Handbook for Criminal Appeals in the Seventh Circuit

Second Edition

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1.01: Becoming Counsel on Appeal

Counsel are appointed to appeals in criminal cases in the Seventh Circuit in a variety of ways.

If you were appointed under the Criminal Justice Act ("CJA") in the district court to represent your client, your representation continues automatically in the Court of Appeals. You will be obligated to continue to represent your client, unless relieved by the Court of Appeals. There is no need to seek *in forma pauperis* status in the Court of Appeals, as your client's indigent status is presumed to continue for purposes of appeal.

Like appointed counsel, retained counsel in the district court are expected to continue to represent their clients on appeal. If your client has become indigent by the time the appeal is filed, you will need to seek *in forma pauperis* status in order to be appointed to represent your client under the CJA. *See* Section 1.02. If you do not intend to continue your representation of your client on appeal, you must file a motion to withdraw. *See* Sample 16. If you state in the motion to withdraw that your client no longer has funds to retain counsel, the Court of Appeals will likely order you to assist your client obtain *in forma pauperis* status. The Court of Appeals will not typically relieve you of representation until after the district court has granted *in forma pauperis* status.

Where you were appointed as "stand-by" counsel in the district court for a defendant who was allowed to proceed *pro se*, you do not have an obligation to continue to represent the defendant on appeal. Nevertheless, the Court of Appeals will presume that you represent the defendant on appeal until you file a "Notice of Non-Involvement" with the Court of Appeals explaining that you were only "stand-by" counsel in the district court and do not represent the defendant on appeal. *See* Sample 1. After such a Notice is filed, the Court of Appeals will typically relieve you from any further responsibility in the case and will either appoint counsel for the defendant on appeal or allow him to proceed *pro se*.

1.02: Obtaining in Forma Pauperis *Status*

If you or prior trial counsel were retained in the district court, but your

client has become indigent by the time the appeal is filed, you must seek *in forma pauperis* ("IFP") status in order to receive compensation under the CJA and allow your client to proceed without the prepayment of appellate fees and costs, pursuant to 28 U.S.C. § 1915(a) and Federal Rule of Appellate Procedure 24.

The motion filed in the district court must state that the defendant is indigent and set forth the issues you intend to raise on appeal. However, if you are newly appointed counsel and have not yet had an opportunity to review the case to determine, what, if any, issues will be raised, a statement to this effect in the motion will ordinarily suffice in lieu of a statement of the issues to be presented on appeal. *See* Sample 2.

Along with the motion, you must file an affidavit executed by your client demonstrating that he or she cannot pay for an attorney and appellate fees and costs. The form for this affidavit is set forth in Form 4 of the Appendix to the Federal Rules of Appellate Procedure. Fed. R. App. P. 24(a)(1)(A); *see* Sample 3; http://www.ca7.uscourts.gov/forms/pauperis.pdf. You will also need to attach to the affidavit a copy of a report from your client's prison commissary account, indicating how much money he has available to him. Your client can obtain this form from his prison counselor.

While your *in forma pauperis* motion is pending in the district court, the Court of Appeals will likely suspend briefing and require you to file a status report every 30 days until the district court rules on the motion. The status report need contain only basic case information (such as offense, conviction, sentence, date of appeal, date of appointment) and any information regarding the pending motion. If the district court has not yet ruled on the motion, the status report should include a request to file another status report in 30 days. *See* Sample 4.

It is good practice to notify the Court of Appeals immediately after the district court has ruled on the motion, even if your next status report is not yet due. Fed. R. App. P. 24(a)(2); *see* Sample 5. Once the Court of Appeals receives the district court's order granting *in forma pauperis* status, the court will set a briefing schedule.

IFP motions are granted in the vast majority of cases. However, if the district court denies the motion, you may file the motion with the Court of Appeals pursuant to Federal Rule of Appellate Procedure 24(a)(5), using the same attachments to the motion which you used in the district court. This motion must be filed within 30 days of the district court's denial of your motion.

It is very rare for the Court of Appeals to deny an IFP motion made after the district court has denied it.

1.03: Moving to Withdraw as Counsel on Appeal

As Section 1.01 above indicates, once you agree to represent a client in the district court, your representation continues in the Court of Appeals until relieved by the Court of Appeals. Until 1999, the Court of Appeals rarely allowed trial counsel to withdraw from representing a client on appeal. The Court realized that forcing trial lawyers (some of whom had little experience with or interest in appellate work) to represent their clients on appeal did not promote quality appellate work. Thus, the Court of Appeals adopted a more liberal policy on motions to withdraw as counsel, normally granting such motions regardless of the reasons given in the motion.

If you no longer wish to represent your client (or he no longer wishes to be represented by you), you should file a motion to withdraw with the Court of Appeals. The motion should state the circumstances of the case, the nature of your representation (CJA appointment or retained), and the reasons for moving to withdraw. You should also ask that briefing be suspended while your motion is pending, as it can sometimes take a few months for new counsel to be appointed. *See* Sample 6.

While your motion is pending, the Court of Appeals will require you to order the necessary transcripts while a ruling on your motion is pending, file a status report regarding the preparation of transcripts, and file a Circuit Rule 10(b) Transcript Information Sheet demonstrating that you have in fact ordered the transcripts. *See* Sample 13. Ordering the transcripts at this point is very important to the progress of the appeal. If transcripts are not ordered until the next attorney assumes the representation, it can often delay the case by several months. In most cases, the Court will order you to obtain transcripts while the briefing schedule is suspended in order to avoid lengthy delays. *See* Section 2.03.

1.04: The Notice of Appeal

1.04.01: Time for Filing

Every appeal begins by the filing of the Notice of Appeal in the district court. In a criminal case, the defendant must file the notice of appeal in the district court within 14 days after the later of: (1) the entry of the judgment or order being appealed, or (2) the filing of the notice of appeal by the government.

See Fed. R. App. P. 4(b)(1)(A). A notice of appeal filed within 14 days of the criminal judgment is sufficient to appeal all of the orders preceding the judgment. If a Rule 33 motion for new trial is filed after sentencing, however, you must file a new notice of appeal to challenge the district court's ruling on the motion for new trial. *See United States v. Rosby*, 454 F.3d 670, 675 (7th Cir. 2006).

Rule 4(b)'s time limit is not jurisdictional and is merely a claim-processing rule that can be waived or forfeited. *United States v. Neff*, 598 F.3d 320, 323 (7th Cir. 2010). The court will enforce the rule "when the appellee stands on its rights." *United States v. Rollins*, 607 F.3d 500, 501 (7th Cir. 2010) (government argued court lacked jurisdiction over appeal which was filed late); *United States v. Shah*, 665 F.3d 827, 837 (7th Cir. 2011).

An attorney's failure to file a timely notice of appeal constitutes *per se* ineffective assistance of counsel if a defendant makes a timely request for his attorney to appeal. *See Dowell v. United States*, 694 F.3d 898, 903 (7th Cir. 2012); *see also Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) (noting "request" is a key factor in determining whether counsel was ineffective for failing to timely file notice of appeal, as "[a] lawyer need not appeal unless the client wants to pursue that avenue.") Accordingly, it is good practice to automatically file a notice of appeal in every case where the defendant is convicted and sentenced, unless the defendant states in writing that he does not desire to appeal, as you can always later voluntarily dismiss the appeal or file a brief pursuant to *Anders v. California,* 386 U.S. 738 (1967), if there turns out to be no non-frivolous issues that can be advanced on appeal.

1.04.02: Untimely Notice of Appeal

If you are appointed by the Seventh Circuit Court of Appeals to represent a defendant on appeal, the notice of appeal will have already been filed. Upon appointment, however, you may discover that the notice of appeal was not timely filed. Despite the untimely filing of the notice of appeal, there are circumstances where you can avoid dismissal of the appeal because of the late filing.

Specifically, you may file in the district court a motion to extend the time to file a notice of appeal if you show "excusable neglect or good cause," pursuant to Federal Rule of Appellate Procedure 4(b)(4). *See* Sample 7. The district court cannot grant an extension beyond 30 days from the expiration of the 14 day appeal period if a notice of appeal has not been filed within this time period. Although the notice of appeal must be filed within this time period, the motion to

extend the time to file a notice of appeal may be filed *at any time*, so long as the notice of appeal was filed within the 30 day extension period.

Accordingly, the first question to ask is whether a notice of appeal has been filed within the 30 day extension period after the original 14 day period for timely filing has expired. If so, then you may file the motion to extend the time for filing the notice of appeal at any time.

For examples of cases where the Seventh Circuit Court of Appeals has affirmed the district court's finding of "excusable neglect or good cause," *see United States v. McKenzie*, 99 F.3d 813, 815-16 (7th Cir. 1996) (affirming excusable neglect finding, where the defendant timely requested his attorney to appeal and his attorney was on vacation and unreachable during the 10 day appeal period, because defense counsel effectively "abandoned" the defendant during a crucial time); *United States v. Alvarez-Martinez*, 286 F.3d 470, 472-73 (7th Cir. 2002) (upholding district court's finding of excusable neglect, where defense counsel stated that he did not believe the defendant desired to appeal, he did not meet with the defendant after sentencing, he thought the defendant had mental problems, and counsel was coping with two deaths in his family).

"Counsel's schedule and defendant's responsibilities," without more, is insufficient to support a finding of "excusable neglect." *United States v. Dumas*, 94 F.3d 286, 289 (7th Cir. 1996). "Excusable neglect" requires more than failure to meet the deadline because of a hectic schedule. *Id*. Mere inadvertence is also not an excuse. *United States v. Marbley*, 81 F.3d 51, 52 (7th Cir. 1996). When seeking an extension of time for a late filing of a notice of appeal, be as specific as possible. It is insufficient to recite that you have an excuse without detailing what that excuse is, as the district court cannot determine whether the late filing is "excusable" or not. *Id*.

If you cannot obtain an extension of time to file a late notice of appeal (most often because the notice was filed beyond the allowable time limits), you may assist your client with filing a 28 U.S.C. § 2255 motion for ineffective assistance of counsel. *See United States v. Dumas*, 94 F.3d 286, 289 (7th Cir. 1996) (recognizing that § 2255 motions are likely to follow unsuccessful Rule 4(b) motions for extensions of time). In this situation, to satisfy the prejudice prong of the ineffectiveness test, you are not required to show probability of success on appeal because "[a]bandonment is a *per se* violation of the sixth amendment." *Castellanos v. United States,* 26 F.3d 717, 718 (7th Cir. 1994) (citing *United States v. Cronic*, 466 U.S. 648, 658-59 (1984)). The appropriate relief for ineffective assistance of counsel in perfecting an appeal is "an appellate proceeding, as if on

direct appeal, with the assistance of counsel." *Castellanos,* 26 F.3d at 720. In sum, timely filing the notice of appeal is of paramount importance.

1.04.03: Contents of the Notice of Appeal

The notice of appeal must (1) identify each party appealing, (2) specify the judgment, order, or part thereof being appealed, and (3) name the court to which the appeal is taken. Fed. R. App. P. 3(c). You do not need to specify what issues you intend to appeal, and there is no set formula for the contents of the notice of appeal. However, Form 1 contained in the *Appendix of Forms to the Federal Rules of Appellate Procedure* contains a good example of what should be in the notice of appeal. *See* Sample 8.

1.05: The Docketing Statement

Seventh Circuit Rule 3(c)(1) requires the appellant to file a docketing statement either in the district court contemporaneously with the notice of appeal; or in the Seventh Circuit Court of Appeals within seven days of filing the notice of appeal. The docketing statement is essentially the same as the jurisdictional statement that must be filed in compliance with Federal Rule of Appellate Procedure 28(a)(4). The docketing or jurisdictional statement must identify the federal statute or part of the constitution that gave the district court jurisdiction, and the provision the party believes confers appellate jurisdiction on the Seventh Circuit Court of Appeals. Moreover, the docketing statement must contain the following particulars: (1) the date of the entry of the order or judgment being appealed[1]; (2) the filing date of any motion for new trial or other motion that may toll the time for filing the appeal; (3) the disposition and entry date of any said motion; (4) the filing date of the notice of appeal; and (5) if the case was an appeal from a magistrate's decision, the dates the parties consented. Fed. R. App. P. 28(a)(4). *See* Sample 9. Simply put, you must include everything in the jurisdictional statement that would enable the court to readily determine whether the notice of appeal was timely filed.

A Rule 3(c) docketing statement is not a substitute for the jurisdictional statement that must be included in the brief in accordance with Federal Rule of Appellate Procedure 28(a). You must still include a jurisdictional statement in your principal brief. *See* Sample 9.

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[1] Please note it is the date of entry of the Judgment in a Criminal Case, not the date of the sentencing hearing nor the date the district court judge signed the Judgment.

Upon being appointed by the Seventh Circuit to represent a defendant on appeal, it is common to discover that prior counsel neglected to file the docketing statement in the district court. Although the Court of Appeals will often order you to file the overdue docketing statement in the same order appointing you as counsel, you should always review the docket sheet for the case to ensure that the docketing statement was in fact filed. If you are filing the docketing statement *after* the notice of appeal has already been filed, then you should file it in the Seventh Circuit, rather than the district court.

1.06: The Disclosure Statement

In addition to the notice of appeal and docketing statement, a disclosure statement must be filed after the appeal is filed. Seventh Circuit Rule 26.1 requires that this statement be filed no later than 21 days after the appeal is docketed or with a party's first motion or response to an adversary's motion. If you are appointed pursuant to the court's order, then the statement should be filed within 21 days of the order appointing you. *See* Sample 10.

With the advent of e-filing in the Court of Appeals, it is essential to file the disclosure statement immediately after you are appointed by the Court. The disclosure statement functions as a notice of appearance. Until you have filed the disclosure statement in an appeal, CM/ECF will not allow you to file any other document in that appeal. Access for filing other documents is not triggered immediately, but must wait for the clerk's office to process the filing which may take up to a few hours when the Court is open for business.

The Court of Appeals has a disclosure statement form on its website (www.ca7.uscourts.gov/forms/discstat.pdf). If there is some reason you cannot use that form, you may instead file a disclosure statement in the older "motion" format. *See* Sample 10.

The Court of Appeals uses the disclosure statement to screen the case for conflicts. The rule therefore requires that the statement disclose the names of all law firms whose partners or associates have appeared for the party in the district court or are expected to appear in the Court of Appeals. Note that your disclosure statement must list *everyone* who appeared on behalf of the defendant in both the district and appellate court. To determine who these attorneys are, you should look at the district court and appellate court docket sheets. In the case heading, all attorneys, both past and present will be listed. You should include the name of each of these lawyers, along with their law firms, in your disclosure statement.

There is also a duty to update your disclosure statement within 14 days of any change in the relevant information. *See* Circuit Rule 26.1(d). Thus, if the case is transferred to another attorney in your office or you recruit another attorney to assist you with the appeal, you should file a supplemental disclosure statement which adds this lawyer to the disclosure. When you file your brief in the case, the most current version of the disclosure statement should be included in it, as discussed in Section 5.02.01 below.

Chapter 2:
Gathering and Reviewing Information

Once the necessary pleadings have been filed in the district and appellate courts to initiate the appeal, the next step is obtaining the documents necessary for you to review the case and litigate the appeal.

2.01: The Docket Sheets

The first documents you will need to obtain are the district and appellate court docket sheets. These documents provide you with the essential information related to the case, and it is from them that you will be able to determine what other documents you need to obtain.

2.01.01 The District Court Docket Sheet

The district court docket sheet is your roadmap to the proceedings below. It lists all of the essential information related to the case, including: the district court case number, the presiding judge, the name and address of prior counsel, the name and address of the prosecutor; and docket entries for all filings and hearings in the case.

The district court docket sheet is available through each district's PACER and Case Management/Electronic Case Filing ("CM/ECF") system. CM/ECF is a comprehensive case management system that allows courts to maintain electronic case files and offer electronic filing over the Internet.

To differentiate between them, think of PACER as a tool for searching and CM/ECF one for filing. PACER searches can find CM/ECF documents but you need a separate account to use CM/ECF to file documents.

A PACER user ID and password will give you access to the docket sheet and to the documents linked to it. If you do not have one, you can obtain one by registering online at the following Internet address:
http://www.pacer.gov/register.html

Of course, to practice in any court in the Seventh Circuit, including the Seventh Circuit, the lawyer will also need a separate CM/ECF number for each court. To obtain a CM/ECF number and password, you will need to register with each court.

Seventh Circuit: http://www.pacer.gov/cmecf/ap.html
Northern District of Illinois: http://www.ilnd.uscourts.gov/home/CMECF.aspx
Central District of Illinois: http://www.ilcd.uscourts.gov/court-info/faq-ecf
Southern District of Illinois: http://www.ilsd.uscourts.gov/ecf/ecfAttyRegistration.aspx
Northern District of Indiana: http://www.innd.uscourts.gov/ecf.shtml
Southern District of Indiana: http://www.insd.uscourts.gov/Attorney/default.htm
Eastern District of Wisconsin: http://www.wied.uscourts.gov/index.
Western District of Wisconsin: https://ecf.wiwd.uscourts.gov/AttorneyReg/

Once you are signed up, the CM/ECF access pages for the districts in the Seventh Circuit, are:

Seventh Circuit: https://ecf.ca7.uscourts.gov
Northern District of Illinois: https://ecf.wiwd.uscourts.gov/cgi-bin/login.pl
Central District of Illinois: https://ecf.ilcd.uscourts.gov/cgi-bin/login.pl
Southern District of Illinois: https://ecf.ilcd.uscourts.gov/cgi-bin/login.pl
Northern District of Indiana: http://ecf.innd.uscourts.gov/cgi-bin/login.pl
Southern District of Indiana: http://ecf.insd.uscourts.gov/cgi-bin/login.pl
Eastern District of Wisconsin: http://ecf.ilsd.uscourts.gov/cgi-bin/login.pl
Western District of Wisconsin: https://ecf.wiwd.uscourts.gov/cgi-bin/login.pl

Once you access the docket sheet in your case, it is a good idea to print out a copy of it for your file, as you will refer to it many times throughout the course of the appeal. From the docket sheet online, you will therefore have easy access to an electronic copy of almost every filing made in the district court, unless the document is under seal. Without permission from the court, you still will not be able to access documents under seal, although they should appear on the docket entries.

Reviewing the district court's docket sheet at the initial stage of the appeal is extremely important. The docket sheet will give you a general idea of the offenses, sentences, motions, and other proceedings. It may also give you a general idea of how much time your case will take to prepare for appeal. As a general rule, guilty pleas are less time consuming than jury trials, cases with no pretrial motions take less time than cases with multiple pretrial motions, etc. Of course, there is always going to be that case that looks deceptively simple from the docket sheet but takes on a life of its own on appeal. The docket sheet also allows you to determine which transcripts to order. If the transcripts have already been transcribed, that should be reflected in the docket entries. In some cases, you may already be able to obtain the transcripts online. However, just because they appear on the docket entries does not mean that you can

automatically download them. Some may have a waiting period that has not ended and others may be under seal. If you cannot access them, you should order them by filling out a CJA-24 form (Sample 14) and a Seventh Circuit transcript information sheet (Sample 13). You cannot rely on the fact that prior counsel ordered the transcripts. In addition, many court reporters (and judges) will not honor those earlier requests for transcripts because the attorney who ordered them is no longer the attorney of record.

2.01.02: The Appellate Court Docket Sheet

The docket sheet in the Seventh Circuit is similar to the district court docket sheet, as it lists all of the filings and events which have occurred in the case. It is available online via the Seventh Circuit's website. You will need a PACER account to login. You will be able to view the actual documents filed in the case.

Reviewing the Court of Appeals' docket sheets will tell you several important things. Most importantly, it will inform you how long the case has been pending, including how many motions for extension of time have been filed. The length of time an appeal has been pending may impact how many extensions of time you will be able to request. If the previous attorney has already had three or four extensions of time, it is unlikely you will be able to request more than one extension. The docket sheet will also indicate the current Assistant United States Attorney ("AUSA") handling the case for the government, which may be different from the AUSA who handled the case in the district court.

The appellate docket sheet will also inform you whether the case has been consolidated with other pending appellate cases. It is important to note these case numbers in order to contact the attorneys and possibly prepare joint motions and briefs. Finally, you should check whether a docketing statement has been filed, whether any jurisdictional questions are pending, whether previous briefs have been filed, and whether the case has been previously appealed.

2.02: The Record

The record in a case consists of the pleadings that were filed in the district court, transcripts of hearings, exhibits used at any hearing, and the presentence report ("PSR"), including the parties' filings with the probation office in response to the PSR and the district court's statement of reasons. The rules governing the record on appeal are Federal Rule of Appellate Procedure 10 and Seventh Circuit

Rule 10. The record and the record on appeal are usually different, with the record being more complete. Counsel for the appellant is responsible for ensuring that the record on appeal includes everything necessary to pursue the appeal.

2.02.01: Obtaining the Record

For the most part, you will be able to obtain the record from the online docket sheets. If you were not the attorney in the district court, but are the attorney on appeal, you should be able to obtain the presentence report from the probation office. The probation office may require a judge's permission, but that should not be hard to obtain. Also, many district's sentencing practices include counsel sending letters to the probation office with the initial objections to the presentence report. The probation office should also provide these to you, as well as any other pleading or document the parties send to the probation office in response to the presentence report, including the government's version of the offense. Finally, the probation office is the best source for the judge's statement of reasons that includes the final guideline calculations and, sometimes, an additional explanation of the reasons for the sentence. The judge's statement of reasons is not to be confused with the probation officer's recommendation to the judge for a particular sentence. The probation office will not disclose the officer's recommendation to you and, for some reason that has never been clear, no judge will allow you to see it.[2]

2.02.02: Contents of the Record

The record consists of all papers, documents, and exhibits filed with the district court, relevant transcripts of the proceedings, and a certified copy of the docket entries. Fed. R. App. P. 10(a). The PSR is automatically part of the record in every criminal appeal; however it is not bound with the record compiled by the district court's clerk's office. Cir. R. 10(f). The Court of Appeals will not accept certain items that would ordinarily be a part of the record, such as contraband, drugs, liquids, currency, weapons, securities, or similar items. Cir. R. 11(a).

Appellate counsel should be aware that Circuit Rule 10(a) specifically says

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[2] At this time, there is no district court judge in the Seventh Circuit that discloses the probation officer's recommendations to counsel. However, there are a few judges in other districts that allow disclosure.

that, unless ordered by the Court of Appeals, the record on appeal will not include many items that may be necessary for the appeal, including briefs and memoranda, subpoenas, summonses, and motions to extend time. If you have any question about whether an item will be part of the record on appeal, you should ask the clerk of the court. If the clerk was not intending to make something that you need in the record part of it, the clerk may require a letter specifically requesting designation of the particular documents for inclusion in the Record. *See* Sample Letter 2.

