. Keep in mind which authority binds the court, and which authority may (or may

---

[11] "Take 'standard of review.' Now to the normal reader that is legalese. To the judge, it is everything." Former Tenth Circuit Chief Judge Deanelle Tacha, Harry T. Edwards & Linda A. Elliott, FEDERAL COURTS STANDARDS OF REVIEW v (2007).

[12] *See, e.g., See United States v. Zander*, 794 F.3d 1220, 1233 n.5 (10th Cir. 2015) ("While raising an alternative plain error argument [in the opening brief] might be a prudent practice for appellants to follow, we are not persuaded that it is mandated" by precedent.).

[13] Scalia & Garner, MAKING YOUR CASE 44 (2008) ("Paramount rule: Before coming to any conclusion about the meaning of a text, read the *entire* document, not just the particular provision at issue. The court will be seeking to give an ambiguous word or phrase meaning *in the context of the document in which it appears*.") (emphasis original).

not) be merely persuasive.[14] Understand the difference between published and unpublished opinions. Do not shy away from asserting that controlling authority is wrong or conflicts with subsequent legal developments. Courts do overrule themselves—but not (usually) unless litigants ask them to do so.[15]

(7) Being a conscientious legal writer.

(a) There is always room to improve legal writing. Attend appellate seminars; read legal-writing treatises; subscribe to legal-writing blogs; follow legal-writing experts on social media.

(b) Consider your audience. Judges are busy. Organize well; use subheadings; insert images of essential exhibits or the text of essential statutes, jury instructions, or pleadings directly into the brief (don't count on the reader to flip to an appendix or dig through a digital record); and bookmark the final .pdf product, if allowed by the circuit.

(c) Proofread thoroughly. Is every sentence a sentence? Are the citations all in proper form? Proofread again.[16]

(d) Peer review of briefs is essential for issue-spotting, organization, clarity, and line-editing. To make the most out of peer review, give the reader a polished product with

---

[14] *Id.* at 52-55 ("Master the relative weight of precedents.").

[15] *See Taylor v. United States*, 136 S.Ct. 2074, 2081 (2016) ("But we have not been asked to reconsider *Raich*. So our decision in *Raich* controls the outcome here.").

[16] Bryan A. Garner, *Interview with Justice Antonin Scalia*, 13 Scribes J. Legal Writing 5, 71-72 (2010) ("If you see somebody who has written a sloppy brief, I'm inclined to think this person is a sloppy thinker . . . . Well, my goodness, if you can't even proofread your brief, how careful can I assume you are?").

ample time to review, and point out areas that you think may need particular attention.

(8) Counsel may file a letter of additional authority after the brief is filed, or after oral argument. FRAP 28(j).

(9) Reply briefs. While technically optional, *see* FRAP 28(c), it is a rare case in which a reply brief is not warranted. Use the reply to summarize points of agreement and which issues remain in dispute after the government's brief, to address any questions about the standard of review, to clarify facts or distinguish cases relied on by the government, and to otherwise distil the issues.

C. Oral argument.

(1) Requesting argument. If the case will benefit from oral argument, check the circuit's local rules for requesting argument. FRAP 34(a). Some circuits require that the request be made in the opening brief. Some circuits are also more likely to grant oral argument than others. Ask local practitioners how best to get a case on the oral-argument docket.

(2) Preparing for argument.

(a) Review the briefs; refresh the research; and prepare any argument notes for the podium. Consider going digital and using an iPad or other tablet at the podium.

(b) Prepare a very short introductory statement outlining the issues you intend to address, keeping in mind how quickly argument time will pass. Prepare as well to be redirected to other issues. Summarize the essentials of cases or statutes that might be discussed. Consider every question the judges might ask, using the government's brief as a point of departure. Prepare to answer detail-oriented questions, keeping in mind your larger themes. Prepare to

clearly articulate the remedy sought. What should the mandate say?

(c) File any FRAP 28(j) letter of additional authority sufficiently in advance of argument so that opposing counsel and the panel judges will have had time to review it.

(d) Observe arguments live in the circuit court if possible ahead of time, or listen or watch online recordings of arguments in the circuit.