Although included in the record by Federal Rule of Appellate Procedure 10(a)(1), exhibits introduced in the district court typically do not make it into the physical or electronic record. If you determine that an exhibit should be included in the record, there are a number of ways to attempt to get the exhibits into the record.

First, the Clerk's office may have the exhibits but did not include them in the record or place them on PACER. In such a case, you simply need to send a letter to the Clerk designating these items for inclusion in the record. *See* Sample Letter 2.

The more difficult situation is when the Clerk's office no longer has the exhibits, as they are often returned to the parties after trial or hearing. In such a case, trial counsel may have copies of the exhibits and will likely send them to you upon request. If trial counsel does not have them, then the government ordinarily has copies of its own exhibits and sometimes of defense exhibits. In that case, you may be able to obtain copies of: documents, pictures, tapes, and other electronic media that are not contraband from the government. As a last resort, for the exhibits that are written and not voluminous, there may be copies in the district judge's file in chambers and, upon request, the judge's clerk may be able to send copies to you.

2.02.03: Supplementing the Record

If items are missing from the record, or the items in the record are incorrect or incomplete, the parties must file a Motion to Correct or Motion to Modify the record with the district court. Fed. R. App. P. 10(e)(1); Cir. R. 10(b); *see* Sample 11. If the district court denies the motion, the matter may be taken to the Court of Appeals by motion. Fed. R. App. P. 10(e)(3). It is a good idea to talk to the AUSA prior to asking to supplement or modify the record. In most cases, the AUSA will agree to the modification.

There are two situations where supplementing or modifying the record is common. First, trial exhibits are often left out of the record, as noted above in Section 2.02.02. Exhibits can be easily added to the record as long as the exhibit was introduced at trial and actually accepted into evidence. Second, documents and exhibits used at sentencing often do not make it into the record. It is appropriate to supplement the record with these items if they were referred to by any party or relied on by the district court.

Note that a motion to supplement the record can only be used to include an item that was actually before the district court. For example, if a police report was introduced into evidence at trial, but did not make it into the record, a motion to supplement the record would be proper. However, if you obtain a copy of a police report referred to in the Presentence Investigation Report, *but never introduced below*, you may not supplement the record with it. *See United States v. Banks*, 405 F.3d 559, 567 (7th Cir. 2005).

2.02.04: Items under Seal

Upon receiving the record on appeal, you may find that certain items were placed under seal in the district court (the PSR is always under seal, and is discussed separately below in Section 2.04).

Due to the differences in practice among the various clerk's offices, the first place you should go to obtain a copy of an item under seal is prior counsel and, if this is unsuccessful, to the AUSA in the case. If both of these attempts fail, you may ask the district clerk's office for a copy, but they will almost always deny this request. At most, the clerk's office will allow you to only view the document at the courthouse, which can be problematic if you do not practice in that particular district. Thus, you may have to file a motion in the district court to obtain copies of the sealed documents, which the district courts almost always grant. *See* Sample 12.

Once the record is transmitted to the Seventh Circuit Court of Appeals, Seventh Circuit Operating Procedure Rule 10(a) requires that every document filed in or by the Court of Appeals (whether or not the document was sealed in the district court) is in the public record unless a judge of the Seventh Circuit orders it to be sealed. The only exception applies to portions of the record that are required to be sealed by statute, such as the PSR.

Typically, upon receiving the record on appeal, the Seventh Circuit will enter an order with language similar to the following:

> This Court has received 1 envelope, document no. 27, under seal from the district court. All documents filed in this Court, except those required to be sealed by statute or rule are considered public. Pursuant to 7th Circuit Operating Procedure 10(b), documents sealed in the district court will be maintained under seal in the Court for 14 days, to afford time to request the approval required by section (a) of this operating procedure. Absent a motion from a party these sealed documents will be placed in the public record on [DATE].

After such an order has been entered, the document will be unsealed if you do nothing. Thus, if you believe the document should remain under seal, you should file a Motion to Keep Document Under Seal. *United States v. Foster*, 564 F.3d 852, 854 (7th Cir. 2009) (listing the appropriate reasons for documents to remain under seal and reminding counsel that it is usually better to prevent the documents from becoming part of the record on appeal than to argue that they should remain under seal once in the Court of Appeals).

2.02.05: Reviewing the Record

The first step to reviewing the record on appeal is to review the docket sheet. You should read everything filed with the district court. Almost any document has the potential to provide (1) an issue for appeal; (2) an answer to the question "is this issue frivolous," or (3) an answer to the question "why did this happen?"

There are parts of the record, however, that are always going to be essential to review for appellate purposes, as set forth below.

The Information or Indictment

In every criminal case, there is either an information or an indictment and there is often a complaint. If a complaint has been filed, it usually has an affidavit of the investigating officer attached. These affidavits typically provide more factual information about the offense than a general indictment does and are a good way of getting the big picture of the offense. If no indictment was filed, check to make sure your client waived his right to indictment. This is usually done in writing immediately before or at the change of plea hearing.

Most cases in federal court are brought by indictment. When reviewing the indictment, it is important to note the date of filing and compare it to the date

of the alleged conduct. This will determine if there are any statute of limitations arguments. Also, note the number of charges, the factual allegations for each charge, the statutes cited, and the elements of the offense. Compare each count in the indictment to the elements of the offense to make sure the government has alleged all elements correctly. Make sure to note the period of time the offense covers, the amount and type of drugs, the amount of money, the number of fraudulent acts, etc. Make a side note of all of the co-defendants and other participants listed in the indictment. Watch for forfeiture allegations as well.

Pretrial Motions

There are multiple types of pretrial motions to be filed in any given case. The following motions are examples of motions that may support possible issues that could be raised on appeal: motions to dismiss; motions to suppress evidence and statements; motions based on the statute of limitations, multiplicity, and duplicity; and any motions relating the evidence presented at trial. It is important to read any motion filed by defense counsel, the response filed by the government, and the judge's ruling on the motion to determine whether it might provide a basis for appeal.

Keep in mind when reviewing pretrial motions that, in most cases, if a client pleads guilty, he or she waives the ability to raise any issue on appeal related to his pretrial motions. *See United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011). This rule includes motions to suppress unless he or she has specifically reserved in writing the right to raise the suppression on appeal, with the consent of the government. Fed. R. Crim. P. 11(a)(2). Although the rule requires reservation to be in writing, the Seventh Circuit has accepted it where the parties clearly agreed to reserve the issue during the change of plea hearing. *United States v. Yasak,* 884 F.2d 996, 1000 (7th Cir. 1989).

The Plea Agreement

The vast majority of federal criminal cases result in guilty pleas pursuant to written plea agreements with the government. The language in many of these agreements is boilerplate, but it is important to review every provision in the plea agreement.

First, review the initial parts of a plea agreement to determine whether it has been made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). This provision allows the government and the defendant to agree on a specific sentence which binds the district court. If the agreement is an 11(c)(1)(C)

agreement, the district court must either accept the agreed sentence or allow the defendant to withdraw the plea agreement and proceed to trial.

Second, note which charges your client pled guilty to and which charges the government has agreed to move to dismiss.

Third, review the factual basis for the offenses, specifically comparing the facts to the elements of the offense. It is important to note which admitted facts may provide the basis for statutory or sentencing enhancements, such as "the defendant agrees the substance involved was the crack form of cocaine base," or "the defendant agrees the amount of loss was more than $400,000," or "the defendant acknowledges his prior conviction for burglary constitutes a crime of violence."

Fourth, note any agreements regarding the sentencing guidelines calculations. It is important to determine whether the defendant has agreed to the calculation, has agreed not to contest something, or understands the government will argue for a certain calculation but does not agree to it.

Fifth, determine whether your client has agreed to pay a specific amount of restitution. An agreement to pay restitution in the plea agreement is binding even in cases where restitution is not mandatory under the Mandatory Victims Restitution Act ("MVRA.") *United States v. Randle,* 324 F.3d 550, 556 (7th Cir. 2003).

Sixth, determine whether your client has preserved any specific issues for appeal, most often motions to suppress.

Seventh, note whether the plea agreement contains an appeal waiver and determine the scope of that waiver. In other words, does it waive the right to appeal the conviction, sentence, restitution order, and forfeiture order?

Eighth, compare the requirements of Rule 11 with the admonishments given by the district court at the change of plea hearing. *See* Sample 39. However, even if the district court forgets one (or many) of the Rule 11 admonishments, this most often will not provide a basis for an appeal. Many times the record will establish that the defendant already knew what the district court forgot to review. It could be covered in the plea agreement or, like the right to counsel, otherwise obvious. *United States v. Driver*, 242 F.3d 767, 769 (7th Cir. 2001).

The Change of Plea Hearing.

See Section 2.03 below, under "Transcripts."

The Trial Documents

If your client's case went to trial, the pleadings filed before and during the trial will be great sources of potential issues. Review these in the same manner you review any other motions, particularly writing down case law or rules relied on by the parties or the district court. If you were not trial counsel, it is important to review all parts of jury selection for potential issues. Finally, carefully review the jury instructions and compare them with the Seventh Circuit Pattern Instructions, noting any discrepancies and possible reasons. Also review the verdict, particularly if there is a special verdict filed.

It is important to obtain all exhibits entered during trial. As already noted elsewhere, exhibits are not routinely included with the record by the clerks offices. To ensure you have the exhibits when you review the record, check each volume of the trial transcripts for the list of admitted exhibits. Court reporters usually will make a thorough list of all of the exhibits at the beginning of each volume of the transcripts. Use this list to note which exhibits you need and which exhibits you will be able to get (recognizing, of course, you will not be able to receive firearms, contraband, drugs, ammunition, etc. for obvious reasons).

The PSR

See Section 2.04 below, under "The PSR."

Objections to the PSR, Sentencing Memoranda, and other Sentencing Motions

Review these documents in the same manner as other motions in the record. In guilty plea cases, most of your issues will be contained in a pre-sentencing objections or memoranda. Therefore, it is very important to note exactly which arguments are presented to the district court and the court's ruling on each issue. Some objections are only sent to the probation officer and not filed with the court. When you ask for the PSR, also ask for the parties' objections and the judge's statement of reasons.

The Sentencing Hearing Transcript

See Section 2.03 below, under "Transcripts."

The Judgment in a Criminal Case

Always review the judgment very carefully. Note the length of the sentence, including whether counts run concurrent or consecutively; the length of the term of supervised release; any recommendations to the Bureau of Prisons ("BOP") such as designation, treatment, medical issues, etc.; any special terms of supervised release; the amount of the special assessment; the amount of the fine; the amount of restitution; the payment schedules for any financial obligations; and the statement of reasons. Compare each of these provisions with the court's oral pronouncements at the sentencing hearing and what the parties discussed at the change of plea hearing. It should be noted that when there is a discrepancy between the oral and written judgments, the oral judgment controls unless it is ambiguous. *United States v. Becker,* 36 F.3d 708, 711 (7th Cir. 1994).

2.03: The Transcripts

Once you have reviewed the district court's docket sheet, it is necessary to determine if any transcripts need to be ordered.

2.03.01: When to Order

Federal Rule of Appellate Procedure 10(b)(1) requires trial counsel order the transcripts within 14 days after filing the notice of appeal. Because trial counsel will naturally be familiar with what transpired in the district court, he should be able to order these transcripts without a need to review the record. Even if you intend to withdraw as counsel on appeal, it is essential that you order the transcripts within this 14 day time period for two reasons. First, when you file your motion to withdraw, the Court of Appeals will require you to file a Rule 10(b) Transcript Information Sheet demonstrating that you have in fact ordered the transcripts. *See* Sample 13. Although the Court in the past did not enforce this rule consistently, it now requires strict compliance. Thus, if you fail to file the Transcript Information Sheet, the Court will issue a Rule to Show Cause for failing to file it. The second reason for ordering the transcripts promptly is that a motion to withdraw can remain pending for several months. If the transcripts are not ordered and prepared during this period, additional delay will be created once new counsel is appointed. New counsel will have to order the transcripts and wait for their preparation which can sometimes take months. By failing to order the transcripts promptly, several months can be added to the length of time it takes to litigate an appeal.

In cases where the conviction was obtained through a guilty plea, it is common for trial counsel to only order the sentencing hearing transcript prior to moving to withdraw on appeal. However, the change of plea transcript is extremely important to any evaluation of a case for appeal. Therefore, if you are trial counsel ordering transcripts for an appeal, always order *at a minimum* both the change of plea hearing transcript and the sentencing hearing transcript. If you do not order the change of plea hearing transcript, the Court of Appeals will ask you to show cause for your failure to do so.

If you are appointed as counsel on appeal, trial counsel will hopefully have already ordered the transcripts in the case while his motion to withdraw was pending. Unfortunately, despite the provisions of Rule 10(b), this will often not be the case. In addition, trial counsel may not have ordered all of the relevant transcripts you need to evaluate the case for potential appellate issues. And, even if prior counsel has ordered the transcripts, it is a good idea to order them yourself if they have not been completed yet. Also, many court reporters will not work on an attorney's order for transcripts when that attorney no longer represents the appellant. In such a case, you will need to promptly obtain the record, review it, and order the necessary transcripts as soon as possible. It will usually take at least a month, and sometimes many more, the receive the transcripts. Waiting for transcripts is the leading cause for delay in litigating an appeal.

2.03.02: How to Order

You must order the transcripts from the court reporter who recorded the hearings in question. In addition to the order, you must complete a Seventh Circuit Transcript Information Sheet (*see* Sample 13) for the court reporter to complete. This will inform the Court which transcripts you ordered, and, more importantly, the court reporter's estimate of how long it will take for the transcripts to be completed. Often the court reporter for the hearing will be listed in the docket entries. Although this is not always true, many of the district court judges have a particular court reporter assigned to the judge. The assigned court reporter will be able to tell you from whom to order the hearings for a case under that judge. If more than one court reporter worked on the hearings in a case, you will usually have to fill out a separate CJA 24 form (*see* Sample 14) and a separate Seventh Circuit Transcript Information Sheet for each court reporter. You can also contact the judge's chambers to find the name and address of the court reporter.

Sometimes a contract court reporter will be used for hearings, instead of

the judge's regularly assigned court reporter. If this is the case, the judge's regular court reporter will be able to tell you who recorded the hearing and how to contact the reporter.

The problem of multiple court reporters arises most frequently in the Northern District of Illinois. If after contacting the judge's assigned court reporter you find that multiple reporters were used throughout the case, you should contact the Northern District of Illinois's Court Reporter Supervisor at (312) 435-5885. She will be able to tell you which court reporters were assigned to which hearings.

Once you have determined from whom you need to order the transcripts, you can order the transcripts by sending a letter to the court reporter. In the letter, you should request the transcripts by listing the date the hearing was held and the name of the hearing. You should also note in the letter the due date for your brief and, if the court has entered an order setting a briefing schedule, a copy of that order as well. *See* Sample Letter 3.

2.03.03: What to Order

To determine which transcripts to order, you will need to carefully review the docket sheet and the record. When doing so, check to see if any transcripts have already been prepared and filed with the district court. You may be able to download the transcripts when you are appointed. However, just because you see the transcripts on the docket does not mean that you can always download them. Many will still be in a 90 day waiting period, during which time you will not be able to download them. Others may be under seal.

In most cases where the defendant pled guilty, you will just need transcripts of the change of plea hearing and the sentencing hearing. Although there are often a large number of status hearings indicated in the docket sheet, these hearings rarely need to be transcribed. If the docket entry contains some additional information, such as an indication that an attorney's motion to withdraw was considered, a transcript of these hearings might be necessary. Additionally, if there was a hearing on a motion to withdraw a guilty plea or motion to suppress, these should always be ordered.

For cases that went to trial, you will need to order transcripts from several different hearings. You will need a transcript of all trial testimony, any hearings on evidentiary issues or hearings on motions that could have affected the trial, and the sentencing hearing. If you were not trial counsel, you should also obtain

the transcript of: the jury instruction conference, voir dire, closing arguments, any discussion of notes from the jury, and supplemental instructions. Those sections of a trial are sources of issues for appeal often enough that they should always be reviewed, particularly if counsel was not present for them. It is sometimes useful to have the judge's reading of the jury instructions to the jury as well. Although most court reporters will transcribe all of the hearings noted above upon request, some judges require counsel to file a motion to obtain anything other than the evidentiary portions of a trial. *See* Sample 15.

In most cases, it is not important to get the transcript of *voir dire* or opening statements. The exceptions, with respect to *voir dire*, are when the minutes show that a *Batson* motion was made or the court denied a defense challenge for cause and the defendant used up all of his peremptory challenges. Otherwise, it is very unlikely that there will be an appellate issue with respect to *voir dire*. In most circumstances, it is a good idea to speak with trial counsel and ask whether there were any objections during *voir dire* that would form the basis for an appellate issue. You may then need to review the *voir dire* transcript.

Opening statements are almost never a source of prejudicial error by themselves. However, there may be circumstances when you would still want to order them. For example: (1) if the minutes show an objection; (2) trial counsel says that there was prosecutorial misconduct at that stage; or (3) the defendant says that trial counsel conceded his guilt, then you will need to review a transcript of the opening statements for possible issues.

Finally, order transcripts of: competency hearings; motions for new counsel that were not granted or withdrawn; *Faretta* hearings, and anything that seems to go further than a mere status hearing from the description in the minutes. All of those are sources of possible issues for appeal. In addition, make sure to obtain and review any transcripts that have already been prepared, but which you probably would not have ordered yourself. If it has been prepared and is part of the record, you need to know what is in it.

2.03.04: Delayed Transcripts

Federal Rule of Appellate Procedure 11 requires that court reporters complete transcripts within 30 days of receipt of an order for them. If the court reporter cannot complete the transcript within the 30 day period, Circuit Rule 11(c) requires the court reporter to file a request for an extension of time to prepare the transcripts with the Seventh Circuit. There are two very important things you should know about these rules. First, court reporters rarely file

requests with the court for an extension of time, no matter how much past the 30 day limit the transcripts are completed. Second, in the unlikely event that the court reporter does file an extension, *this request will not extend the due date of your brief*. Rather, you must file your own motion for extension of time, giving as a reason the delay in the preparation of the transcripts.

In most cases, however, you should expect to receive the transcripts within 30 days of your request unless you are seeking transcripts of a lengthy trial. If you have not received the transcripts after 30 days, it is necessary to contact the court reporter to determine when he or she anticipates finishing the transcripts.

If you need to file a motion for extension of time because of delayed transcripts, it is important to note in the motion that you have contacted the court reporter and indicate the reporter's anticipated date of completion. Some court reporters require regular reminders about the transcript and the Court of Appeals needs to know the efforts you have made to receive transcripts.

2.04: The Presentence Investigation Report

The Presentence Investigation Report ("PSR") is automatically part of the record on appeal, but it is required by statute to be placed under seal. Therefore, you will almost never receive a copy of the Presentence Report as part of the record.

To obtain the PSR, a letter to the probation officer will usually suffice. You can determine from whom to request the PSR by calling the probation office in the district where the case originated. Once you give them the name of your client, the probation office will give you the name of the probation officer who prepared the PSR. You should then direct your letter to this probation officer and include a copy of the order appointing you to represent the defendant. *See* Sample Letter 4. Be sure to request not only the PSR, but also any objections or letters sent to the probation officer which relate to the PSR, and the judge's statement of reasons. You will usually receive the PSR and other relevant documents from probation within 30 days of your request. Most probation officers will email the documents to you.

Once you receive the PSR, you should review it very carefully. The PSR is the best single document for giving you a broad overview of the case. The first few pages of the PSR give you basic information about your client's case including: the charged offenses, the statutory minimum and maximum terms of imprisonment; the defendant's release status; the names of any co-defendants;

and any related cases.

The next section contains identifying information of the defendant, including his: name, date of birth, age, race, sex, social security number, FBI number, U.S. Marshall's number, education, marital status, dependents, citizenship, legal address, and aliases.

Part A of the PSR contains all of the information related to the offense. This section will ordinarily first set forth the charges filed against the defendant, whether he plead guilty to the charges or went to trial, the significant provisions of any plea agreement (including whether the defendant waived his right to appeal), and other pertinent procedural information. Although this portion of the PSR is rarely a source of appellate error, it is important to cross check the indictment and the judgment and conviction to ensure that the defendant was in fact charged with and convicted of the offenses listed by probation.

The next section of Part A is a narrative description of the offense conduct. For this section, the probation officer draws upon many sources for the narrative, including the government's version of the offense, the plea agreement, the factual basis for the plea, trial testimony, police reports, and other sources of information which may or may not be in the actual record in the case. Oftentimes, the basis for relevant conduct enhancements (such as additional drug quantities) are set forth in this section, so it is important to read this section carefully to determine what sources the probation officer is relying upon for any guideline enhancements.

The most important section of Part A is the "Offense Level Computations" section. Here, the probation officer sets forth what he believes to be the actual guideline calculations for the defendant's conduct. All guideline calculations start with a base offense level derived by cross-referencing the offense of conviction with the corresponding guideline section which covers the offense. You should review the Guideline Manual to ensure that the probation officer in fact used the correct guideline section.

Based upon the appropriate guideline section, the PSR then recommends any "Specific Offense Characteristics," "Victim-Related Adjustments," "Adjustments for Role in the Offense," "Adjustment for Obstruction of Justice," "Adjustment for Acceptance of Responsibility," "Chapter Four Enhancements," and a "Total Offense Level." These calculations, along with the Criminal History computation, are the most frequent source of appellate issues related to the sentence.

In reviewing these sections, you should first perform all of the guideline calculations yourself, checking to see if your calculations are different from the probation officer's. Likewise, you should review any objections filed by trial counsel which relate to these calculations, read probation's and the government's responses to the objections, and review how the district court ultimately resolved the objection.

The next section of the PSR, Part B, covers the defendant's criminal history. In this section, the probation officer will set forth the entirety of the defendant's known criminal history, assess points for the convictions based upon the various guideline provisions, and calculate the defendant's Criminal History Category. Again, you should preform these calculations yourself and review any objections made to them.

Part C, entitled "Offender Characteristics" is important to review in conjunction with any argument in mitigation made on the defendant's behalf. This section also contains useful background information regarding your client. It will provide you with a wealth of information about your client's personal background, employment history, educational level, etc. This information is often a source for trial counsel's argument that § 3553(a) factors warrant a non-Guideline sentence.

Finally, Part D entitled "Sentencing Options" sets forth the guideline and statutory provisions governing the defendant's custody, supervised release term, fines, and restitution. You should double-check all of these conclusions, ensuring that the guideline and statutory ranges have been correctly calculated.