(e) Moot court is an essential preparation tool for oral argument. Ask colleagues (including appellate practitioners at the local Federal Public Defender or Community Defender office) to review the briefs and preside over a moot court sufficiently in advance of the argument to incorporate their questions, comments, and observations into your argument preparations.

(3) Appearing at argument.

(a) Make travel plans with built-in cushion time for delayed or canceled flights, bad roads, and other contingencies.

(b) Determine the rules and conventions for checking in at the clerk's office, seating at counsel table, requesting or reserving rebuttal time, and so forth.

(c) Listen. Be responsive. Speak clearly (and into the microphone). Seek clarification when necessary. Do not fear silence; take a moment to pause and think before answering questions. Watch the clock and remember to reserve your rebuttal time consistent with the local rules and conventions.

(4) Following up after argument.

(a) File a FRAP 28(j) letter of additional authority if appropriate in response to questions posed during argument.

(b) Give the client a report of oral argument and send authorized family members or other contacts a link to the online recording. Some BOP facilities may allow you to mail a DVD or flash drive containing the argument recording to the client. Check with the facility for the proper procedure.

D. Post-decision representation. Counsel should advise the client in writing of all post-decision procedures. If counsel concludes that a petition for rehearing or for certiorari lacks merit, counsel should advise the client how to proceed pro se and move to withdraw if circuit rules require.

(1) Consider petitioning for panel rehearing or rehearing en banc, if doing so would be consistent with FRAP and the circuit court's own rules. FRAP 35; FRAP 40.

(2) Consider petitioning the Supreme Court for a writ of certiorari.

(a) Check your circuit's rules and CJA plan to determine appointed counsel's obligations with respect to filing a petition for a writ of certiorari.[17]

(b) Be careful not to feed false hopes: advise the client that a grant of certiorari is highly unlikely.[18]

---

[17] *See also Austin v. United States*, 513 U.S. 5 (1994).

[18] According to the Supreme Court, "[e]ach Term, approximately 7,000-8,000 new cases are filed in the Supreme Court. . . . Plenary review, with oral arguments by attorneys, is currently granted in about 80 of those cases each Term[.]"

(c) Become familiar with the Supreme Court's rules and guides for counsel.

(d) Become a member of the Supreme Court Bar and register for electronic filing in the Supreme Court.

(e) Learn how to craft an effective petition for a writ of certiorari, keeping in mind that the Supreme Court is not a court of mere error correction.[19] Identify a circuit split regarding the legal issue; explain the importance or likely recurrence of the issue; explain why your case is an appropriate vehicle for deciding the issue; and explain how the circuit court decided the issue incorrectly.

(3) The appeal is not final until the mandate issues. FRAP 41. But be aware that some post-appeal deadlines run from the date that the opinion is issued, not the date the mandate is issued (e.g., the time for filing a petition for a writ of certiorari and the time to file a motion under 28 U.S.C. § 2255).[20]

(4) At the close of appellate representation, advise the client of subsequent rights and deadlines for filing a motion and seeking appointment of postconviction counsel under 28 U.S.C. § 2255.

7. **Unusual circumstances on appeal.**

---

[19] For a deep dive into Supreme Court practice, check your local bar library, law-school library, or Federal Public Defender or Community Defender office for Shapiro, et. al., SUPREME COURT PRACTICE (11th Ed. 2018).

[20] *E.g.*, Sup. Ct. R. 13(3) ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice).").

A. Government appeals/cross appeals. Check FRAP 28.1 and the circuit's own rules for special rules applying to these appeals.

B. Voluntary dismissals. Because the decision whether to appeal belongs to the client, the client may also dismiss the appeal at any time before it is decided. Check the circuit's rules for required pleadings. Some circuits require, for instance, a statement signed by the client and proof of service on the client.

C. *Anders* briefs.[21] While the decision whether to appeal is the client's, the client does not have the right to demand that counsel file a frivolous brief. If the client still wishes to go forward after being advised that there are no non-frivolous appellate issues to brief, counsel may file an *Anders* brief and move to withdraw. If the motion is granted, most (if not all) circuits will offer the client an opportunity to file a pro se brief.

   (1) Check circuit rules for your circuit's *Anders* procedures and search for *Anders* cases within your circuit to get a sense of local conventions with respect to *Anders* motions and briefs.

   (2) Review the entire record on appeal for any potential appellate issues.