Chapter 3:
Motions and Miscellaneous Pleadings

3.01: General Rules Governing Motions

3.01.01: Federal Rule of Appellate Procedure 27

Motions practice is more often associated with the district court, however, an appellate practitioner will file motions in the Court of Appeals more often than one would expect. The rules governing such motions are different than those governing motions in the district court and briefs in the Court of Appeals. Thus, prior to filing any motion in the Seventh Circuit, you should familiarize yourself with the rules particular to these motions.

Federal Rule of Appellate Procedure 27 governs the general provisions regarding motions practice. Under that rule, a motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it. Fed. R. App. P. 27(a)(2)(A). Any affidavit or other paper necessary to support the motion must accompany the motion. Your legal argument should be contained in the motion itself and may not be put in a separate brief. Fed. R. App. P. 27(a)(2)(B)-(C).

A response to any motion may be filed within 10 days of service of the motion, and a reply to the response may be filed within seven days after service of the response. Fed. R. App. P. 27(a)(3)-(4).

A motion or a response may not exceed 20 pages, and a reply may not exceed 10. However, the page limit does not include any disclosure statement or other accompanying documents required by the rules. The typeface and typestyles are the same as those required for briefs (discussed in Section 5.01), and the document should be double spaced with one-inch margins on all sides. Fed. R. App. P. 27(d).

3.01.02: Federal Rule of Appellate Procedure 25 and Circuit Rule 25

Filing by attorneys must be electronic, through the Seventh Circuit's CM/ECF. Any exemption must be sought by motion, providing "a good reason" and filed seven days in advance of the due date for the document you want to file on paper. Also, for every document filed you must serve paper copies on all parties that do not participate in CM/ECF, most often your clients.

Service should be evidenced by a proof of service consisting of a statement certifying: the date and manner of service; the names of the persons served; and the address (either mail, fax, or electronic) to which service was made. This "Proof of Service" may appear on or be affixed to the papers filed. The Court of Appeals has a sample certification of service which we have adapted for our office's use as follows:

> I hereby certify that on _____, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier within 3 calendar days, to the non-CM/ECF participants.

3.02: Motions for Extension of Time

The motion most often filed during an appeal is a Motion for Extension of Time. Even the most diligent attorney may need an extension of time to receive the record on appeal, allow for the preparation of transcripts, research potential issues, or communicate with an incarcerated client.

Although the general rules for motions apply to Motions of Extension of Time, Circuit Rule 26 (Extensions of Time to File Briefs) contains provisions unique to these motions. First and foremost, the rule states that "[e]xtensions of time to file briefs are not favored." Cir. R. 26. Accordingly, unless you are confronted with one of the situations noted in the preceding paragraph, you should do everything you can to file your brief within the time set by the Court.

If you must file a motion for extension of time, the motion should state: the date the brief is due; the number of days by which you seek to extend the due date; whether any previous motions for extension of time have been filed; and the Court's ruling thereon. *See* Sample 16. Typically, you should not ask for an extension of more than 30 days. Unless a court reporter has indicated that transcripts will not be prepared within 30 days, the Court of Appeals will only grant a 30 day extension, even if you ask for more in your motion.

You must accompany the motion with a supporting affidavit setting forth with specificity the reasons demonstrating that "with due diligence, and giving

priority to the preparation of the brief, it will not be possible to file the brief on time." Cir. R. 26. Additionally, the specific facts giving rise to this circumstance must be set forth in the affidavit. "[G]eneralities . . . will not be sufficient." Cir. R. 26. Finally, the affidavit should give the appellant's custodial status.

Among the grounds that may merit consideration for an extension of time are:

> (1) Engagement in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth (a) a description of action taken on a request for continuance or deferment of other litigation; (b) an explanation of the reasons why other litigation should receive priority over the case in which the petition is filed; and (c) other relevant circumstances including why other associated counsel cannot either prepare the brief for filing or, in the alternative, relieve the movant's counsel of the other litigation claimed as a ground for extension.
>
> (2) The matter under appeal is so complex that an adequate brief cannot reasonably be prepared by the date the brief is due, provided that the complexity is factually demonstrated in the affidavit.
>
> (3) Extreme hardship to counsel will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

Cir. R. 26.

If the ground for your motion is that you have not yet received documents necessary to litigate the appeal such as transcripts, the record, or the PSR, you need only state this ground in your affidavit. The Court of Appeals will know that you cannot litigate the appeal until you receive these documents, so there is no need to provide further elaboration. However, you should demonstrate in your affidavit that you have been diligent in your attempts to obtain the documents. *See* Sample 17.

When you are seeking an extension of time because deadlines in other cases have prevented you from completing the brief, you should list those other cases with particularity. List only those cases that *actually* consumed your time during the relevant time period. You should not simply provide a list of your pending cases in the Court of Appeals. Rather, provide the Court with the name,

number, deadlines, and work completed on the cases. *See* Sample 18. Be aware of the fact that the Court of Appeals may not grant more than one extension of time due to counsel's other obligations.

Typically, the Court of Appeals will not deny a motion for extension of time without having previously warned you that further extensions of time will not be granted. Specifically, the Court will put you on notice that you have received your last extension of time by including the following language in its order granting your motion: "Further extensions of time will not be allowed, except in extraordinary circumstances." Obviously, if you need another extension of time, your grounds would need to be exceptionally strong. If the Court instead states in its order, "No further extensions of time will be granted," then the Court means what it says and it will likely deny any additional motion for extension of time, regardless of your grounds.

Finally, Circuit Rule 26(3) requires that "notice of the fact that an extension will be sought must be given to opposing counsel with a copy of the motion prior to the filing thereof." Although the government very occasionally complies with this rule, the rule is for the most part ignored by all parties. However, because this requirement is in the rule, you should comply with it.

Remember also that the motion must be received by the Court at least five days before the brief is due, pursuant to Circuit Rule 26.

3.03: Motion to Voluntarily Dismiss the Appeal

In some circumstances, you will conclude that there are no issues to raise on appeal after reviewing your client's case. After consulting with your client, he may agree to voluntarily dismiss his appeal, rather than have you file an *Anders* brief. Likewise, you may conclude that your client's only argument is that his trial counsel provided ineffective assistance of counsel or another issue that will require the introduction of new evidence. Because ineffective assistance of counsel arguments should almost never be raised on direct appeal and new evidence cannot be introduced on direct appeal, your client may elect to dismiss his direct appeal and pursue a collateral attack in the district court. Whatever the reason for voluntarily dismissing an appeal, Federal Rule of Appellate Procedure 42(b) and Circuit Rule 51(f) provide procedures which govern such a motion.

To voluntarily dismiss an appeal, you must first obtain your client's signature on an "Acknowledgment and Consent" form, indicating that he agrees with your decision to file a motion to voluntarily dismiss his appeal. The form

must substantially comply with the format set out in Appendix III to the Circuit Rules. *See* Sample 19. Send this form, along with a self-addressed stamped envelope[3] to your client, requesting that he sign and return it to you. Once you receive the form from your client, you can then file it with along with a Motion to Voluntarily Dismiss the Appeal. *See* Sample 20.

Note that it can sometimes take a few weeks to receive the signed acknowledgment form back from your client. Thus, you may need to file a Motion for Extension of Time to file the brief while you are waiting to receive the form. In your affidavit supporting your motion, you should state as a ground that you are waiting to receive the signed acknowledgment form back from your client. But if you receive an extension of time on this basis and you still have not received the signed form from your client within a week or two of the new due date for the brief, you should be prepared to draft and file an *Anders* brief. It is not uncommon for clients to agree to voluntarily dismiss their appeal but then have a change of heart. If you go ahead and file an *Anders* brief, but then receive the acknowledgment form, you can always file the motion to voluntarily dismiss the appeal, even if you have already filed the *Anders* brief.

3.04: Motion to Waive Oral Argument

As discussed in more detail in Chapter 6, the Seventh Circuit grants oral argument in most cases. If your case has been set for oral argument and you wish to waive it, you must file a motion with the Court of Appeals. Cir. R. 34(e). One typical instance where you may wish to waive oral argument is where you raise an issue solely for the purpose of preserving it for Supreme Court review because the Seventh Circuit has repeatedly rejected the issue in previous cases. *See* Sample 21.

Although not required, you should first contact the Assistant United States Attorney to determine if he or she has an objection to such a waiver. If he has no objection, you should caption your motion as "unopposed," and reference in the body of your motion your discussion of the waiver with the prosecutor. *See* Sample 21. Obviously, if your motion is unopposed, the Court is much more likely to grant it.

Although not specifically mentioned in the rules, the Court of Appeals

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[3] Please note that some federal prisons do not allow defendants to receive self-addressed stamped envelopes. You should discuss this with your client prior to sending one.

requires that you file a signed acknowledgment from your client consenting to the waiver of oral argument. Because no rule requires such consent, there is no prescribed format for the acknowledgment. A form consistent with that for voluntarily dismissing an appeal will be accepted by the Court. *See* Sample 22. Keep in mind that getting the signed consent form back from your client can take a few weeks (sometimes more). Thus, you may not have time to obtain the consent from your client if your argument is only a few weeks away. You should therefore seek your client's consent as early as possible.

3.05: Motion to Expedite Appeal

A typical criminal appeal in the Seventh Circuit can take several months from the filing of the notice of appeal to a final disposition. Even if briefs are filed without the need for any extensions of time, it can take two or three months for the case to be set for oral argument and several more months for a final decision. Where your client has received a relatively short sentence, it is sometimes possible that he may be released from custody prior to the conclusion of his appeal. In such a case, if you are challenging your client's conviction or the length of his sentence, you may wish to file a motion to expedite consideration of the appeal to ensure that your client obtains some benefit from a successful appeal. *See* Sample 23.

You should file a motion to expedite *after* you have filed your opening brief in the case. It makes little sense to request an expedited appeal if you have not been able to file your brief yet.

In your motion, you should briefly summarize the argument you have made on appeal. You should then describe how winning the issue on appeal would affect your client's sentence. Then set forth the amount of time your client has already spent in custody and his anticipated release date. The purpose of this information is to demonstrate to the court that if the appeal proceeds on a normal schedule for disposition, your client will likely already have been released by the time the court decides the appeal. If you filed motions for extensions of time in the case, you should note this in your motion. If the grounds for such motions were because of delayed transcripts or other matters beyond your control, the need for such extensions should not affect the Court's consideration of the matter. If the grounds for extensions of time were your heavy workload, however, the Court may be disinclined to grant your motion, as you will have already been responsible for delaying the conclusion of the appeal.

3.06: Citation of Supplemental Authorities

If after you have filed the brief, and even after oral argument, you discover "pertinent and significant" authority that is either new or that you missed, you may file a letter with the Court bringing the decision to its attention. Federal Rule of Appellate Procedure 28(j) governs this procedure. The Rule provides:

> 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.

Fed. R. App. P. 28(j). Notwithstanding the introduction of electronic filing, Circuit Rule 28(e) still provides that you must file 10 copies of the letter *and* 10 copies of the case which you are providing as supplemental authority. Nevertheless, the clerk's office has been orally advising appellate counsel that they may disregard this provision if they e-file the letter and supplemental authority as a combined .pdf document. Confirm this by calling the clerk's office before you file.

Note that under the previous version of this rule, you were not allowed to provide any argument based upon the supplemental authority. You may now provide an argument no longer than 350 words in your letter. As the Rule states, be sure to cite the precise portion of your brief to which the supplemental authority pertains. *See* Sample Letter 5.

3.07: Motion to Deconsolidate Appeals

When an appeal is docketed in the Seventh Circuit, the Court checks the case to determine whether there are any pending cases in the district court or the appellate court related to your case. For example, in a multi-defendant case, the defendants may be sentenced on different days and each will file a separate notice of appeal. As the notices are filed, the Seventh Circuit will consolidate the cases and order that joint briefs be filed to the extent that there are common issues.

Ordinarily, this consolidation is not a problem and, in fact, it can often make drafting the brief more efficient. However, there are occasions when you may wish to have your case considered separately from the other cases. One

such instance is where you have filed an *Anders* brief in your client's case but other co-defendants are filing merits briefs. If your case remains consolidated with the other cases, it could take many months before a final disposition in your case because the case will not conclude until a final disposition is made in all of the cases. If the Court were to consider the *Anders* brief separately, however, the case could be concluded within a few months. A second instance is where the Court may consolidate your case with co-defendants against whom your client cooperated. If the credibility of your client is at issue on appeal for a co-defendant against whom he cooperated, you could find yourself at oral argument with co-counsel attacking your client. In such an instance, you may wish to have your client's case considered separately.

In order to do so, you must file a motion to deconsolidate the appeals. In the motion, you should describe how your case is related to the other consolidated cases and why your case should be considered separately. You should file such a motion when you believe consolidation is contrary to your client's interests, but be aware that the Seventh Circuit rarely grants these motions. *See* Sample 24.

3.08: Motion to Withdraw

See Chapter 1, Section 1.03.

3.09: Motion to Proceed In Forma Pauperis

See Chapter 1, Section 1.02

3.10: Status Report

See Chapter 1, Section 1.02.

Chapter 4:
Research

4.01: Spotting the Issues

Before beginning the research in any appeal, you must know *what* to research. In other words, a lawyer must know what issues are worth looking into further and which ones will get you nowhere fast. Naturally, the lawyer discovers such issues by reading the transcripts, record, and presentence report (as discussed in Chapter 2), as well as talking with his client and previous counsel. In doing so, you will discover three categories of issues.

The first type of issue, the one most readily advanced on direct appeal, is one that was fully litigated in the district court. In such a case, the record on appeal may contain motions filed by both parties and a written order by the district court. Thus, you will already have a clear idea of what the issue is, what authorities are relevant to the issue, and which cases the district court used in making its decision. With such an issue, your job will be to read the cases relied on in the district court, as well as look for any cases the parties may have overlooked and any new law on the issue.

A slightly more difficult category of issue is one which, although preserved for appeal, was not fully litigated below. Such issues may arise during the course of a trial through an objection during the testimony of a witness or at sentencing where the issue is raised orally for the first time. Here, it will be unlikely that any written memoranda of law or opinion will be in the record. Indeed, with the lawyers and the court working on the fly, there may be no relevant case law mentioned in the record. At best, you may have a reference to a rule of evidence and no more. In this circumstance, you will basically need to start your research from scratch, although the issue will be clear enough.

The third category of issue is the one hardest to spot - the issue missed by everyone. There will be no objection, no motion *in limine*, nothing but your own knowledge of the law to alert you that a potential error has occurred. Only a working knowledge of the law will give you the ability to spot such an issue. After all, if it were an easy issue to spot, somebody would have already caught it in the district court. A surprising number of seemingly obvious issues are missed by everybody in the district court. With the advantage of time and distance from the heat of the battle in the district court, it is the appellate attorney's duty to ensure that nothing was missed that might benefit his client.

4.02: Keeping Current with the Law

In order to spot that third category of issues noted above, you must have a very good working knowledge of the law. You cannot spot an issue if you do not know it exists, and you will not know it exists unless you know the law. In this regard, there is no substitute for experience. Obviously, the more cases you have litigated, the more issues you have seen. If you do not have experience, however, there are still a number of ways to stay current with the law that will work as good substitutes for experience.

First and foremost, do not work alone. If you are new to litigating a federal criminal appeal, find an experienced practitioner with whom you can discuss your case or go to with questions. You will be surprised how an experienced practitioner can spot issues in your case based solely upon your general description of what happened in the district court. As you describe your case, he will know what questions to ask and what issues to look for. A good mentor can save you immense amounts of time by being able to immediately identify issues for research or, alternatively, recognizing a flat-out loser before you have expended valuable time and energy going down a dead end.

If you are unable to find an experienced mentor, you can always contact our office for assistance. Since 1999, we have litigated hundreds of appeals in the Seventh Circuit Court of Appeals, and we will be more than happy to assist you as you litigate your appeals. Whether it is to bounce an idea off of someone or have someone review your brief before filing it, we encourage you to contact us. You may do so by calling the office at (309) 671-7891 and asking for assistance from the Appellate Division.

Second, read the slip opinions. New slip opinions of the United States Supreme Court and the Seventh Circuit Court of Appeals are posted online everyday. On a typical day, you may spend between 30 and 60 minutes reading these new cases. While this is an investment of time, it pays off in spades because in doing so, you are not only reading the latest case law, but also learning well-established law from these new opinions. Six months of reading all of the criminal slip opinions in the Seventh Circuit will cover between 50 and 75 percent of all issues you will be likely to encounter in a typical case. The longer you read the daily slip opinions, the greater this percentage becomes.

Third, unless you are one of the lucky few who does nothing but practice federal criminal defense, you likely have numerous other areas of the law with which to stay current. An hour here on this area of the law, an hour there on this

other area of the law, and soon you are reading more than you are practicing. To avoid this dilemma, there are sources to which one can go to get summaries of the latest case law. Although not a substitute for reading the slip opinions, these resources are a close second. Chief among these resources is our office's website and listserv email service located at http://ilc.fd.org. In addition to articles and practice tips, the listserv is regularly updated with the newest Seventh Circuit and Supreme Court case law. After signing up for the emails, you will receive short summaries of significant recent cases about which you should be aware.

Finally, take advantage of seminars on federal criminal defense practice. All of the Federal Defenders in the Seventh Circuit provide seminars on at least an annual basis. At these seminars, you will receive practice pointers from lawyers who are litigating cases in federal court everyday, receive updates on Seventh Circuit and Supreme Court law which will keep you informed of ever-changing federal criminal law, and have an opportunity to establish a relationship with other federal practitioners whom you can call upon when you need assistance. Seminars offered by the Federal Public Defender for the Central District of Illinois are always announced in advance on our website and via the listserv.

Without good background knowledge, you will be faced with a mass of information without any guideposts or markers. By using the means of keeping current with the law mentioned above, your review of the record will be placed in its proper context. You will be able to know what questions to ask as you read through the pleadings and transcripts, while making the most efficient use of your time spent on research.

4.03: Researching Specific Issues

Once you have combed the record for preserved and unpreserved issues, it is then time to hit the books - figuratively. While it is theoretically possible to go to a law library, pull out the digests, go to the reporters, and then Shepardize the cases, doing so would be about as efficient as typing your brief on a manual typewriter. It is safe to say that anyone who went to law school later than the 1990s would never dream of doing research with books, and might not know how, even if he wanted. To be an appellate lawyer today is to be proficient at electronic research. Without electronic research, you will be at a distinct disadvantage to everyone else in the criminal justice system, from the probation officer to the judge.

The best engines for research are Westlaw and Lexis/Nexis. While these

services are not free, they have a number of different plans which are tailored for specific types of practice for all sorts of lawyers. Although they are of varying degrees of searchability and usefulness, there are a number of free research sources as well. For example, FindLaw has searchable federal cases, statutes, and regulations.

Whatever your research source, you should always begin by researching the law in the Seventh Circuit. If you start with the Supreme Court, you are unlikely to find a case precisely on point. If you start with an "all circuits" search, you are likely to find too many cases on point and, often, coming to too many different conclusions. By beginning your search with the Seventh Circuit, instead you will have the right level of generality and, of course, in the jurisdiction that (with the exception of the Supreme Court) is the most relevant to your case. Furthermore, if there is a relevant Supreme Court case on point with your issue, the Seventh Circuit case law will mention it.

Before going to an electronic search engine, however, you may wish to consult the case summaries on our website for a recent case on your issue. By quickly perusing the latest opinions, you may be able to quickly find a case from which you can then launch the rest of your research by reading the authorities the case relies upon.

If you cannot find a relevant case in the summaries or slip opinions, an electronic search is often helpful in quickly finding a case on point is a "natural language" search in the Seventh Circuit. This search will yield the 20 cases in which your search terms most appear. Usually, if you have put in the right search terms and have been specific enough, at least one case in those twenty will address the issue you are researching.

Once you find a case on point, you can then construct a "research chain" by reading the cases cited in the case you have found. After reading a few of these cases and reading the cases they cite, you can usually trace the cases back to the first case in the circuit to address your issue. Before long, you have found all the relevant circuit case law on your subject.

If there are no relevant cases on point in the Seventh Circuit, then, of course, you will need to change your database to search all the circuits. Although your manner of search will be the same as for a Seventh Circuit search, your reading of the cases will be more extensive. Moreover, you will need to ascertain if all the circuits to have addressed your issue treat the issue the same or, if not, how each of the various circuits have ruled on the issue.

Chapter 5:
Briefs

5.01: Introduction

Brief writing is a highly structured, formal type of writing. Like any type of writing, there are conventions which are unique to this particular type of writing. Moreover, there is another layer of formalization imposed upon a brief by the Federal Rules of Appellate Procedure, the Seventh Circuit Rules, and those unwritten requirements which, although they cannot be found anywhere, are enforced by the Court like any rule. Even if you have a fantastic issue which is supported with elegant prose, if you fail to follow the rules for the format of your brief, it will be rejected by the Seventh Circuit Clerk's office before anyone has a chance to read it. Accordingly, before you sit down to actually write your brief, you should understand what sections must be in the brief, in what order the sections should appear, and what the content of each section should be.

5.02: The Sections of a Brief

Federal Rule of Appellate Procedure 28 requires that your brief have the following sections *in the order* indicated. If you have all of the sections but fail to put them in the correct order, your brief will be rejected. Likewise, if you have all the sections in the right order but fail to label them correctly, your brief will be rejected. Accordingly, it is very important to organize your brief into the following sections, in the order indicated and labeled exactly as shown:

1. Disclosure Statement
2. Table of Contents
3. Table of Authorities
4. Jurisdictional Statement
5. Issues Presented for Review
6. Statement of the Case
7. Statement of Facts
8. Summary of the Argument
9. Argument
10. Conclusion
11. Certificate of Compliance with Rule 32(a)(7)(C)
12. Appendix
13. Certificate of Compliance with Circuit Rule 30
14. Appendix Table of Contents

When you file a brief electronically, it is not immediately accepted by the clerk's office, even though it is docketed as "filed." Members of the clerk's office review each brief when it is filed to determine if it follows the rules. One of the primary things they are scanning the brief for is to ensure that all of these sections are in fact in the brief and in the right order. Accordingly, if you adhere to the list as set forth above, you will stand a very good chance of having your brief accepted and formally filed by the clerk's office.

Failing to have the correct information in these various sections can also get your brief rejected and also get you into trouble with the judges. Therefore, it is important to know exactly what the judges expect to see in each section.

5.02.01: Disclosure Statement

The disclosure statement is what the judges use to determine whether they have a conflict in the case, either because of you or your client. Circuit Rule 26.1 sets forth the requirements for a disclosure statement. Because such a statement must be filed within 21 days of the docketing of the appeal or upon the filing of a first motion (whichever is sooner), the disclosure statement in your brief will generally be an exact duplicate of the one you have already filed in the case. However, if attorneys have been added to the case since you filed your original disclosure statement, be sure that the statement in your brief is updated and current. *See* Sample 10.

5.02.02: Table of Contents

The Table of Contents should list all 14 sections already noted above, with their corresponding page numbers in the brief. Although it is not required , you may also include sub-sections in your Table of Contents. For example, under Issues Presented for Review, you may set forth the issue in the Table of Contents as a subsection. The same is true for the headings in your Argument section. By putting these subsection headings in your Table of Contents, a judge can quickly get a general overview of your case simply by glancing at the table. *See* Sample 25 for an example of a good Table of Contents.

5.02.03: Table of Authorities

The Table of Authorities should be divided into three sections entitled: Cases, Statutes, and Other Authorities. These sections should appear in this order and labeled as such. These are the only sections that should be included in the Table of Authorities. Within each subsection, the authorities should be

alphabetically arranged with citations to the relevant page number in the brief. Although you may be tempted to "assist" the Court by adding other subsections, *e.g.* State Cases, Federal Cases, Constitutional Provisions, Guidelines Provisions, etc, do not give in to the temptation because these sections could result in the rejection of your brief. *See* Sample 26.

5.02.04: Jurisdictional Statement

The jurisdictional statement is an area where practitioners frequently get into a great deal of trouble. The Court of Appeals often issues opinions discussing the mistakes made in the jurisdictional statement. Fortunately for criminal practitioners, jurisdiction is fairly straight forward most of the time.

A jurisdictional statement will set forth the jurisdictional basis in the district court (most often 18 U.S.C. § 3231). It will then list the charges in the indictment along with the statutory sections where those offenses appear. Next, the jurisdiction of the Court of Appeals is set forth, usually founded upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Finally, four particulars must be set forth establishing jurisdiction: the date of the entry sought to be reviewed (usually the Judgment in a Criminal Case); the filing date of a motion for new trial; the date and disposition of a motion for new trial; and the filing date of the notice of appeal. Below is a format for a typical criminal appeal after a guilty plea and sentencing:

> 1. The jurisdiction of the United States District Court for the *[district]*, was founded upon 18 U.S.C. § 3231. A grand jury sitting in the aforementioned district charged *[Appellant's Name]* by indictment with *[offense]* in violation of *[statutory section]*.
>
> 2. The jurisdiction of the United States Court of Appeals for the Seventh Circuit is founded upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and is based upon the following particulars:
>
> I. Date of entry sought to be reviewed: judgment and conviction entered on *[entry date from docket sheet]*;
>
> ii. Filing date of motion for a new trial: n/a;
>
> iii. Disposition of motion and date of entry: n/a;
>
> iv. Filing date of notice of appeal: *[filing date from docket sheet]*.

Always check to make sure the dates listed establish jurisdiction, *i.e.*, the notice of appeal was timely filed. If not, explain additional entries that establish jurisdiction, such as motions to extend the time to file a notice of appeal.

Your jurisdictional statement should carry the page number of "1." All of the preceding pages should be paginated with lower case roman numerals, *i.e.*, i, ii, iii, etc. *See* Sample 9 (Circuit Rule 3(c) Docketing Statement which has the exact form as the jurisdictional statement contained in the brief).

5.02.05: Issues Presented for Review

In this section, you should list each issue separately in the form of a question. Do not put your issues in this section in all caps, bold, or italics. You can number each issue or simply indent the first line of each issue to indicate when you are stating a new issue. It is best to double space your text, just as you would do with any text in the body of the statement of facts.

Formulating a well crafted issue is more difficult than it appears. The following example illustrates this point. Assume you are appealing the denial of a motion to suppress where your client was stopped and frisked based upon an anonymous tip that a black man on the corner of 1st Avenue and Maple Street had a gun on him. There are several different ways you could state your issue.

The most general statement would be, "Whether the district court erred in denying the motion to suppress?" Although this statement is accurate, it gives the reader no information about the particulars of the issue, and certainly does not pique their interest. On the other extreme, you can put so much detail into your issue that it ceases to be useful as a means of understanding the case. For example, an overly complex statement of the issue might be:

> Whether the district court erred when it denied Mr. Jones's motion to suppress where an anonymous tipster reported to the police that a black man was standing on the corner of 1st Avenue and Maple Street, the police then stopped and frisked Mr. Jones based solely upon the anonymous description, and found a gun which formed the basis of Mr. Jones's prosecution, all in violation of Mr. Jones' Fourth Amendment right to be free from unreasonable searches and seizures as interpreted by the Supreme Court in *Florida v. J.L.*?

Again, although accurate, the level of detail in this statement of the issue borders on argument. Although you want to give the Court a clear indication of what you will be arguing in your brief, you do not want to actually make the entire argument in your issue statement.

A good statement of the issue with a sufficient, but not excessive, amount

of detail, might read like this:

> Whether the seizure and search of Mr. Jones was unreasonable where the police had no basis for doing so other than an uncorroborated anonymous tip similar to the one found insufficient by the Supreme Court in *Florida v. J.L.*?

Of course, there are many, many different ways to state the issue effectively. The important thing to remember is that it is critical to take your time drafting the issues presented for review in your case. Revise them, review them, and keep coming back to them as you write your brief. Of all the various sections in your brief, the very first thing a judge is likely to turn to in your brief is the issues presented for appeal. If you do a poor job of drafting them, you stand a good chance of making a bad impression on the judge which may be difficult to overcome in the rest of your brief.

5.02.06: Statement of the Case

What must or should go into the Statement of the Case is very ambiguously defined in the Rules. Indeed, the only guidance for what should go into the Statement of the Case is provided in Federal Rule of Appellate Procedure 28(a)(6) where it states that a brief must include "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Accordingly, at a minimum, this section of the brief provides the court with a procedural history of the case, some of which will overlap with what you have already written in the Jurisdictional Statement.

In a typical case, you would state the district in which your client was charged, the charges in each count of the indictment, whether your client filed any pre-trial motions and their disposition, whether your client pled guilty or went to trial, on which counts your client was ultimately convicted, the contents and disposition of any post-trial or post-plea motions, objections made prior to sentencing, the district court's findings at sentencing, the actual sentence imposed, and the filing date of the notice of appeal.

Although this bare bones procedural history should be in every Statement of the Case, you should also emphasize those portions of the procedural history which will be the subject of your appeal. You should do this because you never know what portion of the brief will be read first by the judge or the law clerks. Whatever section that may be, you want the judge to get a clear picture of where you are going with the appeal, even if that section is the only portion of your

brief he has read.

For example, if your issue is a motion to suppress, the procedural history relevant to the motion to suppress should dominate your discussion in the Statement of the Case, although the remainder of the procedural history should be included as well. On the other hand, if your issue is a sentencing issue only, your entire discussion of the motion to suppress might be a single line or two, with a more extensive discussion of the sentencing issue. *See* Sample 27 for an example of a good Statement of the Case.

5.02.07: Statement of Facts

The art of drafting a strong, persuasive Statement of Facts is the subject of almost any seminar or article on appellate advocacy. A few of the less commonly discussed aspects of the Statement of Facts are worth noting.

First and foremost, every fact in your statement should be directly relevant to your argument. Nothing can make a Statement of Facts more difficult to read than extraneous information which is not relevant to your appeal. Your reader should know what issue or issues you will be raising solely from reading your statement of facts. Every irrelevant fact you place in the statement will make it more difficult for your reader to make such a discernment. For example, if your only issue on appeal is whether your client should have received a leader/organizer enhancement, there is no reason to discuss what happened at a motion to suppress hearing unless some fact relevant to the enhancement came out during it. No matter how protracted and interesting the motion to suppress hearing may have been, if it is not relevant to your issue, leave it out entirely.

Keep in mind that the Statement of Facts should still contain basic information regarding the case. It is important for your readers to know the offenses charged, a short summary of the facts of the offense, whether your client pled guilty or was convicted after a trial, and what the guidelines calculations are. These are basic pieces of information that help frame a general picture of your client's case. A good framework of facts is necessary, but do not include every fact available to you in the record.

One effective way to ensure that your Statement of Facts is concise is to draft it after you have drafted your argument. By the time you start drafting your brief, your familiarity with the record should be such that you do not need a written Statement of Facts to write your argument. As you write your argument, you will naturally incorporate those facts which are relevant to your issue.

Having completed the argument, you will then know every fact which was necessary for your argument, be able to include them in your Statement of Facts, and include only those other facts that are essential to the background or context of the important facts. Writing the argument first will be of great assistance with one of the most difficult parts of drafting the Statement of Facts, *i.e.,* knowing how to organize all the facts in the case in a meaningful, coherent way. By drafting the argument first, you will have that organizing principle for the facts in your case.

Another simple tool that is very effective in organizing your Statement of Facts is the use of sub-headings. Lawyers often include all their facts in one section without any subheadings to let the reader know where he is in the story and where he is going. Additionally, like the drafting of the Issues Presented for Review, the manner in which the sub-headings are drafted can be an effective advocacy tool.

For example, where the issue in the case is whether the district court erred in giving your client a leader/organizer enhancement, possible sub-headings in the Statement of Facts could look like this:

I. Indictment and Offense Conduct
II. Plea Agreement and Change of Plea Hearing
III. PSR Calculations and Objections
IV. Sentencing Hearing

While such sub-headings are better than nothing, they also represent a missed opportunity to get your point across to the judges. The judges may not read every word of your brief, but they are very likely to read your sub-headings, either in the body of the Statement of Facts or in the Table of Contents.

Making the most of your sub-headings, you could draft them as follows:

I. The Grand Jury indicts Mr. Jones for bank fraud.
II. Mr. Jones pleads guilty to bank fraud pursuant to a written plea agreement, but reserves his right to challenge any leader/organizer enhancement.
III. Mr. Jones objects to the PSR, arguing that the four level enhancement for being a leader/organizer should not apply when there was only one other participant.
IV. The district court at sentencing finds that there was only one other participant, but also finds that the crime was "otherwise

extensive."

The simple use of these sub-headings has not only broken up the Statement of Facts into discreet sections of organized information, but has also given the reader a great deal of information about the case. From these headings alone, the reader knows: (1) the offense to which the defendant pled guilty; (2) the issue he is raising on appeal; (3) the fact that the issue was preserved for appeal; (4) the basis for the defendant's objection; and (5) some of the district court's reasoning. Well-drafted sub-headings are yet another way to maximize every opportunity to inform and persuade your reader.

Proper citation is also important for the Statement of Facts. Not only is proper citation to the record and appendix required by the rules, but it is an essential part of keeping your reader happy. The last thing you want is for the judge to put your brief down and pick up the government's brief to find a citation to the record which you omitted. Everything the judge needs or wants to know should be in your brief. Thus, every fact cited in your Statement of Facts should have a corresponding citation to the record or the appendix. Whatever abbreviations you use for your citations, you should drop a footnote after your jurisdictional statement spelling out what each abbreviation means. *See* Sample 28.

Importantly, if you have materials in the appendix which you refer to in your Statement of Facts, then cite to the appendix page. If you have an item in the appendix but cite only to the record, your reader will not know the item is in the appendix until he has finished the brief. By citing to the appendix, the reader can quickly turn to the appendix if there is something he wishes to see while he is reading the relevant portion of your brief.

Finally, remember that your reader is not as familiar with your case as you are. After having spent hours pouring over a record, the lawyer becomes so familiar with it that he will implicitly assume that his reader has more information about the case than he actually does. When this happens, the writer will introduce a place or person without providing any context, wrongly assuming that the reader has this information. To keep your reader from scratching his head, be sure that you properly introduce and give context to all the people and places when they are first introduced into your brief. There is nothing worse then leaving the judge with unanswered questions about the facts in your brief. When this happens, it is all too tempting for him to lay your brief down and pick up the government's.

These are but a few of the organizational tips which can make the Statement of Facts more readable. Ultimately, what makes a good Statement of Facts are the same things which are universal to all good writing: clarity, conciseness, and theme.

5.02.08: Summary of Argument

You should always write your Summary of Argument after you write your argument. As with other sections already discussed, the primary difficulty in drafting this section is finding just the right balance between specificity and generality. A simple restatement of the Issues Presented for Review is too general. Indeed, the Rules themselves state that the summary should not simply be a reiteration of the issues. Fed. R. App. P. 28(a)(8).

One good way to summarize your argument is to eliminate from the summary any detailed discussion of specific precedent from your argument section. The argument section of a good brief will usually contain a portion various specific cases are analyzed and distinguished. However, in most cases, the crux or your argument rests upon the application of the facts in your case to a well-settled set of legal principles. Summarizing the application of the facts to well-settled law, while eliminating discussion of specific cases, will provide a very useful Summary of the Argument. Alternatively, if your argument is based primarily on the controlling nature of a single precedent, *e.g.* a Supreme Court case, then describing how that case applies to the facts in your case to the exclusion of other less important cases would make a good summary.

Drafting the Summary of Argument should be taken seriously and not done as an afterthought. It is impossible to know if the summary will be the first thing the judge reads and, if you have done a poor job with it, your appeal may never be able to recover from that bad first impression.

5.02.09: Argument

If every portion of a brief is important, then the Argument is "first among equals." You can have a beautifully drafted Statement of Facts, a precise Issue Presented for Review, and a persuasive Statement of the Case. However, if your Argument is bad, it is nearly impossible to win your case on appeal.

General Structure

As with every other section of the brief discussed so far, organization is

key. Before you start writing, you should separately outline your Argument. Although there are no strict rules for how this outline should be structured, the basic structure of an appellate court opinion provides a good model for the Argument in your brief. If you read the slip opinions with regularity, a pattern emerges. Like an appellate brief, an appellate court opinion usually starts with a short summary of the case and disposition, a thorough statement of facts relative to the issues raised, a statement of the relevant law applicable to each issue followed by an analysis of the facts of the specific case within the framework of the law. Although a brief is not an opinion, appellate judges are your audience. Thus, if you write in a manner familiar and comfortable to them, you have a better chance of getting and keeping their attention because they will know what to expect as they read your brief.

This basic structure is similar to the "IRAC" rules you may have learned in law school: Issue, Rule, Analysis, and Conclusion. Typically, your issue will be stated in the heading for your argument. After setting forth the standard of review (discussed below), you should next set forth the well-established legal principles which apply to your issue. For example, if your issue concerns the admission of Rule 404(b) evidence, then the well-established law concerning Rule 404(b) evidence should come at the beginning of the argument. By placing this law at the beginning, you accomplish two things. First, if the judge reading your brief feels comfortable with the general law applicable to Rule 404(b), he will likely skip over this portion of your brief. By not mixing any analysis specific to your case in this section, you will not take the risk that your audience will miss part of your actual analysis. Second, if your reader is not familiar with the general principles of law on your issue, putting the applicable law at the beginning of your argument will give the reader the information he needs to analyze the specific facts in your case.

Next, you should apply the generally applicable law to the facts of your case and establish why the law favors the outcome you seek. This is the heart of your argument. Once you have concluded this fact-intensive portion of the analysis, then discuss any specific cases which either support your analysis or which need to be distinguished. Finally, conclude the argument by noting the relief to which your client is entitled on the particular issue you just addressed.

Applying the above organizational structure, a skeleton outline for most issues might look like this:

I. Issue
    A. Standard of Review

B. Well-Established Law
C. Application of Law to Facts
D. Discussion of Analogous or Distinguishable Cases
E. Conclusion

Of course, such an outline may not work in every case, but it will work in the majority of them. Moreover, if you use this organizational structure, your readers (judges and law clerks) will be very comfortable as they move through the issues in your brief.

Headings

As with the Statement of Facts discussed above, breaking up an argument section with sub-headings will assist your reader. You should use your headings as an opportunity to persuade. The outline structure noted above could be used as sub-headings for an argument. They would certainly assist the court in understanding the organization of your argument. However, you could also give the court the same information regarding organization while at the same time advocating your position by being more specific in your headings. An example of more specific headings would be:

I. Evidence of Mr. Jones's prior conviction for drug distribution was not admissible under Rule 404(b).

   A. The district court's admission of evidence under rule 404(b) is reviewed for an abuse of discretion.
   B. Evidence admitted under Rule 404(b) may not be admitted as character evidence, but may only be admitted to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or accident.
   C. Evidence of Mr. Jones's prior conviction could have only been admitted as improper character evidence because none of the reasons set forth in Rule 404(b) supported admission of the evidence in this case.
   D. The facts in this case are nearly identical to those in *U.S. v. Smith*, where this Court found reversible error.
   E. The error was not harmless and Mr. Jones's is therefore entitled to a new trial.

Detailed headings inform the Court about what you will be arguing in each subsection of your argument. In addition, they will also appear in your

Table of Contents as sub-headings. Thus, if a judge were to look at the Table of Contents, they would see your issue spelled out under the "Issues Presented for Review" section, a basic outline of what happened below via the sub-headings in the "Statement of Facts" listing in the Table of Contents and, finally, the basic outline of your argument through the Argument sub-headings. By using sub-headings in all these sections and putting them in the Table of Contents, the Table of Contents will serve as a mini-summary of your entire brief which a judge can use for quick reference. *See* Sample 25.

Standard of Review

For *each* issue presented in your brief, you must set forth the standard of review for your issue. Fed. R. App. P. 28(a)(9)(B). If the clerk's office cannot readily find your standard of review when skimming your brief, your brief may be rejected. Accordingly, although not required, it is a good idea to set forth the standard of review in a separate sub-section immediately following your argument heading.

Having set forth the standard of review in the argument section of the brief, it is important to then make certain that your argument addresses the standard of review. For example, if the standard of review is *de novo*, then your argument should not spend a great deal of time talking about the district court's rationale for its decision. Under *de novo* review, it does not matter what the district court thought because it is entitled to little deference. However, for an issue with a clear error or abuse of discretion standard of review, what the district court did and why will be essential parts of your argument because you will need to overcome the deference owed to the district court.

Finally, for errors not raised below, you will have to directly address whether the issue was merely forfeited (subject to plain error review) or waived (subject to no appellate review). Assuming you can show a forfeiture rather than a waiver, you will then need to address the four elements of plain error review. It would be insufficient to merely show that the district court made a mistake under this standard. Rather, you must show that: (1) there was an error; (2) which was plain; (3) which affected the defendant's substantial rights; (4) and which affected the fairness and integrity of the judicial proceedings. Given this standard, if you simply state the correct standard of review but do not provide analysis on each of these four factors, your argument would be incomplete. In other words, always keep the standard of review in mind as you write your argument.

Brevity

Verbosity is not a virtue in appellate brief writing. Judges have a substantial amount to read and little time to do it in. Accordingly, if your brief is too long and does not get to the point quickly, you will rapidly lose your reader's attention and, as already noted, he may feel tempted to pick up your opponent's brief to see if is any better.

A few ways to keep your argument brief is first to avoid discussing the law of other circuits if there is Seventh Circuit law on your issue and no circuit split. Only if there is a case almost identical to your own from another circuit should you discuss it. There is no need to discuss persuasive authority if you have binding authority on the issue.

Secondly, do not spend much time analogizing or distinguishing specific cases. Generally, pick the best one or two cases and show how your case is analogous to them. If your argument on your best two cases does not persuade the court, discussing five less compelling cases is not likely to change their mind. The same holds true for distinguishing bad cases. If you can successfully distinguish the one or two worst cases, then there is really no need to distinguish the five or six other bad cases which do not fit your facts as closely. In both of these instances, the greater includes the lesser, so avoid repetition.

Third, avoid lengthy string cites. Lawyers and judges automatically go into "skim" mode when they see a long list of citations. Again, cite one or two of the most relevant cases and move on. Likewise, closely related to string cites, avoid parentheticals and lengthy footnotes. If it is not worth putting into the body of your argument, it is likely not worth putting in the brief at all. On the other hand, if the information in your parenthetical or footnote *is* important, then you definitely should not put it a place where it is likely to be ignored. Parentheticals and footnotes also put your reader into "skim mode."

5.02.10: Conclusion

Your Conclusion should state the exact relief you are seeking, *e.g.*, a new trial, remand for re-sentencing, etc. Fed. R. App. P. 28(a)(10). If you have raised multiple issues, then you should state your alternative conclusions as well. An example would be as follows:

> For the foregoing reasons, this court should reverse Mr. Jones's conviction and remand the case for a new trial without the

admission of his prior conviction. Alternatively, even if this Court does not find a reversible trial error, the Court should remand this case for re-sentencing without the four level enhancement for being a leader/organizer.

As the example shows, the Conclusion should contain no extraneous information. A judge should be able to flip to your Conclusion and know exactly what relief you are seeking.

5.02.11: Certificate of Compliance with Rule 32(a)(7)(C)

Every brief must contain a certification that it complies with the type-volume limitations set forth in the Federal Rules. First, a brief must be typed with 12 point or larger proportionally spaced type, and the footnotes must be at least 11 point. If you use the default font setting for most word processors, you will comply with this Rule.

Regarding your brief, it may not exceed 30 pages *unless* you certify that the brief is less than 14,000 words. To determine this word count, highlight your text beginning with the "Jurisdictional Statement" through the end of your "Conclusion" and then go to the word counting function for your word processing program. In your certification, state how many words your brief is and what word processing program you used to produce it. An example of an adequate certification is as follows:

> The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains _____ words, and _____ lines of text as shown by Word Perfect 9.0 used in preparing this brief.

See also Sample 29.

Above and beyond these minimum requirements, it is important to think about what font type and style is easiest to read. Before deciding on a font type and size, you should go to the Seventh Circuit's website and read "Requirements and Suggestions for Typography in Briefs and Other Papers," available at this link: http://www.ca7.uscourts.gov/Rules/type.pdf. This article give you an excellent guide to using fonts, headings, and styles to your advantage when writing a brief. Although you should experiment with various fonts and sizes, a good and easily readable font for briefs is Book Antiqua, 13 point type - the font in which this handbook is written.

5.02.12: Certificate of Compliance with Circuit Rule 31(e)

Prior to electronic filing, briefs were required to provide the Rule 31(e) certification where you certified you have filed a digital version of your brief. This provision of the Circuit Rules was removed when electronic filing came into effect. Therefore, it is no longer necessary to comply with this rule.

5.02.13: Appendix

The Appendix is governed by Federal Rule of Appellate Procedure 30 and Circuit Rule 30. Because you must certify that your Appendix contains all the materials required by the rules, it is *extremely* important that you read and thoroughly understand these rules. There are several published opinions in the Seventh Circuit where a lawyer is fined $1,000 or more for failing to include a required item in the Appendix after having signed the certification.

First, there are certain items which must be included in the Appendix and *bound with the brief*. This material is referred to as "Circuit Rule 30(a)" material. Because this material must be in the Appendix and bound to the brief, the full text of the Rule is worth repeating here:

> The appellant shall submit, bound with the main brief, an appendix containing the judgment or order under review and any opinion, memorandum of decision, findings of fact and conclusions of law, or oral statement or reasons delivered by the trial court or administrative agency upon the rendering of that judgment, decree, or order.