   (3) Walk through the proceedings in the brief, and note the absence of any non-frivolous appellate issues with respect to each proceeding.

   (4) Do not slight the client in the motion or brief. Simply inform the court that you have advised the client that you believe there are no non-frivolous appellate issues to brief, and that the client nonetheless wishes to proceed with the appeal.

[21] *Anders v. California*, 386 U.S. 738 (1967).

(5) Include the certificate of service or proof of service on the client that is required in your circuit in both the motion and the brief.

D. Motions to enforce appeal waivers in plea agreements.

(1) Timing. Check your circuit's rules and caselaw to determine when and how the government must move to enforce an appeal waiver in a plea agreement. If the government's motion is untimely or otherwise fails to comply with circuit rules, respond that the government has waived (or forfeited) enforcement.

(2) Knowing and voluntary. As with waivers of other rights, valid appeal waivers must be knowing and voluntary.

(3) Scope. Not every appeal waiver waives every appellate issue. Read the language carefully and consider whether there are appellate issues that fall outside the scope of the waiver.

(4) Exceptions to appeal waivers. Even if within the scope of an appeal waiver, some appellate issues may be subject to review to prevent a miscarriage of justice, to address a jurisdictional issue, or to correct a sentence that exceeds statutory limits. Check your circuit's caselaw for exceptions.

E. Cooperator appeals. Some circuits may be willing to take measures to protect the identity and safety of cooperating defendants, including sealing documents, using pseudonyms, omitting references to identifying district court information, and sealing the entire appeal.[22] Check both district court and circuit

[22] *See, e.g., United States v. C.D.*, 848 F.3d 1286, 1288 n.* (10th Cir. 2017) ("Due to safety concerns arising from Defendants' cooperation with authorities in the investigation or prosecution of others, the Court GRANTS Defendants' respective motions to seal appellate documents. Those documents are identified in said motions. Because the Court elects to resolve these appeals in a published opinion, both the Court's

court rules regarding documents containing cooperator information.

F. Client death. Check circuit law regarding the death of a criminal defendant during the pendency of the direct appeal. Some circuits hold that the interests of justice do not allow a conviction to stand untested by direct appeal, and therefore will dismiss the appeal and remand the case to the district court with instructions to vacate the judgment and dismiss the underlying indictment.[23]

G. Client absconder. The circuit court may dismiss a direct criminal appeal under the fugitive disentitlement doctrine. But the Supreme Court has counseled restraint in resorting to this discretionary "harsh sanction of absolute disentitlement."[24] If the government seeks dismissal on grounds that the client has absconded, consider seeking discretionary alternatives such as abating the appeal until execution of any outstanding arrest warrant.

H. Stays/abeyances. The circuit court may be willing to stay (or hold in abeyance) an appeal pending what will be a controlling decision in another case nearing decision either in the circuit or in the Supreme Court.[25] When seeking a stay or abeyance, or responding to a government request for one, keep in mind

---

caption and opinion refer to Defendants by non-identifying initials to aid in preserving their anonymity.").

[23] *See, e.g., United States v. Volpendesto*, 755 F.3d 448 (7th Cir. 2014); *United States v. Davis*, 953 F.2d 1482 (10th Cir. 1992).

[24] *Degen v. United States*, 517 U.S. 820, 823, 827-28 (1996); *see also United States v. Smith*, 419 F.3d 521, 526-27 (6th Cir. 2005).

[25] *See, e.g., Rodriguez-Penton v. United States*, 905 F.3d 481, 486 n.3 (6th Cir. 2018) (noting that court granted government's request to hold case in abeyance pending Supreme Court decision on related issue).

whether any delay will harm the client.[26] The circuit court may also be willing to remand the case to the district court for limited findings necessary to the appeal.[27]

[26] *See United States v. Islas-Saucedo*, 903 F.3d 512, 521-22 (5th Cir. 2018) (denying government's request for abeyance pending Supreme Court action on certiorari petition in governing circuit case where defendant's sentence on remand, given ruling in his favor, "would likely equate to time served").

[27] *United States v. Ferrell*, 725 Fed. Appx. 672, 676 (10th Cir. 2018) (noting mid-appeal remand for district court to clarify and make necessary fact findings).