Cir. R. 30(a).

In a criminal case, the entire Judgment and Conviction will always appear in your Appendix. If you are challenging a motion to suppress, you would also need to include that portion of the transcript where the judge makes his ruling on the record, as well as any written order on the motion. The same is true for any pre-trial motions and sentencing issues. If the judge makes findings at the hearing and does so in writing, *both* must be in the Appendix. These Circuit Rule 30(a) materials must be bound with the brief, regardless of how many pages there are. In other words, the 50 page limit for Appendix material *does not apply to Circuit Rule 30(a) material*. It all must be bound with the brief, no matter how long it is.

Everything else that may be included in the Appendix is governed by

Circuit Rule 30(b). Importantly, however, if something can be in an Appendix under Circuit Rule 30(b), it need not be bound with the brief and *may not* be bound with the brief if the Circuit Rule 30(a) material already exceeds 50 pages. In such a case, the Circuit Rule 30(b) material would appear in a separately bound Supplemental Appendix. A few examples will illustrate how these two rules operate in conjunction with the 50 page limit for 30(b) material.

Example 1: Circuit Rule 30(a) material = 60 pages.
Circuit Rule 30(b) material = 10 pages.

In this example, all 60 pages of Rule 30(a) material will be bound with the brief, and the ten pages of Rule 30(b) material will be bound in a Supplemental Appendix.

Example 2: Circuit Rule 30(a) material = 30 pages
Circuit Rule 30(b) material = 20 pages

In this example, both the Rule 30(a) and Rule 30(b) material may and should be included in the Appendix bound with the brief. The Rule 30(a) material, of course, must be bound with the brief. Because the Rule 30(b) material brings the total number of Appendix pages up to 50 (the limit), these also can be bound with the brief.

Example 3: Circuit Rule 30(a) material = 30 pages
Circuit Rule 30(b) material = 30 pages

Here, as usual, all of the Rule 30(a) material must be bound with the brief. However, because adding all of the Rule 30(b) material to the Rule 30(a) material would bring the length of the appendix over 50 pages, only 20 pages of the Rule 30(b) materials could be bound with the brief. The remaining ten pages of the Rule 30(b) material will need to appear in a separately bound Appendix.

It is very rare in criminal cases to have the combined Rule 30(a) and Rule 30(b) material exceed 50 pages. As long as you have your required Appendix materials and your Appendix does not exceed 50 pages, you can be confident that your Appendix complies with the Rules. If, on the other hand, your Appendix exceeds 50 pages, review the included items to ensure that they are actually required Appendix items. If not, try to eliminate any non-required items to get the Appendix below 50 pages to ensure compliance with the Rule.

In addition to required Appendix materials, you may be tempted to

include other material from the record which you believe will be helpful to the Court. Resist the temptation. The Seventh Circuit Court of Appeals disfavors unnecessarily lengthy Appendices and Supplemental Appendices. The judges have access to the record and, other than the required Appendix materials, would prefer to go to the record if they need to read some item rather than have you include it in an Appendix.

Finally, the Appendix should never include anything from the Presentence Investigation Report, including the district court's Statement of Reasons. Those documents are under seal and any portion of it appearing in the Appendix is the surest way to get your brief rejected. The same is true for any other document under seal. Do not put it in the Appendix.

5.02.14: Certificate of Compliance with Circuit Rule 30

This certificate tells that Court that you have complied with all the rules pertaining to appendices set forth in the preceding section. Because the Court requires you to make this certification, it is essential that you have put the Appendix together correctly. If you have not done so, you may be ordered to explain errors in the Appendix or asked about your mistake at oral argument. Given the certification, there are not many excuses for getting the Appendix wrong, which is partly why the Court will sometimes impose heavy sanctions for certifying that the required Appendix materials are present when they are not.

Here is an example of adequate certification language:

> The undersigned counsel for Defendant-Appellant, hereby states that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

See also Sample 30.

5.02.15: Appendix Table of Contents

Each page of your Appendix should be paginated consecutively, in addition to any page numbers that the actual documents included in the Appendix may have. The Appendix Table of Contents should refer to the page numbers you add to the pages.

However, it is also helpful to include in the Appendix Table of Contents the document's own internal page numbers. For example, if your Appendix

includes pages from the sentencing transcript, a good way to reference it would be as follows:

Sentence Transcript (pp. 28-31). 15-18

The parentheticals refer to the actual transcript page numbers, while the numbers to the far right indicate the Appendix page numbers.

Finally, your Appendix cover page should carry the page number of "Appendix i," the Certificate should be "Appendix ii," the Appendix Table of Contents should be "Appendix iii," and the first actual Appendix document page should begin with "Appendix 1." *See* Sample 31. It is also acceptable to use the abbreviated page number of "App. i" or "App. iii."

5.03: Filing and Serving the Brief and Other Papers

As of June of 2011, all filing in the Seventh Circuit is required to be electronic. For general electronic filing rules, refer to the Court's user manual for electronic filing found here: http://www.ca7.uscourts.gov/ecf/ECF_Users_Manual.pdf

File the brief electronically on or before the due date. The paper copies of the brief, which must be identical to the electronic version of the brief, are due a week later.

5.03.01: Filing Deadlines

Federal Rule of Appellate Procedure 26(c)

If you were the attorney who litigated the case in the district court and filed the notice of appeal, you may not receive a specific date from the Court of Appeals indicated exactly when your brief is due. In such a case, the rule is that your brief is due 40 days from the date the appeal is *docketed* in the Seventh Circuit Court of Appeals. The government's brief is due 30 days thereafter, and the reply is due 14 days later.

In a case such as this where the time for filing the brief is a period of time, rather than a fixed date, Federal Rule of Appellate Procedure 26(c) provides that three days will be added to the time for filing the next pleading, assuming service by mail. For example, if your brief is filed on the 40th day after the appeal was docketed and service to the government was by any means other than hand

delivery on the same date as service, the government will have 33, rather than 30, days from the date of service to file their brief. Assuming they file their brief 33 days later and serve you by mail, you will have 17, rather than 14, days to file your brief. Electronic filing does not affect this rule, which states:

> When a party must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Fed. R. App. P. 26(c).

However, this rule does not apply if your brief is due on a specific date. In other words, in any case where you receive the case via appointment by the Seventh Circuit Court of Appeals or have requested and received an extension of time to file your brief, your brief will be due on a specific date and this three day service rule will not apply. Indeed, in the court's order granting an motion for extension of time, there is usually a notation that this Rule does not apply.

The Mailbox Rule

Do not confuse the rule in discussed in the preceding section with the mailbox rule for filing paper briefs. A paper brief is considered timely filed if it is placed in the mail or with a third class carrier *on the date it is due*. Thus, if your brief is due on December 30th, it will be timely filed if you get it into the mail on that date, even though the Court will not receive it on that date. The same is true for response and reply briefs. ***However, this Rule only applies to briefs. All other pleadings must be received in the Seventh Circuit on the day they are due.*** Many lawyers make the mistake of believing that the mailbox rule for briefs applies to other pleadings; it does not.

5.03.02: The Cover Sheet

Federal Rule of Appellate Procedure 32 governs the physical form requirements for briefs. This Rule provides that the cover of the appellant's brief must be blue; the appellee's brief must be red; an amicus curiae's brief must be green; a reply brief must be gray, and any supplemental brief must be tan.

Rule 32 requires that the cover sheet to any brief, whether it is the

appellant's, appellee's, a reply, or other, contain the following information:

1. The number of the case centered at the top;
2. The name of the court;
3. The title of the case;
4. The nature of the proceeding (*e.g.*, Appeal) and the name of the court, agency, or board below;
5. The title of the brief, identifying the party or parties for whom the brief is filed; and
6. The name, office address, and telephone number of counsel representing the party for whom the brief is filed.

See Sample 32 for an example of an acceptable cover sheet.

5.03.03: The Number of Copies

Federal Rule of Appellate Procedure 31 and Circuit Rule 31 govern the number of copies which must be filed with the Court and served on other parties. Specifically, Circuit Rule 31 provides that a party should file 15 copies of a brief. Note that this number differs from the 25 copies required by Federal Rule of Appellate Procedure 31. However, Circuit Rule 31 specifically authorizes the lower number of 15. Thus, 15 copies of your brief (and reply, if any) along with one original should be filed with the Court.

Additionally, Federal Rule of Appellate Procedure 31 requires service of two copies on each unrepresented party and on counsel for each separately represented party. Keep in mind that if your appeal is consolidated with other appellants, counsel for each appellant must receive two copies of your brief.

5.04: The Reply Brief

5.04.01: When to (or not to) File

Once you have filed your opening brief and received the government's response, you will need to decide whether the filing of a reply brief is necessary. Although lawyers have different views regarding whether a reply should be filed, our presumption is that a reply should typically *not* be filed. Judges read a very large number of briefs each week. Although you may be tempted to use a reply brief to reiterate the points you made in your opening brief, as soon as a judge detects that the reply is only a rehashing of the opening brief, he is likely to stop reading. If your reply will simply repeat your opening brief, avoid the

temptation to file one.

There are a limited number of occasions when a reply should be filed. For example, if the government argues in its brief that an issue you raised was waived in the trial court, you should file a reply to address the government's waiver argument. This is perhaps the most frequent reason for filing a reply. Unless you anticipated the waiver argument and already addressed it in the opening brief, failure to file a reply will leave the government's waiver argument unanswered and deprive you of the ability to cite favorable cases on the issue during oral argument.

Similarly, if the government argues that your client's conviction or sentence should be affirmed on grounds not addressed in your opening brief, you should file a reply to address the issue. A common example of this scenario is when the government concedes that the district court erred, but argues that the error was nevertheless harmless. Although it is always better to *anticipate* the harmless error argument in your opening brief, if you failed to do so, then you should address the issue in your reply.

Occasionally, the government may accuse you of mischaracterizing the record or the holding of a case. If the extent of the government's attack can be read as impugning your integrity or credibility, then, of course, such an attack should be answered in the reply. Likewise, if the government seriously mischaracterizes the record or grossly over-reads a case, it may be necessary to point this out in a reply.

The common factor in all of these exceptions to the "no reply" principle is that there is something that needs to be said in the reply that was not said in your opening brief. On the other hand, if the government's response to your brief is in essential agreement about the black letter law in your case and the relevant facts, but disagrees only as to the application of the facts to the law, it is most likely unnecessary to file a reply to restate your position. By reading the two briefs, the Court should have all it needs to review the appeal.

Keep in mind that you may not raise a *new* issue in the reply brief. In other words, if you neglected to raise an issue or argument in your opening brief, you cannot include it later in your reply. Only if the government raises a new argument in its response as a grounds for affirmance may you then address it in the reply. Otherwise, you are limited to the issues and arguments you raised in the first instance.

5.04.02: The Sections of a Reply Brief

Federal Rule of Appellate Procedure 28(c) governs the contents of reply briefs. It provides that a reply brief must contain a Table of Contents and Table of Authorities with relevant page references. The rules provide other little guidance concerning the format of a reply brief.

Notwithstanding the paucity of guidance from the rules, it is good practice to include in your reply brief the following sections:

1. Disclosure Statement
2. Table of Contents
3. Table of Authorities
4. Issues Presented for Review
5. Statement of Additional Facts (if necessary)
6. Argument
7. Conclusion
8. Certificate of Compliance with Rule 32(a)(7)(C)

The form and content of numbers 1 through 4 above are the same as those for the opening brief, as discussed in Section 5.02 above. The "Statement of Additional Facts" section should only be included if the argument you make in your reply relies upon facts not stated in your opening brief or the government's response. For example, if the government makes a waiver argument in its brief, but omits crucial facts concerning the question of waiver, you may wish to include those new facts in the reply. Finally, the remaining sections are the same as those for opening briefs, with the exception that the word limit for a reply is 7,000 words, exactly half of that allowed for the opening brief. Thus, you should ensure that the word count in your Certificate of Compliance does not exceed the limit for a reply.

5.04.03: Filing and Service of the Reply Brief

Federal Rule of Appellate Procedure 31 provides that the reply brief must be filed within 14 days after service of the appellee's brief. Where the court has set a briefing schedule, the Court's order will specify the exact day on which the reply brief is due. As with the opening brief, the "mailbox" rule applies to the reply brief, allowing the brief to be placed into the mail or with a third-party carrier on the day it is due. *See* Section 5.03.01. An original and 15 copies (with a gray cover) must be filed with the Court.

Service of the reply brief on opposing counsel and co-defendants is the same as that provided for opening briefs. In other words, two copies must be provided to opposing counsel, counsel for any co-appellants, and two copies on any unrepresented parties. *See* Fed. R. App. P. 31(b).

Chapter 6:
Oral Argument

6.01: Introduction

In the Seventh Circuit, you will most likely receive oral argument in every case where you file a merits brief. The judges of the Seventh Circuit have demonstrated a firm commitment to providing oral argument in every case where counsel requests it. Allowing oral argument in most cases serves a number of objectives. First, it reduces the isolation which an appellate judge can experience if their work is limited to reading briefs and writing opinions. By maintaining this interaction with members of the bar, the judges gain familiarity with counsel who appear frequently in the Court of Appeals, which assists them in putting a face with a name when they pick up a brief and read the names of the attorneys in the case. Second, a lawyer who knows that he will be required to stand up in court and defend his argument is much more likely to carefully assess the merit of his arguments and craft it well. The idea that one will ultimately need to personally argue the issues in the brief before the well-prepared judges of the Seventh Circuit improves the quality of briefs filed with the Court. Lastly, oral argument serves the traditional role of giving the judges an opportunity to ask questions of counsel which may have been overlooked by the parties and to explore with counsel the consequences of potential holdings in a particular case for future cases in general.

6.02: The Setting of Oral Argument

Federal Rule of Appellate Procedure 34 provides that oral argument must be permitted in "every case" unless a panel of three judges unanimously agree after reviewing the briefs and record that oral argument is unnecessary because: (1) the appeal is frivolous; (2) the dispositive issue or issues have been authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2). Typically, unless you are raising an issue solely for the purpose of preserving it for review by the United States Supreme Court or the Seventh Circuit decides a case after the briefs are filed in your case which definitively resolves your appeal, you will receive oral argument in your case.

The Court will set oral argument by written order. This order typically issues after all of the briefs in the case have been filed, although the Court will

occasionally issue an order setting the date for oral argument immediately after the opening brief is filed.

Once the date for oral argument is set, you will not be able to reschedule the argument unless some extraordinary circumstances exist. Specifically, Circuit Rule 34(b)(4) provides that "[o]nce an appeal has been scheduled for oral argument, the Court will not ordinarily reschedule it." However, subsection (b)(4) of this Rule provides that "[r]equests by counsel, made in advance of the scheduling of an appeal for oral argument, that the court avoid scheduling oral argument for a particular day or week will be respected, if possible." Thus, it is critical that you notify the Court *before* argument of days on which you know you will be unavailable. You can provide the Court with this notice by writing a letter to the Clerk of the Court, similar to the one set forth in Sample Letter 6. Because the Court posts on its Internet site the days it is in session, it is also a good idea to check this schedule to see if the days you are unavailable are days in which the Court is not sitting. If the calendar indicates that the Court is not in session on the days you are unavailable, then it is unnecessary for you to file an unavailability notice with the Clerk. You can access this calendar at the following link: http://www.ca7.uscourts.gov/cal/argcalendar.pdf.

The order you receive from the Court will indicate the date, time, and courtroom in which your argument is scheduled. Although the majority of arguments are held in the main courtroom on the 27th floor of the Dirksen Building, arguments are also occasionally set in the Court's ceremonial courtroom located on the 25th floor of the building. Read the order setting oral argument carefully to determine which courtroom you will be in.

Arguments set in the morning are scheduled for 9:30 or 10:30, and afternoon arguments are scheduled for 2:00 p.m. Occasionally, the Court will start the day at 9:00 a.m. rather than at 9:30 a.m. Only rarely, however, does the court sit in the afternoon. Keep in mind that multiple cases are usually set for argument at 9:30 and 10:30. *See* Cir. R. 34(b)(1). Thus, if your case is set for 9:30, your argument can actually begin any time within the next hour. In all but the most unusual of cases, the Court will allot only ten minutes for each side in criminal cases.

After the setting of oral argument in your case, you will be required to file an argument confirmation form. This form replaces the formerly used "blue card" to notify the Court of who will be giving the argument and how much rebuttal time you need. This document should be filed as soon as possible after you receive notice of the oral argument. The document can be found at the

following link: http://www.ca7.uscourts.gov/cal/arg_confirm_card.pdf

The document you will receive along with the order setting your case for argument is a "Special Notice to Counsel Who Will Present Oral Argument." *See* Sample 33. This document contains important information you will need to know prior to arriving to Court on the day of your argument and will be discussed in detail in Section 6.04 below.

6.03: Preparing for Oral Argument

Preparing for oral argument in the Seventh Circuit is unique in a number of ways. First, the Seventh Circuit does not inform you of the panel which will hear your case until the morning of your oral argument. Therefore, you cannot tailor your preparation for any particular judges. Second, criminal cases are typically given only ten minutes of time per "side." In other words, even if you have one or two co-appellants with different issues, it is likely all of the co-appellants will have to share the ten minutes given to them. Given the short amount of time you will have for argument, an effective oral argument will need to be very concise and to the point. Finally, the judges on the Seventh Circuit Court of Appeals are extremely well-prepared for oral argument. No matter who the judges on your panel are, they will have read all of the briefs, be familiar with parts of the record, and have a good grasp of the controlling case law. Accordingly, the judges will likely ask very searching and pointed questions, oftentimes zeroing in on the weakest part of your case with their initial questions.

Given these circumstances, a lawyer appearing in the Seventh Circuit has only one route to effectively use the time he has: PREPARE, PREPARE, and PREPARE.

6.03.01: Review the Briefs

It is essential to be very familiar with everything that is in the briefs filed in your case. Few things are as embarrassing at oral argument as being asked a question about a case in the briefs with which you are unfamiliar. Because it may have been at least a few months between the drafting of your brief and oral argument, it is essential to re-read the briefs before oral argument.

One effective way to do this is to pull the briefs out of your file a week or two before oral argument and read through them each day in the days immediately proceeding the argument. Through this frequent re-reading, you will have a very good idea of all the arguments made, as well as the cases relied

upon by both you and the government.

Likewise, it is important to re-read the important cases relied upon in the briefs filed by both you and the government. For the cases which are analogized or distinguished in the briefs, you should print out a copy of the cases, familiarize yourself with their facts, and memorize the holdings. For other cases which are cited merely for the black letter law, you should at least commit to memory the legal proposition for which you and the government cite the cases. As already noted, unfamiliarity at oral argument with a case cited in the briefs is a sure sign of poor preparation.

6.03.02: Review the Record

It is very likely that the judges on the Seventh Circuit will know at least as much, if not more, about the law governing your case as you. However, the one area where you have a distinct advantage is the record. Although the judges may have read portions of the record prior to oral argument, it is very unlikely that they will have been able to gain as much familiarity with it as you have over the course of researching and drafting your brief. Thus, of all the areas likely to generate questions during oral argument, questions about the facts and the record below are the most frequent.

Because you are expected to be very familiar with the record in your case, it is critical that you review it again prior to oral argument. You should start by reviewing those portions of the record which pertain directly to your arguments on appeal. Thus, if you are making a challenge to the district court's guideline calculations at sentencing, you should carefully review the PSR, the transcript portions where the guideline calculations are discussed, and any pleadings filed in the district court which directly address your issue. If possible, you should attempt to memorize the page numbers in the record where your issue is addressed. It is always impressive to see an attorney respond to a judge's question by citing from memory page numbers in the transcripts or record.

In addition to the portions of the record which pertain directly to your issues on appeal, it is still important to also be familiar with all the other information in the record. Judges will ask questions about the record which may not seem directly relevant to the issues presented on appeal. It is simply impossible to predict what in the record a particular judge may find interesting or important about the case. Therefore, you should re-read the pleadings in the case, the transcripts, and the PSR in their entirely before oral argument. By doing so, you will hopefully have enough knowledge of the record to answer questions

which are not easily anticipated.

6.03.03: Outline your Argument

Once you have re-acquainted yourself with the law and facts pertaining to your case, you should next outline the argument you will present. Typically, you will have only ten minutes for your argument and rebuttal, so it is very important to have your argument well organized.

It is best to begin your argument with a clear and concise statement of the issues you are raising on appeal. Because of the limited amount of time you have for argument and the thorough preparation the judges of the Seventh Circuit perform prior to oral argument, it is usually unnecessary to provide a detailed explanation of the background facts in your case. Thus, when outlining your argument, start with the statement of the issue, a very brief description of the critical facts of your case, and then move immediately into your legal argument.

It is best to only outline your argument, rather than write the entire argument out word for word as you expect to give it. First, if you commit a written argument to memory, your delivery will sound as if you are reading your argument, which is generally not very effective. You want your argument to have a conversational tone with the judges, as if you were discussing the case with three of your favorite law professors or colleagues. Second, if you have your entire argument written out and committed to memory, you may have difficulty transitioning back into your argument after you answer questions from the judges.

If you outline your argument in such a way as to provide enough information in the outline to allow you to cover all the points you wish to, you will give yourself enough flexibility at oral argument to allow for a natural delivery. Likewise, an outline which you can simply glance at during oral argument to ensure you have discussed all of your important points will prevent you from omitting the discussion of an important point during the heat of the argument.

6.03.04: Anticipate Questions

An essential part of outlining your argument is attempting to anticipate questions the judges may ask you. This is, of course, a difficult task, as you will not know which judges will be on your panel until the morning of argument and, even if you did know who would be on the panel in advance, it is very difficult to

know what a particular judge may find interesting about your case.

With these limitations in mind, it is best to begin by looking for the weakest portion of your argument. Whether it is a particular case or a particular fact which is most damaging to your case, the most likely question (and usually the first) you will receive from the judges will go directly to the weakest part of your case. By anticipating this question, you will avoid being caught off guard when the questions begin to come, and you will be able to work your response to this question into the outline for your argument, thereby allowing for a smooth transition from the judges' questions back into the substance of your argument.

Indeed, anticipating potential questions will assist you in forming effective transitions from questions back into the core portions of your argument. You cannot predict at what point in your argument a question may arise, and it is important to have a plan for moving from the answer to anticipated questions back into your argument. Once you have formulated a list of potential questions, you should compare this list of questions to the various sections of your outline. Think about how you would transition from the answer to each question - no matter when it is asked - back into each portion of your argument outline. By performing this exercise, you will ensure that your argument flows smoothly and that you will not overlook during argument any of the points you wish to raise.

6.03.05: Moot Court

The best way to prepare for your argument and anticipate questions is to participate in a moot court before argument. Ideally, you should conduct the moot court with other lawyers who have read your briefs and will pepper you with questions about the case. There is a very good chance that the questions your peers will ask you will be similar to those asked by the judges.

When our office conducts a moot court, we typically run through the argument twice. The first time the argument is presented, we ask numerous questions and ignore whatever time limits the Court may have imposed. Our questions will stretch a ten minute argument out for half an hour or more. Once we have exhausted all the questions we have, we give the lawyer who is presenting the argument a few minutes to rework their argument, and then allow them to present their argument as prepared and within the time limit set by the Court. By using this dual moot court technique, we ensure that the lawyer has the benefit of hearing all the questions we anticipate may arise, while at the same time giving the lawyer an opportunity to present their entire argument as prepared and uninterrupted. Of course, the more times one can present a moot

court after receiving input from peers, the better. Such a process helps to refine the argument and narrow its focus to the most critical aspects of the case.

6.03.06: Search for Recent Precedent

In the few days immediately preceding your argument, you should search recent decisions to ensure that a case on point has not been decided since the briefs in your case were filed. As already noted, it is often a few months between the filing of the last brief and oral argument, and cases directly on point are sometimes decided in the interim.

The best way to keep abreast of any recent cases is to read the daily slip opinions issued by the Seventh Circuit and the United States Supreme Court as posted on these courts' websites. Because you know what issues are raised in your briefs, a very quick perusal of the recent cases will inform you about whether your issues are addressed in these cases.

If you are unable to read the daily slip opinions, then you should perform an electronic search for new cases using one of the electronic search engines. To find only recent cases which may have been decided on your issue, use a date restriction beginning from the date you filed your brief to the present. This search method should give you any recent cases on your issues.

If you in fact find a case which should be brought to the attention of the Court, you should then file a Rule 28(j) letter with the Clerk of the Court. *See* Section 3.03. Unless you file such a letter, you will be prohibited from referring to the case during oral argument. However, although you may not refer during oral argument to cases not cited in the briefs or referred to in a Rule 28(j) letter, the Court is not bound by this restriction. Thus, if a recent case has been decided, it is almost a certainty that the judges will ask you about the case, whether you filed a Rule 28(j) letter or not. Avoiding questions about a case about which you know nothing is yet another good reason to read the recent case law to ensure that you are fully prepared for oral argument.

6.04: The Day of Oral Argument

The clerk's office opens each morning at 9:00 a.m. Even if your argument is scheduled for 10:30, it is a good idea to arrive at the courthouse early and sign in at the clerk's office. Keep in mind that the security procedures for entry into the Dirksen building can sometimes result in long lines in the lobby, especially if you arrive at the courthouse between 8:30 and 9:00 a.m. Thus, be sure to arrive

early enough to allow you to get through the security screening, and remember to bring a picture I.D.

You are required to sign in at the clerk's office at least 15 minutes prior to the time scheduled for your argument. However, it is best to arrive at the clerk's office at 9:00 a.m., sign in, and check the bulletin board in the lobby outside the clerk's office. By 9:00 a.m. on the day of argument, this bulletin board will list the panel of judges hearing the cases that day, as well as the order of the cases. By looking at the order of cases and the time allotted to each side, you will then be able to estimate approximately when your argument will occur. Although the case order is posted online prior to the day of the argument, cases can be moved around, so it is a good idea to check on the morning of the argument.

Because oral arguments occasionally end before their allotted time expires, you are expected to be in the courtroom during the argument of the case immediately preceding yours. To allow a prompt transition between arguments, you should be seated in the front row of the public gallery during the argument immediately preceding yours, if possible. Of course, it is best to watch *all* of the oral arguments preceding yours. By doing so, you will be able to gage the mood of the panel and whether they are asking many or few questions. If you prefer to review your case prior to your argument, you may use the Attorney's Room next to the courtroom, the cafeteria on the 2nd floor, or the library on the 16th floor.

Once your case is called by the Court, you should move immediately to the podium, only stopping to place your materials at counsel table. The table for the appellant's counsel will be on the left side of the courtroom when you are facing the bench, and the appellee's counsel table will be on the right. Once you are at the podium, wait to begin until those exiting the courtroom from the previous case have left and the Court has quieted down.

When you arrive at the podium, *do not touch or adjust the microphone*. Few things bring down the approbation of the judges like touching the microphone. Rather, if the podium is too high or too low for you to be effectively heard from the microphone, there is a switch (similar to a light switch) on the lower right, inside portion of the podium which will automatically adjust the height of the podium. If you must adjust the podium, use this switch to do so.

You will also notice three lights on the podium: white, yellow, and red. For appellants, the white light will turn on when you have entered into your rebuttal time. The yellow light will turn on when you have one minute of all your time remaining. Finally, the red light will turn on when all of your time has

expired. When you see the red light turn on, it is very important to immediately wrap up your argument. If you are in the process of answering a judge's question, quickly finish your answer and conclude. The judges do not like attorneys to exceed their allotted time, and they will become very impatient if you do not attempt to conclude your argument within a matter of seconds after the red light has come on.

When you begin your argument, you should do so by saying, "May it please the Court." You should then introduce yourself and state the name of the party you represent. A statement that you intend to reserve a portion of your allotted time for rebuttal is "unnecessary and inappropriate." *Practitioner's Handbook*, United States Court of Appeals for the Seventh Circuit, p. 130. You should then clearly and concisely state your issue presented, briefly note the *relevant* facts, and move quickly into your legal argument. When you have concluded your argument, clearly request of the Court the precise relief you requested in your brief, *e.g.*, remand for re-sentencing, reversal of the conviction and a new trial, etc.

After the government has concluded its argument, the presiding judge will typically ask the courtroom deputy how much time you have left for rebuttal, and then ask you if you have anything additional to say. If you have had several questions during your opening argument and used up all of your rebuttal time, the presiding judge will sometimes give you an extra minute for rebuttal, recognizing that the bulk of your time was spent answering their questions. If you have a rebuttal argument to make, again, be sure to conclude quickly once the red light comes on.

Keep in mind that it is not always necessary to present a rebuttal argument. If the Court has grilled the government during its argument and you are satisfied that all the important points have been made, it is entirely appropriate to indicate to the Court that you have nothing in rebuttal, unless the Court has further questions. In other words, like a reply brief, use your rebuttal time only if you in fact need to rebut something the government said during its argument. If you would only be restating what you have already argued, then it is probably best to respect the Court's time and give up the balance of your time.

6.05: Decorum

In the Court's "Special Notice to Counsel Who Will Present Oral Argument," the Court states that "attire for counsel should be restrained and appropriate to the dignity of a Court of Appeals of the United States." *See*

Sample 33. Remember that you are only one court away from the United States Supreme Court. Thus, appropriate attire is a dark suit for both men and women. Blazers, loafers, and bright colored suits for women should be avoided.

All cellular telephones, pagers, or personal digital devices must be switched off in the courtroom. Similar to what happens in the district court, the judges will become *very* agitated if one of your electronic devices goes off while court is in session.

6.06: Handling "Cold" and "Hot" Panels

Few things are worse than a "cold" panel, *i.e.,* a panel that asks few or no questions. Although a cold panel will give you the opportunity to present your entire argument as prepared, a cold panel will give you the impression (although probably false) that the judges are uninterested in your case. As your argument proceeds, you may begin to feel an overwhelming urge to quickly conclude your argument and sit down. Rarely is this a good idea, unless the panel is clearly signaling to you by their body language (or occasional audible sighs) that they have heard enough. Instead, stick to the outline of your argument you have prepared, give your entire argument, and resist the temptation to sit down until you are done.

In the Seventh Circuit, the far more common situation is the "hot" panel, *i.e.,* the panel that continually peppers you with questions. Indeed, it is not uncommon to spend your entire allotted time, including time you intended to reserve for rebuttal, answering the judges' questions. Although answering all of the judges' questions can be a challenge, a "hot" panel is a clear indication that the judges are at least interested in your case.

The cardinal rule of handling a "hot" panel is to answer the judges' questions directly. Do not answer a different question, equivocate, or ignore the question. The judges on the Seventh Circuit will not relent until they get an answer to their question. If you believe a truthful answer to your question may hurt your case, answer the question truthfully anyway. The Court will usually still give you an opportunity to explain why, notwithstanding your answer, your client should prevail.

If the Court asks you a question about an issue or a case not addressed in the briefs, then you should answer honestly if you have not considered the matter. Simply state to the Court that you did not consider the issue or are unfamiliar with the case, and then ask the Court to allow you to file a short post-

argument memorandum on the issue. If the issue is important enough, the Court will sometimes give both parties seven days to brief the issue.

If the judges are asking a lot of questions, do not be overly concerned about making every point you intended to make when preparing for argument. If the judges are using all of your time asking questions on a particular point, it means that this point is important to them. Better to use your time attempting to persuade the judges on a point with which they are struggling than to use it addressing matters about which they have already formulated an opinion.

Do not ask the judges questions. Although, as already noted, the best oral arguments are similar to a conversation with the judges about your case, it is not appropriate to ask the judges questions. They are there to ask the questions; you are there to answer them.

Do not lose your cool. Occasionally, the questioning from the judges may get very intense. It is not unheard of to have your argument during oral argument referred to as "frivolous," "ridiculous," or "nonsense." As an aggressive advocate, your natural tendency may be to get quite irritated by such comments. However, it is never a good idea to raise your voice or get angry with the judges. No matter how agitated a judge may become, keep your cool. You will never do your client any good by becoming visibly agitated at the judges, even if they are agitated with you.

Finally, resist the temptation to get out of the line of fire. When under intense questioning, you may find yourself longing to simply sit down and get out of the line of fire. Resist this temptation. A "hot" panel is an interested panel, and you cannot afford to lose the opportunity to persuade them during oral argument. When the questioning subsides, transition back into your outline and address whatever issues you can that have not already been covered in the time you have left.

6.07: The Court's View on Oral Argument

The best source of information concerning what the judges are looking for in an oral argument is from the judges themselves. Fortunately, the Court of Appeals has indicated what it views as effective oral argument in its *Practitioner's Handbook*, available on-line at this link: http://www.ca7.uscourts.gov/Rules/handbook.pdf. Indeed, much of what is set forth in this chapter is also contained in *The Practitioner's Handbook*. Prior to presenting oral argument, you should read the section on oral argument in *The Practitioner's Handbook*, found at pages 127-34.

Chapter 7:
Post-Decision Pleadings

7.01: What to do When you Win

If you are successful on appeal, your case will almost always go back to the district court for further proceedings. The nature of these proceedings will naturally depend on the relief granted by the Court of Appeals, *e.g.*, a new trial, re-sentencing, etc.

If your appeal results in a remand to the district court for a new trial, the case will automatically be reassigned to a different judge unless the Seventh Circuit says otherwise or all the parties request the same judge. Cir. R. 36.

On the other hand, if your case is sent back for re-sentencing only, then the same district judge who performed the original sentencing hearing will ordinarily hear the case again. However, Circuit Rule 36 does allow for the Court of Appeals to apply Circuit Rule 36 to cases which are not subject to the rule by its terms. If the Court elects to apply the rule in this circumstance, it will explicitly state in its opinion that Circuit Rule 36 applies. *See United States v. Bradley*, 628 F.3d 394, 401 (7th Cir. 2010). Likewise, if you believe that there is a good reason for a different judge to hear a case upon remand where Circuit Rule 36 does not apply by its terms, you can request that the Court apply the rule on remand. Typically, the reason for making such an argument is that the district judge's comments or actions on the record indicate that she or he may be unfairly biased against your client upon remand.

When your case is remanded to the district court, the district court will generally assume that your representation will continue in the district court. However, you may not wish to continue to represent the defendant in the district court, either because your practice is limited to appeals or because the district in which the case originated is geographically inconvenient for you.

In such a circumstance, you should file a motion to withdraw as counsel *in the district court*. *See* Sample 34. If possible, it is best to consult with prior trial counsel before filing the motion to determine if he or she is willing to assume responsibility for the case again in the district court. As long as prior counsel's original reasons for withdrawing were not due to a conflict of interest or breakdown in the attorney-client relationship, they are generally willing to agree to represent your client again. If you can obtain such an agreement, you should

state this fact in your motion or, if you cannot, ask that entirely new counsel be appointed for the district court proceedings. *See* Sample 34.

7.02: What to do When you Lose

If your appeal in the Seventh Circuit is unsuccessful, you have three options. First, you can file a petition for rehearing. Second, you can file a petition for a writ of *certiorari* in the Supreme Court of the United States. Third, if it would be frivolous to do either, you may close the case. When an appointed lawyer agrees to litigate an appeal in a federal court of appeals, that lawyer has also agreed to represent the appellant throughout the appellate process, including a possible petition for rehearing with suggestion for rehearing *en banc* and/or a possible petition for writ of *certiorari* in the Supreme Court. *Austin v. United States*, 513 U.S. 5 (1994). So, although indigent defendants do not have a constitutional right to appointed counsel for these discretionary appeals, *see Ross v. Moffitt*, 417 U.S. 600, 617 (1974), they do have a statutory right based on the Criminal Justice Act, 18 U.S.C. § 3006A. *Wilkins v. United States*, 441 U.S. 468, 469 (1979); *United States v. Price*, 491 F.3d 613, 615 (7th Cir. 2007). Each of these alternatives is discussed below.

7.03: Petitions for Panel Rehearing

7.03.01: Whether to File

A petition for panel rehearing requests that the panel which originally decided your case reconsider its opinion. It is *not* a request that all of the active judges in the Seventh Circuit hear the case *en banc*. Although neither the Circuit Rules nor the Rules of Appellate Procedure list circumstances when such a petition should be filed, the most frequent use of such a petition is when the panel which heard the case relied upon incorrect information when it originally issued its decision. For example, the Court may rely on a fact which it believes to be in the record which in fact is different than as characterized by the Court. Likewise, the Court may rely on a precedent which it grossly misinterprets or has been overruled. In such instances, a petition for panel rehearing can point out the mistake to the panel and give it an opportunity to correct its error. Of course, such mistakes by the Court of Appeals are rare, and it is for this reason that petitions for panel rehearing are very rarely granted.

If instead of relying upon some piece of erroneous information, the Court of Appeals places (in your opinion) too much or too little emphasis on a particular fact or facts to reach its decision, or interprets a case in a manner

different than you would, this does not ordinarily provide a ground for filing a petition for panel rehearing. Such petitions should not be used as an opportunity to reargue your case and register with the Court your disagreement with the manner in which it has decided to interpret the law. In other words, petitions for panel rehearing do not function as appellate analogues to motions to reconsider in the district court. Only if the Court of Appeals has relied upon some objectively erroneous information in reaching its decision should you file a petition for panel rehearing.

7.03.02: Format, Filing, and Service

If you elect to file a petition for panel rehearing, you must do so within 14 days of the entry of judgment. Fed. R. App. P. 40(a)(1). With electronic filing, you may file the motion up until midnight of the fourteenth day. If you seek a motion for extension of time to file the petition, that motion must be received by the clerk's office within 14 days after entry of judgment as well. However, be forewarned that the Court of Appeals almost *never* grants a motion for extension of time to file the petition.

The only guidance in the rules for the format of a petition for panel rehearing is that it must contain a Table of Contents with page references (alphabetically arranged), and statutes and other authorities cited, with reference to the pages of the brief where they are cited. Cir. R. 40(a). In addition to these sections, a petition should include:

1. Cover Page
2. Table of Contents
3. Table of Authorities
4. Statement of Reasons why Panel Rehearing Should be Granted
5. Statement of Facts
6. Reasons why Panel Rehearing Should be Granted
7. Conclusion
8. Certificate of Compliance with Fed. R. App. P. 35 (b)(2)

The cover page should be white, and contain all the same information contained on the cover of your opening brief, with the exception that it should be entitled, "Petition for Panel Rehearing." Fed. R. App. P. 32(c)(2)(A). Because oral argument is not permitted for such petitions, there should be no "Oral Argument Requested" notation at the bottom of the cover page.

The Table of Contents and Table of Authorities should be formatted the

same as those for an opening brief. *See* Sections 5.02.02 and 5.02.03.

The "Statement of Reasons why Panel Rehearing Should be Granted" is the analogue to the "Issues Presented for Review" in the opening brief. In this section, you should state in one or two sentences the primary reason why you believe the panel should rehear the case. You will elaborate on this reason later in the petition in the "Reasons why Panel Rehearing Should be Granted" section.

The "Statement of Facts" is not the same statement of facts contained in your original brief. Because you are seeking rehearing from the original panel which heard the case, they are presumably already familiar with the underlying facts. Thus, in this section, you should briefly *summarize* the facts as stated in your opening brief, discuss the relevant portion of the Court's decision, and emphasize that portion of the decision which forms the basis of your petition.

The "Reasons why Panel Rehearing Should be Granted" section is analogous to the "Argument" section of your opening brief. Here, you should set forth in detail the factual and legal reasons for why you believe panel rehearing is warranted.

The "Conclusion" section is simply a very brief statement of the relief you are seeking which will be a panel rehearing of the case for the reasons set forth in the petition.

Finally, you should include a "Certificate of Compliance with Fed. R. App. P. 35 (b)(2)" which indicates that your petition is within the 15 page limit for petitions for rehearing. *See* Sample 35.

Similar to opening briefs, you will electronically file the petition and, after it has been accepted, the Court will provide you with a certain number of days to send the required copies of the petition the Court. Cir. R. 40(b). Likewise, you must serve two copies on the government and on the counsel of each represented party. Unless the Court specifically requests an answer to a petition, none is permitted. However, the Court will not ordinarily grant a petition for rehearing without first asking for an answer. Fed. R. App. P. 40(a)(3).

7.04: Petition for Rehearing En Banc

A second type of petition for rehearing is the "Petition for Rehearing *En Banc*." In this petition, you are asking that all of the active judges on the Seventh Circuit hear the case. There are very specific grounds which must be presented

in your case before seeking an *en banc* rehearing. Specifically, Federal Rule of Appellate Procedure 35 states that each petition must contain as statement that either:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the Court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

Fed. R. App. P. 35(b)(1)(A)-(B).

As the above rule demonstrates, the primary basis for seeking a rehearing *en banc* is because the panel's decision conflicts with the decisions of the United States Supreme Court or another Circuit Court of Appeal. If no such conflict exists, then you should typically not file a petition for *en banc* rehearing, as you likely will not be able to comply with Rule 35. Only if the decision of the Court is of "exceptional importance," such that it signals a new rule of law or reinterpretation of an existing rule which may affect large numbers of defendants should you file such a petition if no conflict in precedents exist. Keep in mind, however, that *en banc* petitions are almost never granted.

One reason why such petitions are almost never granted is that the Seventh Circuit is usually aware of any conflicting precedents when it issues an opinion. If the opinion conflicts with the decisions of other circuits, the Court will usually note those conflicts within the body of its opinion. Likewise, if the decision of the Court of Appeals conflicts with it own prior precedents, the Court will usually note this fact as well. Frequently, when the Court overrules its prior precedents or shifts course dramatically, the opinion will contain a statement similar to the following:

> Because this decision signals a change of course, it was circulated to the active members of the Court under rule 40(e). No judge voted to hear the case *en banc*.

Although the rules do not explicitly prohibit the filing of a petition for *en banc* rehearing when an opinion contains this language, it is obvious from the text that seeking rehearing would be futile, given that all of the judges have already considered the question. Thus, you should not file a petition for rehearing when the Court indicates that the judges have already voted not to hear the case *en banc*.

The format, filing, and service requirements for petitions for rehearing *en banc* are identical to those for a petition for panel rehearing, with a few notable exceptions.

First, instead of a "Statement of Reasons why Panel Rehearing Should be Granted," you must include a "Federal Rule of Appellate Procedure 35(b)(1)(A) Statement Regarding Reasons For Granting Rehearing." As already noted in the immediately preceding section, this statement must explain with particularity how the panel opinion conflicts with Supreme Court precedent, other circuit precedents, or is a "question of exceptional importance." Failure to include this statement in your petition can result in serious sanctions. *See H M Holdings v. Rankin, Inc*, 72 F.3d 562, 563 (7th Cir. 1995).

Second, you must file an original and 30 copies of the petition with the court. Cir. R. 40(b).

Third, you must include a disclosure statement in your petition. *See* Sample 10. Although it is a good idea to include the statement in a petition for panel rehearing, it is *required* for *en banc* petitions.

In all other respects, the procedural requirements for petitions for rehearing *en banc* and for panel rehearing are the same.

7.05: Combined Petitions

Although petitions for panel rehearing and for rehearing *en banc* are treated differently by the rules, they are typically combined into one petition for relief, and it is usually a good idea to do so. Specifically, although the filing of a petition for panel rehearing tolls the time for filing a petition for writ of *certiorari* in the Supreme Court, a petition for rehearing *en banc* does not. Counsel has 90 days from entry of judgment on appeal to file a writ with the Supreme Court. However, if a timely petition for panel rehearing is filed, that 90 day period does not begin to run until the Court of Appeals has disposed of the petition for rehearing. S. Ct. R. 13.3. Such is not the case for petitions for rehearing *en banc*.

Even if you file such a petition, the 90 day filing period for a writ begins to run from the date the Court of Appeals issues its opinion, regardless of when it rules on a subsequently filed *en banc* petition. Thus, if you believe you have grounds for rehearing *en banc*, you should still request a panel rehearing as well, in order to ensure that the limitations period for filing a writ is tolled. On the other hand, if you believe you only have grounds for a panel rehearing, you need not file a combined petition to toll the limitations period because a petition for panel rehearing *always* tolls the limitations period, whether filed as a combined petition or not.

There is only one difference between a combined petition and a petition for rehearing *en banc*, *i.e.,* the title. Specifically, the title of the petition should be, "PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC." By captioning the petition in this way, the Court will be on notice that you are seeking *either* panel rehearing *or* rehearing *en banc*. In all other respects, the combined petition is the same as a petition for rehearing *en banc*.

7.06: Petitions for Writ of Certiorari

An alternative to filing a petition for rehearing is a petition for writ of *certiorari* in the United States Supreme Court. The filing of a petition for rehearing is *not* a prerequisite for seeking a writ.

7.06.01: Whether to File

Less than one percent of all petitions for writ of *certiorari* filed with the United States Supreme Court are granted each year, so in the vast majority of cases, it is probably futile to seek a writ. There are, however, a few very narrow classes of cases where the filing of a petition may be warranted.

Specifically, Supreme Court Rule 10 sets forth the most typical classes of cases where the Supreme Court may exercise its discretion and grant a writ. This rule provides:

> Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a

> decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

As Rule 10 makes clear, it is the rare case which will be likely for review by the Supreme Court. Of all the most likely candidates for review are those cases where there is a very clear conflict among the circuit courts, they essentially having divided into to opposed "camps." In such a case, one can make a good argument that the Supreme Court needs to settle the question to ensure uniformity in the application of federal law throughout the country.

If there is a clear conflict among the circuits on an issue in your case, but the Seventh Circuit has definitively decided the issue against your client in prior cases, you should file a merits brief in the Seventh Circuit, noting the adverse precedent but arguing that you are raising the issue to preserve it for Supreme Court review. Once the Court decides the issue against you, you can then seek a writ based upon the conflict among the circuits.

Another type of case where you should definitely seek a writ is where the issue decided by the Court of Appeals is already pending in the United States Supreme Court. In such a case, you do not want your client's direct review rights

to be exhausted while the Supreme Court considers the question in another case. If you do not seek a writ of *certiorari* and the Supreme Court decides the issue in your favor after the time for filing a petition has expired, your client will be unlikely to benefit from the Supreme Court's decision. This is so because although decisions of the Supreme Court apply to all cases currently pending on direct review at the time the decision is made, such decisions (with limited exceptions) do not ordinarily apply to cases where the issue is being raised in a collateral attack. Thus, it is critical in these cases to file a petition in the Supreme Court, noting that the issue presented in your case is already pending in the Court, and requesting that your case be stayed until the Supreme Court decides the question in the case already before it. By doing so, you will have preserved your client's ability to obtain relief from any beneficial decision of the Court.

There are several sources which will inform you about issues currently pending in the Supreme Court, including case updates provided on our website.

7.06.02: Format

Supreme Court Rule 14 governs the format and contents of petitions for writs of *certiorari*. In the typical criminal case, the petition will contain the following sections:

Title Page

As shown in Sample 36, at the top of the title page should contain, "No._____." The reason for leaving the number blank is so that the Supreme Court can stamp the docket number of the case on the petition when it is assigned after filing.

Where the "Term" is set forth, keep in mind that the Supreme Court Term runs from the first Monday in October until the day before the first Monday in October the following year. Thus, the year of the term may differ from the calender year, as when a petition filed in February of 2013 is still considered to be in the "October Term, 2012."

Finally, note that the name of your client appears first in the caption of the case, such as John Doe, Petitioner v. United States of America, Respondent.

Question Presented

The question presented is similar to the "Issue Presented for Review" in an

appellate brief. In the "Question Presented" section, you should emphasize not only the legal question which you seek the Court to decide, but also the reason why the Court should grant the writ. For example, a question presented for review which addresses both of these aspects might read as follows:

> Whether this Court should resolve a split of authority among the Circuit Courts of Appeal by rejecting the Seventh Circuit's reasoning in *United States v. Smith*, which holds that a sentence imposed in a criminal case is presumptively reasonable if it is within the range provided for by the United States Sentencing Guidelines?

At this example shows, the question provides the Court with both the substantive legal issue at stake, as well as the reason why the Court's review of the issue is necessary.

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The "Table of Contents" should set forth the following sections with references to the page numbers:

1. Question Presented
2. Table of Authorities Cited
    - Cases
    - Statutes
    - Constitutional Provisions
    - Other Authorities
3. Petition for Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit
4. Opinion Below
5. Jurisdiction
6. Constitutional and Statutory Provisions Involved
7. Statement of the Case
8. Statement of Facts
9. Reasons for Granting the Writ
10. Conclusion
11. Appendix

S. Ct. R. 14.

Table of Authorities Cited

This Table is similar to that which would appear in an opening brief, with the exception that one additional subsection is included, *i.e.*, "Constitutional Provisions."

Petition for Writ of **Certiorari** *to the United States Court of Appeals for the Seventh Circuit*

Although, as noted above, the petition will have a cover page, the actual petition begins after the "Table of Authorities." Thus, the preceding pages should be numbered "i, ii, iii," etc., and this page will be numbered as "1." On this page, as with the cover page, you will put the caption for the case, along with a space for the Docket Number. *See* Sample 37.

Opinion Below

In this section, you need only briefly indicate the Court from which your case originates, whether the decision of the Court of Appeals was published or unpublished, the date on which it was decided, and the reference to where in the Appendix the decision appears. A typical example of the text for this section would be as follows:

> The published opinion of the United States Court of Appeals for the Seventh Circuit, issued October 5, 2012, appears in Appendix A to this Petition.

Jurisdiction

Here, you should set forth the basis of jurisdiction for the district, appellate, and Supreme Court. The typical statutory bases establishing jurisdiction in a criminal case appear in the following example below:

> 1. The [DISTRICT COURT], originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.
>
> 2. Thereafter, the Petitioner timely appealed his convictions and sentences to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291.
>
> 3. Petitioner seeks review in this Court of the judgment and order of the United States Court of Appeals for the Seventh

Circuit pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

Assuming the constitutional and statutory provisions relevant to your petition are not very lengthy, you may cite the relevant provision and set forth the entirety of the relevant text in this section. Alternatively, if you have numerous or lengthy provisions at issue, you can simply provide the citation to the sections here and place the provisions in the appendix. However, if you do place the text of the provisions in the statute, remember to cite to the appropriate portion of the appendix in this section.

Statement of the Case

Similar to the "Statement of the Case" section in the opening brief (*See* Section 5.02.06), you will set forth the procedural history of your case in this section. In most cases, you will copy the "Statement of the Case" from your opening brief directly into your petition. However, at the end of the section, you should add a discussion of the proceedings in the Court of Appeals, noting the issues you raised on appeal, a brief exposition of how the Court decided the issues, and a statement concerning the issues for which you seek the writ.

Statement of Facts

As with the "Statement of Facts" section in the opening brief, you will set forth the relevant facts of your case in this section. Because the Supreme Court will not have the record when it considers your petition, citations to the record are unnecessary in your petition, unlike in an opening brief in the Court of Appeals. Indeed, it is a good idea to remove the citations from the statement of facts in your petition.

In most cases, you can copy the "Statement of Facts" directly from your opening brief in the Court of Appeals. However, if you are seeking a writ on only one of several issues you raised in the appellate court, you should edit your statement of facts to include only those facts which are relevant to the issue you are raising. Additionally, at the end of the statement of facts, you should include a discussion of the issues you raised on appeal, how the Court decided those issues, and which issues are raised in your writ.

Reasons for Granting the Writ

This section of a petition for a writ of *certiorari* is analogous to the "Argument" section of your brief in the appellate court. However, rather than directly addressing the merits of your substantive argument as you would in an appellate brief, the first portion of your argument here should be directed at the reasons why the Supreme Court should hear the case. Thus, if you are basing your petition on a circuit split, you should initially argue that the Supreme Court should hear your case because of the conflict among the circuits, citing the relevant cases from the various circuits and discussing how those circuits have ruled on the issue in your case.

Only after you have set forth the basis for seeking the writ should you then discuss the merits of a particular issue. In the example cited above where there is a conflict among the circuits, after discussing the conflict among the circuits, you would then discuss why the Court should resolve the conflict in a particular way, *i.e.*, in a way which benefits your client. Finally, you should then discuss how resolution of the issue in the way you suggest applies to the particular circumstances of your case.

Remember that at this stage in the case, your primary concern is convincing the Court to accept your case for review. If you are successful, you will have an opportunity to brief the substantive issue in the Supreme Court.

Conclusion

In your "Conclusion" you should simply state the relief you are seeking, which is the issuance of a writ of *certiorari*. A typical example of a conclusion would be:

> For the reasons set forth above, a writ of *certiorari* should issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit issue on [DATE], affirming the Petitioner's conviction and sentence.

Appendix

The appendix must contain, at a minimum, the written orders and opinions of the courts below and any statutory or constitutional provisions not already set forth in their entirety in the "Constitutional and Statutory Provisions" section. S. Ct. R. 14(1)(i). Each document should receive a different Appendix letter, such as Appendix A, Appendix B, etc. As a general rule, you should only include in the appendix the documents noted above, unless there is some other

document which is absolutely necessary for the Supreme Court's consideration of the petition.

7.06.03: Motion for Leave to Proceed In Forma Pauperis

If you were appointed under the provisions of the Criminal Justice Act in the appellate court, you will need to file a "Motion to Proceed *In Forma Pauperis*" in the Supreme Court at the same time you file your petition for writ of *certiorari*. Because you will have already obtained IFP status in the appellate court, you need not submit an affidavit concerning your client's financial status in the Supreme Court. Rather, you need only state that your client is indigent and was represented by counsel appointed under the CJA in the Court below. *See* Sample 38 for a sample of a motion which will be sufficient in the majority of cases.

Supreme Court Rule 39 provides that a copy of the motion shall precede and be attached to each copy of the accompanying document (in this case the petition). Thus, as discussed in more detail below in Section 7.06.03, the motion to proceed IFP will be stapled to and on top of the original and all copies of the petition for writ of *certiorari*.

7.06.04: Filing and Service of the Petition

Supreme Court Rule 13 provides that a petition for writ of *certiorari* must be filed within 90 days after entry of judgment, *i.e.*, the date the Court of Appeals issues its decision. Only if a petition for panel rehearing is filed in the appellate court is the 90 day period tolled. *See* Section 7.05.

The petition is timely filed if it is received by the Supreme Court Clerk within the 90 days or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing. In other words, a "mailbox" rule applies to *certiorari* petitions, but you must take the petition to the post office to ensure that it bears the postmark of the date you are filing it. Your office's postage meter will not be sufficient. Your petition will also be timely if you deliver it on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within three *calendar* days.

You must file an original and ten copies of the petition if your client is indigent. S. Ct. R. 39(2). As noted in the immediately preceding section, your motion for IFP should be stapled to and in front of your petition.

One copy of your petition and motion to proceed IFP must be served on each party of record. You must serve a copy not only upon the Assistant United States Attorney who litigated the case in the Court of Appeals, but also on the Solicitor General at the following address:

Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Suite 5143
Washington, D.C. 20530-0001

7.07: Closing the Case

If you have determined that neither a petition for rehearing nor a petition for a writ of *certiorari* is warranted, then you should inform your client of this fact and conclude your representation. *See* Sample Letter 7.

There are times that, although you have concluded a petition for a writ of *certiorari* is not warranted, your client may insist that you file one. In such a case, the Seventh Circuit's Criminal Justice Act Plan outlines your duties to your client. Specifically, Article V, Paragraph 3 provides:

> After an adverse decision on appeal by this Court, appointed counsel shall advise the defendant in writing of his right to seek review of such decision by the Supreme Court of the United States. If, after consultation (by correspondence, or otherwise), the represented person requests it and there are reasonable grounds for counsel properly to do so, the appointed attorney must prepare and file a petition for writ of *certiorari* and other necessary and appropriate documents and must continue to represent the defendant until relieved by the Supreme Court. Counsel who conclude that reasonable grounds for filing a petition for writ of *certiorari* do not exist must promptly inform the defendant, who may by motion request this Court to direct counsel to seek *certiorari*.

See Sample Letter 7 for an example of a letter which informs your client of your decision not to file a petition for writ of *certiorari* and his right to file a motion in the Seventh Circuit compelling you to do so.

Chapter 8:
Client Communications

8.01: Introduction

Whether representing a client in the district or appellate court, communicating with your client is not only your duty under the Rules of Professional Conduct, but also essential to effectively representing your client. When representing a client on appeal, he can most often be located in any one of the Bureau of Prisons' facilities across the country. However, some defendants are still serving a sentence in a state facility. This potential distance between you and your client can create unique challenges for appellate counsel.

8.02: Locating Your Client

In the order appointing you as appellate counsel, the Court will direct you to contact your client immediately. The greatest challenge to complying this order can sometimes be locating your client.

The Bureau of Prisons' ("BOP") website has an inmate locator available at the following link: http://www.bop.gov/iloc2/LocateInmate.jsp. If you have either your client's name or register number, you can put the data into the system and it should provide you with the name of the facility where your client is located. Unfortunately, your client may not have been moved from the facility in which he was housed during the district court proceedings when you appointed to the appeal. Unless the facility is a federal prison, your client's location will not appear in the BOP's Inmate Locator system. If this occurs, your best option is to contact prior counsel or, if this is not possible, the United States Marshal from the district where your client was convicted. Either one of those individuals will usually know where your client is being held prior to his transfer into the BOP.

If your client has already been transferred into the BOP, but has not yet been processed into his permanent facility, the BOP Inmate Locator will indicate that your client is "In Transit." In this circumstance, you will be unable to communicate with your client until he reaches his final destination. He may not reach his final destination for two or three weeks. Your only option is to periodically check the Inmate Locator until your client is no longer in transit. Once he arrives at a location where you can communicate with him, you should do so immediately.

8.03: The Initial Client Letter

Once you have located your client, you must send him a letter informing him that you have been appointed to represent him on appeal, along with a copy of the order appointing you. *See* Sample Letter 8. This letter serves a number of important purposes. First, it gives your client notice that you are his new counsel. Second, it informs him of how to reach you, both by letter and by telephone. Third, the letter informs the client of the due dates for the various briefs, and generally outlines how the appellate process works.

In some cases, your client will contact you as soon as he received the appointment order from the Court of Appeals. If he has not contacted you after the order, your initial letter should prompt a telephone call or letter from your client wherein he discusses his case with you and gives you an idea about what his expectations are for the appeal. However, it is important to remember that no two clients are the same. One client may call you immediately upon receiving your letter and another client may not respond in any way.

8.04: The Opinion Letter

Once you have received all of the documents necessary to review the case, performed the necessary research, and reached your conclusions concerning the possible issues for appeal, you should inform your client in writing of the conclusions you have reached concerning his case. Ideally, your client will have been in regular communication throughout your review of the case, giving him a good idea of what you intend to raise and not raise on appeal.

However, sometimes a client will not communicate with you after receiving your initial letter, and your opinion letter will be his first opportunity to learn your opinion of his case. Therefore, it is very important to provide a detailed analysis of your conclusions about his case, including the arguments you have considered but rejected and the arguments you intend to raise on appeal. You should also explain the facts and the law you considered when reaching your conclusions. In some ways, the opinion letter is a preview of the brief. By being detailed about your conclusions about the case, your client will hopefully have a good understanding of what you are doing and why, as well as realize that you have carefully considered his case and have given it the attention it deserves. Although a well-crafted opinion letter can be very time consuming, it may ultimately save you a considerable amount of time by eliminating a need to answer numerous letters or phone calls from a client who does not understand why you are doing what you are doing.

At the end of your opinion letter, it is very important that you request that your client contact you by a date in advance of the brief's due date. You should also state in the letter that if you do not hear back from the client by the date indicated, you will assume that he is in agreement with the analysis set forth in your letter and you will file the brief on the date is due. By including this language in your letter, you ensure that you are not put into the position of having the brief ready to file, while at the same time not knowing if your client wishes you to proceed in the manner indicated in your letter. Of course, even if your client does not contact you by letter or phone within the time period you indicate, you should arrange a telephone call with him to orally relate the opinions expressed in your letter.

8.05: The **Anders** *Letter*

A common opinion letter is one where you have concluded that your client's appeal presents no non-frivolous issues for appeal. *See* Sample Letter 9. As in any other opinion letter, you should state with particularity which issues you considered for appeal and why you concluded that each issue cannot be raised on direct appeal. In this respect, the *Anders* letter is similar to any other opinion letter. However, after your analysis of the issues, you should recommend that your client voluntarily dismiss his appeal because of a lack of appealable issues. You should then explain the process for dismissing the appeal, include a copy of an Acknowledgment Form (*See* Sample 19) for him to sign and return to you, and include a self-addressed, stamped envelope. *See* Section 3.03.

You should then explain that if your client elects not to voluntarily dismiss his appeal, you intend to file an *Anders* brief with the Court of Appeals. You should explain that an *Anders* brief informs the Court of the issues you considered raising on appeal and why you decided that all potential issues were frivolous. Be sure to tell your client that the Court will give him an opportunity to respond to your *Anders* brief.

Finally, be sure to give your client a date certain by which time he should either return the Acknowledgment Form or call you to discuss his case further. If you do not hear back from him by the date indicated in your letter, or if you do discuss his case with him further but your opinion does not change, you will be filing the *Anders* brief on or before the date currently set for the filing of the brief.

No good lawyer enjoys sending a client an *Anders* letter, and no client enjoys receiving one. Thus, as the sample indicates, it is very important to

express a willingness to discuss the case with your client, and your sincere reluctance to reach a conclusion that an appeal has no merit. Although you owe your honest opinion to your client, it is always best to express that opinion in a compassionate and understanding way.

8.06: Status Letters

Because of the difficulty of communicating either in person or by phone with a client in the BOP, it is very important to keep your client informed of the status of his case by letter. Your client should receive a copy of everything you file, everything the government files, and every order entered by the court. Where necessary, you should include a brief cover letter with each document explaining to your client what the enclosed document is and how it affects his case.

Examples of common letters informing your client of pleadings or actions by the Court are as follows:

Grant of Extension of Time - Sample Letter 10
Opening Brief - Sample Letter 11
Government's Brief (No Reply Brief needed) - Sample Letter 12
Government's Brief (Reply Brief needed) - Sample Letter 13
Order Setting Oral Argument - Sample Letter 14
After Oral Argument - Sample Letter 15

8.07: Communicating by Telephone

It is important to take your client's telephone calls when you can. If you inform your clients in your initial letter to them that the calls will not be accepted if you are out of the office or unavailable, they will know that you are not avoiding them when the calls are declined.

It is also important to inform them that all of the telephone calls they place to you from the public phones in the prison are monitored by the Bureau of Prisons. Thus, they should know that it is not a good idea to discuss sensitive matters during such calls. Rather, to have an unmonitored attorney-client telephone call, the call will need to be arranged in advance through your client's BOP counselor or case manager. When you call the facility where your client is located, simply ask to set up an attorney-client telephone call. You can then arrange a date and time when an unmonitored call will be placed. It can sometimes take a few days (or more) to reach the counselor and set up the

telephone call, so it is not a good idea to wait until the last minute to set up a telephone call.

You can find the telephone numbers and addresses for all of the BOP facilities at the following website: http://www.bop.gov/DataSource/execute/dsFacilityLoc.

Finally, you should keep good records of when you spoke to your client on the telephone. You never know when a client may claim that you failed to consult him on a matter or did not communicate with him about the status of his case. Usually, a notation in the file with a summary of your conversation is sufficient to document your conversation. However, if your relationship with the client is strained, it is sometimes a good idea to send a short letter to your client after each telephone conversation documenting the fact that you spoke with him on the phone and summarizing the substance of the conversation.

8.08: Visiting in Person

Because an appellate client can be held anywhere in the country, it is usually expensive, time consuming, and difficult to meet with your client in person. Moreover, because an appeal is based entirely upon the documentary record below, it is usually unnecessary to meet with the client in person. By providing your client with copies of important documents, frequent correspondence, and telephone calls, you can usually easily accomplish everything that needs to be done without traveling to a BOP facility.

If your client is housed nearby, then it is a good idea to visit him in person, if only to establish a rapport with your client and allow each of you to get to know one another. A client who has met you in person may be more willing to accept your advice than one who has never met you before. It is a good idea to visit your client if they are in a facility nearby, although it is not necessary.

Chapter 9:
Anders Briefs

9.01: Introduction

In some cases, there are simply no non-frivolous issues for appeal. One of the most unpleasant tasks an appellate lawyer performs after reaching this conclusion is informing the client that there are no non-frivolous issues that may be appealed and, as a result, recommending that the client dismiss the appeal. In your letter to your client, you will also explain that if the client does not agree to voluntarily dismiss the appeal, you will file an *Anders* brief. Even though *Anders* briefs are based on the premise that all the possible issues are frivolous, the process of drafting an *Anders* brief can be complex and tedious. *Anders* briefs are a necessary evil, however, because attorneys have an ethical duty to avoid making frivolous arguments. Asserting to the Court that an appellant has no issues to present on appeal conflicts with an attorney's duty to advance the interests of his client. Therefore, the United States Supreme Court outlined a procedure to follow in such circumstances.

Specifically, in *Anders v. California*, 386 U.S. 738 (1967), the Court held that when counsel concludes that there are no issues to present on appeal, counsel should move to withdraw. However, this motion must be accompanied by a "brief referring to anything in the record that might arguably support the appeal." *Id.* at 744. "A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses." *Id.* If the Court concludes after a full-examination of the proceedings that the appeal is wholly frivolous, the Court should then grant the motion to withdraw and dismiss the appeal. On the other hand, if it finds any of the legal points arguable on their merits, it must afford the indigent assistance of counsel to argue the appeal. *Id.*

Because of the high number of cases that result in a conviction after a guilty plea and a plea agreement, there is a correspondingly high number of cases where there will be no contested issues to raise on appeal. Accordingly, any lawyer accepting appointments on appeal under the Criminal Justice Act will eventually be faced with the task of filing an *Anders* brief.

9.02: Evaluating the Guilt Phase

Nearly all federal criminal cases result in a guilty plea in the district court. Because an unconditional guilty plea waives all non-jurisdictional defects in the

proceedings, a guilty plea will oftentimes eliminate any issues for appeal concerning your client's guilt. *See United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011).

Before concluding that the guilty plea eliminates any issues, however, you must first decide whether there is any basis for challenging the guilty plea itself. When making this decision, the first question you must answer is whether your client wants to challenge his guilty plea. A defendant may have received some substantial benefit in exchange for his plea and is only dissatisfied with his sentence. He may not wish to make a challenge to his plea, even if some error was made by the district judge when accepting the plea.

Addressing this situation, the Seventh Circuit held that where a defendant does not move to withdraw a guilty plea in the district court, counsel need not address the voluntariness of the plea in an *Anders* brief if, after consultation with the defendant and advisement of any risks associated with the withdrawal of the plea, the defendant indicates that he does not wish to challenge his plea. *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002). Thus, in every case where there is a guilty plea, you must ask the client if he wishes to challenge his guilty plea or if he only wishes to challenge his sentence.

If your client indicates that he does not wish to challenge his guilty plea, then you should not discuss the validity of the plea in an *Anders* brief. Rather, concerning the guilt phase of the case, the sum total of your argument should consist of language similar to the following:

> **I. Any argument challenging Mr. Smith's conviction would be frivolous where he entered into an unconditional, knowing, and voluntary plea of guilty, pursuant to a plea agreement, and did not move to withdraw his guilty plea in the district court and does not seek to challenge his guilty plea on appeal.**
>
> **A. Standard of Review.**
>
> The standard of review applicable to whether a guilty plea is knowing and voluntary is "whether, looking at the totality of the circumstances surrounding the plea, the defendant was informed of his or her rights." *United States v. Kelly*, 337 F.3d 897, 902 (7th Cir. 2003) (quoting *United States v. Mitchell*, 58 F.3d 1221, 1224 (7th Cir. 1995)). In the present case, however, because the defendant failed to

> move to withdraw his guilty plea in the district court below, this Court's review is limited to determining whether "plain error" occurred. *United States v. Sura*, 511 F.3d 654, 658 (7th Cir. 2008) (citing *United States v. Vonn*, 535 U.S. 55, 59 (2002)).
>
> **B. Relevant Legal Principles.**
>
> An unconditional guilty plea generally waives all non-jurisdictional defects in the proceedings. *See United States v. Phillips*, 645 F.3d 859, 862 (7th Cir. 2011). Mr. Smith entered into an unconditional plea in the present case, and the only potential issue would therefore be whether that plea was enforceable as knowing and voluntary.
>
> However, in *United States v. Knox*, this Court noted that where a defendant does not move to withdraw a guilty plea in the district court, counsel need not address the voluntariness of the plea in an *Anders* brief if, after consultation with the defendant and advisement of any risks associated with the withdrawal of the plea, the defendant indicates that she does not wish to challenge her plea on appeal. *United States v. Knox*, 287 F.3d 667, 671 (7th Cir. 2002). Following this Court's direction, counsel consulted Mr. Smith as to whether he wished to seek a withdrawal of his guilty plea. Mr. Smith indicated to counsel that he did not wish to do so. Therefore, whether Mr. Smith's guilty plea was knowing and voluntary is not a potential issue for appeal or consideration in an *Anders* brief.

Language similar to that set forth above in the argument section of your *Anders* brief will adequately inform the Court that the appeal presents no non-frivolous issues on appeal concerning your client's guilt.

If your client informs you that he does wish to challenge his guilty plea, then you must evaluate whether his plea was knowing and voluntary. To do this, you must determine whether the district court adequately complied with Federal Rule of Criminal Procedure 11 when taking the guilty plea.

In most cases, you client will not have moved to withdraw his guilty plea in the district court. Thus, although the standard of review applicable to whether a guilty plea is knowing and voluntary is "whether, looking at the totality of the circumstances surrounding the plea, the defendant was informed of his or her rights." *United States v. Kelly*, 337 F.3d 897, 902 (7th Cir. 2003). Where the

defendant failed to move to withdraw his guilty plea in the district court below, the Court's review is limited to determining whether "plain error" occurred. *United States v. Sura*, 511 F.3d 654, 658 (7th Cir. 2008) (citing *United States v. Vonn*, 535 U.S. 55, 59 (2002)). The Seventh Circuit reviews a defendant's claim of a Rule 11 violation to determine whether: (1) an error has occurred; (2) it was plain; (3) it affected the defendant's substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v. Pineda-Buenaventura*, 622 F.3d 761, 770 (7th Cir. 2010). Applied to an alleged violation of Federal Rule of Criminal Procedure 11, this means the defendant must demonstrate "a reasonable probability that, but for the error, [the defendant] would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). "A defendant must thus satisfy the judgment of the reviewing Court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Dominguez Benitez*, 542 U.S. at 83.

It is fundamental that "a plea of guilty must be intelligent and voluntary to be valid." *Brady v. United States*, 397 U.S. 742, 747 n.4 (1970). In *United States v. Pineda-Buenaventura*, the Seventh Circuit addressed the requirements for a valid plea of guilty under Federal Rule of Criminal Procedure 11. *United States v. Pineda-Buenaventura*, 622 F.3d 761, 770 (7th Cir. 2010). Rule 11 requires that "before the court accepts a plea of guilty or nolo contendere . . . the court must address the defendant personally in open court . . . [and] inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading." *Id*. at 770 (quoting Fed. R. Crim. P. 11(b)(1)(G). It requires that a district court "ensure that [the defendant] understands the law of his crime in relation to the facts of his case." *Id*. (quoting *Vonn*, 535 U.S. at 62). Unless a defendant "fully comprehends the elements of the crime to which he is confessing, his plea cannot be said to have been knowingly and voluntarily entered." *Id*. (quoting *United States v. Fernandez*, 205 F.3d 1020, 1025 (7th Cir. 2000) (quotation and citation omitted)). To determine whether a defendant in fact understands the nature of a charge, the Seventh Circuit takes a totality of the circumstances approach and considers: (1) the complexity of the charge; (2) the defendant's intelligence, age, and education; (3) whether the defendant was represented by counsel; (4) the district judge's inquiry during the plea hearing and the defendant's own statements; and (5) the evidence proffered by the government. *Id*. (citing *Fernandez*, 205 F.3d at 1025).

To comply with the requirements of Rule 11, the district court must advise the defendant of his constitutional rights, the charges against him, the factual basis for the plea, and the minimum and maximum penalty. *Id*. These

safeguards help ensure that the defendant's plea is knowing and voluntary. *Id.* Additionally, subparagraph (b)(3) of Rule 11 requires the district court to satisfy itself that a factual basis exists before entering judgment on a guilty plea, Fed. R. Crim. P. 11(b)(3), *United States v. Rea-Beltran*, 457 F.3d 695, 700 (7th Cir. 2006), but the court is not obligated to engage the defendant in a colloquy to establish the factual basis, *United States v. Arenal*, 500 F.3d 634, 638 (7th Cir. 2007); *United States v. LeDonne*, 21 F.3d 1418, 1424 (7th Cir. 1994). The factual basis need not arise only from the defendant's admissions, however; the Seventh Circuit has held that the Court "may find the factual basis from anything that appears on the record, which includes the government's proffer." *United States v. Rea-Beltran*, 457 F.3d 695, 707 (7th Cir. 2006) (quoting *United States v. Musa*, 946 F.2d 1297, 1303 (7th Cir. 1991)).

Finally, any variance from the procedures required by Rule 11 which does not affect substantial rights "shall be disregarded." Fed. R. Crim. P. 11(h). Moreover, a "violation would be harmless when the defendant already knew the information omitted by the judge - when, for example, his own lawyer had told him about cross-examination, or the written plea agreement had specified the maximum punishment." *United States v. Driver*, 242 F.3d 767, 769 (7th Cir. 2001).

As is obvious from the law governing Rule 11, it is extraordinarily difficult to demonstrate that a guilty plea is not knowing and voluntary, even if the district judge failed to fully comply with Rule 11. Nevertheless, you are obligated to fully evaluate the Rule 11 colloquy and determine if any errors did occur if your client would like to get out of the guilty plea. Even if the error is not sufficient to demonstrate that the plea was not knowing and voluntary, you should note the error and explain why it either fails to meet the plain error standard or was harmless. When evaluating the Rule 11 colloquy, it is useful to refer to a checklist of the various advisements the district judge must make. *See* Sample 39. In your *Anders* brief, discuss every omission by the district court.

The only circumstance where an issue other than the validity of the plea may arise after a guilty plea is where the defendant has entered into a conditional guilty plea. Fed. R. Crim. P. 11(a)(2). A conditional guilty plea occurs when the defendant, through agreement with the government, specifically reserves the right to appeal a specific issue *in writing* prior to entry of the plea. If the defendant raises the issue on appeal and prevails, he then has the right to withdraw the guilty plea. The most typical type of conditional guilty plea is where the defendant reserves the right to challenge on appeal the district court's denial of his motion to suppress evidence.

If your case involves a conditional guilty plea, then, in addition to evaluating the validity of the guilty plea itself, you will need to evaluate the merits of the specific issue reserved for appeal. Although such issues may occasionally lack merit, in many cases, the issue will be non-frivolous and preclude the filing of an *Anders* brief.

Finally, there are very rare occasions where there may be no issues concerning your client's guilt where he was convicted after a jury trial. These cases are rare because typically there are pretrial motions, objections during trial, and errors which may occur during the course of the proceedings. Usually, even if there are no issues that are clear "winners," all of the issues are not frivolous. The exceptions to this rule may be cases where the defendant went to trial simply because he had nothing to lose due to the length of any potential sentence; the case was relatively simple; or where the evidence in the case rested almost entirely on credibility determinations made by the jury. In almost all other circumstances, cases which went to trial will not result in an *Anders* brief.

9.03: Evaluating the Sentencing Phase

After you have determined that the guilt phase of the proceedings presents no non-frivolous issues, the next phase of the case you must evaluate is the sentencing hearing.

A common category of case where there will be no issue concerning the sentence is where, pursuant to a plea agreement, your client waived his right to appeal his sentence. Although such waivers have become less common in recent years in the Seventh Circuit, they still appear in plea agreements from time to time. Upon receiving the plea agreement, the first thing you should do is determine whether a waiver of the right to appeal the sentence is contained therein and the scope of any such waiver.

The court will enforce an appellate waiver if its terms are express and unambiguous and the record shows that the defendant knowingly and voluntarily entered into the agreement. *United States v. Aslan*, 644 F.3d 526, 534 (7th Cir. 2011). When determining whether a written waiver of appeal contained in a plea agreement is "knowing and voluntary," the waiver of appeal must stand or fall with the agreement of which it is a part. *United States v. Sakellarion*, 649 F.3d 634, 639 (7th Cir. 2011). A voluntary and knowing waiver of an appeal is valid and will be enforced. *Id.* at 638. However, keep in mind that the Seventh Circuit does not blindly enforce appeal waivers. *United States v. Smith*, 618 F.3d 657, 664 (7th Cir. 2010). "To determine if a defendant knew and understood the

plea agreement," the Court "must examine the language of the plea agreement itself and also look to the plea colloquy between the defendant and the judge." *Smith*, 618 F.3d at 664 (quoting *United States v. Chapa*, 602 F.3d 865, 868 (7th Cir. 2010).

If the plea agreement does not contain a waiver of the right to appeal the sentence, you must next evaluate the plea agreement to determine if it contains specific stipulations regarding the sentence to which your client agreed. If your client agreed to a specific sentence or agreed to specific guideline enhancements, he or she will most likely have waived his or her right to challenge those aspects of his or her sentence on appeal, precluding appellate review where the district judge imposed a sentence consistent with the agreement. The rule of thumb for evaluating such provisions in a plea agreement which affect the sentence is that the defendant's agreement will waive his right to appeal a sentence imposed in a manner consistent with the agreement. However, if there is a gross error in these guideline calculations, or any other plain error for which the government could not proffer a strategic reason for the proposition that the issue may not waived just by its presence in the plea agreement. *See United States v. Jaimes-Jaimes*, 406 F.3d 845 (7th Cir. 2005)

Some plea agreements will stipulate to some sentencing issues, while noting a disagreement among the parties on other issues. In such cases, there may be an issue regarding the contested sentencing issues. If the district judge adopts the position of the government at sentencing (or another position different from the defendant's), then that issue is usually preserved for purposes of appeal provided the defendant has lodged an objection prior to or at sentencing or defense counsel does not otherwise waive the issue anything said during the sentencing hearing. Of course, the issue may still lack merit depending on the strength of the defendant's objection and the district court's rationale, but the issue will at least not have been waived for purposes of appeal. Rather, you must evaluate the merits of the issue and determine whether it provides any basis for appeal.

Where a defendant enters into a plea without a plea agreement, or the plea agreement contains no stipulations regarding sentencing issues, you must determine whether the defendant made any objections to the calculation of his sentence. If the defendant filed objections to the PSR or objected at the sentencing hearing, those issues will be preserved for appellate review. Where the district court decided contested matters at sentencing, it is less likely (but by no means certain) that there will be no issues for appeal. However, each preserved issue will need to be evaluated on its merits to determine its viability

on appeal.

Even if your client made no objections to the guideline calculations, or the objections he did make present no non-frivolous issues for appeal, you must still evaluate the sentence carefully to determine if any "plain errors" occurred to which your client did not object. To do so, you must independently evaluate every aspect of the sentence, performing the guideline calculations yourself and ensuring compliance with any statutory sentencing factors. If you discover that an error has been made in calculating the sentence to which there was no objection, you must then determine whether the defendant waived or forfeited his right to raise the issue on appeal.

Specifically, for challenges not made in the district court, the applicable standard of review depends upon whether the failure to raise the issue constituted a waiver or a forfeiture. *See Jaimes-Jaimes*, 406 F.3d at 848. Where waiver is accomplished by intent, forfeiture comes about through neglect. *United States v. Charles*, 476 F.3d 492, 495 (7th Cir. 2007). Waiver extinguishes the error and precludes appellate review, but forfeiture, instead of precluding all appellate review, permits plain error review. *Id*. For a forfeited issue, therefore, there must be an "error" that is "plain" and that "affect[s] substantial rights." *United States v. Sawyer*, 521 F.3d 792, 796 (7th Cir. 2008). If all three conditions are met, this Court may exercise its discretion only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Sawyer*, 521 F.3d at 796.

Despite this blackletter law, the line between forfeiture and waiver is very murky. As a general rule, if the issue was never discussed during the proceedings and missed by the parties, the judge, and probation, a forfeiture is likely to occur; it is difficult to intentionally relinquish the right to challenge an issue about which one was never aware. On the other hand, if the issue was discussed in some manner during the proceedings such that the defendant should have at least been on notice that a potential issue existed, a waiver has likely occurred. Finally, the more obvious the error, the more likely the failure to make a challenge below came about through neglect. See *United States v. Anderson*, 604 F.3d 997, 1001-02 (7th Cir. 2010). When in doubt about a strong issue which was not raised below, argue that a forfeiture occurred. Thus, do not assume that an *Anders* brief is required simply because an issue was not raised in the district court.

Finally, even if the guidelines were properly calculated, the sentence is within the statutory maximum and minimums, and no other sentencing calculation errors occurred, the "reasonableness" of the sentence is always a

potential issue at sentencing.

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court explained that sentencing judges must be guided by the factors in 18 U.S.C. § 3553(a), including the applicable advisory guideline range. The Court of Appeals begins the analysis of the sentencing by insuring that the district court did not commit any significant procedural error, "such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553 (a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence - including an explanation for any deviation from the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007). Nevertheless, the district court is not required to discuss every argument made by a litigant. *United States v. Cunningham*, 429 F.3d 673, 678 (7th Cir. 2005). "[A]rguments clearly without merit can, and for the sake of judicial economy should, be passed over in silence." *Id.* at 678.

Should the district court's sentencing decision be procedurally sound, the Court of Appeals then considers the substantive reasonableness of the sentence under an abuse of discretion standard. *Gall*, 552 U.S. at 51. Moreover, in the Seventh Circuit, a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness. *United States v. Durham*, 645 F.3d 883, 897 (7th Cir. 2011) (citing *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)).

If the defendant did not argue in the district court that the § 3553(a) factors in his case entitled him to a sentence below the guideline range and the district judge sentenced him to a within the range sentence, then there is no basis for arguing that the sentence was unreasonable.

If the defendant did argue for a below the guidelines sentence based on § 3553(a) factors, then you must evaluate whether the district judge adequately considered the argument before rejecting it. So long as the district court considered a non-frivolous sentencing factor, gave an adequate explanation for why it was insufficient to warrant a non-guideline sentence, and imposed a within the range sentence, it will be almost impossible to argue the sentence was unreasonable.

Indeed, you will almost never have an issue regarding the reasonableness of the sentence unless your client was sentenced above the guideline range. In such cases, depending on how well the judge explained the basis for the variance, you may have at least some basis for arguing that the sentence was unreasonable,

thereby precluding the filing of an *Anders* brief.

9.04: Informing the Client

Once you have thoroughly evaluated the case and concluded that it presents no non-frivolous issues for appeal, you must inform your client of your conclusions. You should always do so by letter, followed by a telephone call. As discussed in Section 8.05, in this letter you should state with particularity which issues you considered for appeal and why you concluded that each issue cannot be raised on direct appeal. *See* Sample Letter 9. After your analysis of the issues, you should recommend that your client voluntarily dismiss his appeal because of a lack of appealable issues. You should then explain the process for dismissing the appeal, include a copy of an Acknowledgment Form (*See* Sample 19) for him to sign and return to you, and include a self-addressed, stamped envelope.

You should explain that if your client elects not to voluntarily dismiss his appeal, you intend to file an *Anders* brief with the Court of Appeals. Explain that an *Anders* brief informs the Court of the issues you considered raising on appeal and why you decided that all potential issues were frivolous. Be sure to tell your client that he or she will have an opportunity to respond to your *Anders* brief.

Finally, be sure to give your client a date certain by which time he or she should either return the Acknowledgment Form or call you to discuss his case further. Also note that if you do not hear back from him or her by the date indicated in your letter, or if you do discuss his or her case with him further but your opinion does not change, you will be filing the *Anders* brief on or before the date currently set for the filing of the brief.

9.05: Content and Format

If your client does not elect to voluntarily dismiss his appeal, then you must file an *Anders* brief with the Court. This brief is identical to a merits brief, with a few exceptions.

First, instead of titled as "BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT [NAME]," your brief should have the title

> BRIEF IN SUPPORT OF MOTION TO WITHDRAW AS DEFENDANT'S APPOINTED APPELLATE COUNSEL PURSUANT TO *ANDERS V. CALIFORNIA*, 386 U.S. 738 (1967) AND SHORT APPENDIX.

Second, you should omit the "ORAL ARGUMENT REQUESTED" notation of the title page of your brief.

Third, you should include a section entitled "PREFACE" immediately after the "Table of Authorities" section. In this preface you explain to the Court that you are filing the brief in compliance with *Anders v. California*, that you have reviewed all of the relevant proceedings, and that you have concluded there exists no non-frivolous issues for appeal. Typical language for the preface would be as follows:

> After carefully examining the record on appeal and researching the relevant law, counsel has concluded that the appeal presents no legally non-frivolous questions. In reaching this conclusion, counsel has thoroughly scrutinized the record, including the indictment, the plea agreement, a transcript of the Rule 11 proceeding, and a transcript of the sentencing hearing for any arguable violation of the United States Constitution, the applicable federal statutes, the Federal Rules of Criminal Procedure, or the United States Sentencing Guidelines. Because counsel has concluded that no non-frivolous issues are presented by this appeal, he requests leave to withdraw as counsel and submits this brief in accordance with *Anders v. California*, 386 U.S. 738 (1967).

Fourth, your issues presented for review should begin with the phrase, "Whether any argument challenging the Appellant's conviction [or sentence] would be frivolous where . . ." A typical statement of the issues presented for review in an *Anders* brief is as follows:

> I. Whether any argument challenging the Appellant's conviction would be frivolous where he entered into an unconditional, knowing, and voluntary plea of guilty, pursuant to a plea agreement, and did not move to withdraw his guilty plea in the district court and does not seek to challenge his guilty plea on appeal?
>
> II. Whether any argument challenging the Appellant's sentence would be frivolous where his sentence was not imposed in violation of the law, was not the result of an incorrect application of the Guidelines, and was not unreasonable?

Fifth, your "Statement of Facts" section should provide a thorough history

of the proceedings in the case. If your client wishes to challenge the validity of his guilty plea, you should provide a detailed discussion of the provisions in the plea agreement and a discussion of the Rule 11 advisements given at the change of plea hearing. However, if the defendant does *not* want to challenge his guilty plea, then you should not discuss the Rule 11 advisements. Rather, simply state that the appellant pled guilty and after conducting a Rule 11 hearing, the district court accepted the plea. Concerning the sentencing phase, you should set out all of the relevant statutory and guideline sentencing provisions which applied to your clients case, explaining whether any of the provisions were agreed to in the plea agreement; whether any objections were made to the calculations, the positions of the parties, and the district court's resolution of the question. Finally, discuss any arguments made for a non-guidelines sentence, the basis for those arguments, and the manner in which the district court resolved the issues.

Sixth, the argument section is much like the argument section of a merits brief. Set forth the standard of review and the applicable law at the beginning of each argument. Then, in the analysis section, explain why the application of the law in your case demonstrates that the issue is frivolous.

Finally, in the conclusion, you should request that the Court allow you to withdraw as counsel on appeal. Typical language for the conclusion in an *Anders* brief is:

> For the reasons stated herein, undersigned counsel respectfully prays that this Honorable Court allow the Defendant-Appellant's counsel to withdraw.

In all other respects, the filing and format requirements for an *Anders* brief are the same as those for a merits brief. Specifically, the cover should be blue, and, after the brief has been accepted, you must file an original and ten copies with the Court, and include an appendix.

9.06: The Motion to Withdraw

At the same time you file your *Anders* brief, you must file a separate "Motion to Withdraw." The standard form for this motion is set forth in Sample 40. Note that you are required to set forth in the body of the motion your client's current address.

9.07: Disposition

Once you have filed your *Anders* brief and served a copy on your client and the government, the Court of Appeals will enter an order providing notice to the Appellant that you have filed an *Anders* brief and giving him an opportunity to respond to your motion by a certain date. Regardless of whether the Appellant actually files a response, you will not be allowed to file a reply to the appellant's response. Once you file the *Anders* brief, the government is relieved of its obligation to file a brief.

If the Court concludes that your analysis of the case is correct and there are no non-frivolous issues to raise on appeal, it will issue an unpublished order discussing the issues addressed in your *Anders* brief, grant your motion to withdraw, and dismiss the appeal. Your representation of the Appellant is then concluded.

If, however, the Court determines that a non-frivolous issue is presented by the case (which occasionally happens), the Court will do one of two things. It will either order you to file a merits brief on the particular issue it has identified, or it will grant your motion to withdraw but appoint new counsel to brief the issue. Keep in mind that simply because the Court has identified a non-frivolous issue does not mean that the issue is a winner. Very often the Court will ultimately reject the merits of an issue it identifies and requires to be briefed. In other words, the Court's identification of an issue means its not frivolous, but not necessarily meritorious.

Chapter 10:
CJA Vouchers

10.01: Introduction

The process of being paid for your work on appeal pursuant to the CJA is somewhat similar to the process in the district court. However, the following chapter highlights some of the difficulties and common questions about vouchers on appeal. For additional information regarding becoming a CJA attorney or vouchers, visit the Seventh Circuit's website for CJA counsel and use the CJA forms provided: http://www.ca7.uscourts.gov/cja/cja.htm

10.02: How Much Can I Spend?

The Seventh Circuit's CJA Plan allows for up to $6,900 in fees and expenses for attorneys litigating an appeal. This case maximum applies from the date you are appointed on appeal until the issuance of a decision from the last court in which relief was sought. Please note that the last court in which relief is sought may be the United States Supreme Court if, after consultation with your client, you determine that there are reasonable grounds for filing a petition for writ of *certiorari* and your client directs you to file one. An attorney's hourly rate is dictated by statute and cannot exceed $125 an hour as of January 1, 2010.

10.03: What Can I Spend It On?

10.03.01: Hours Invested

You should keep track of all of the hours you spend working on the appeal because your time is valuable and you will be paid for the hours invested in the case. When you tabulate the total number of hours spent working on the appeal, you must submit the final calculation in hours and tenths of hours *only*. The Court will not accept a voucher with other decimals such as 2.25 hours. When tracking your time, you should also make sure to separate each activity into either in-court or out-of-court time. In-court time at the appellate level is limited to oral argument, in contrast to the district court which can include a variety of court appearances including initial appearances, detention hearings, motion hearings, trial, and sentencing hearings.

10.03.02: Transcripts

One of the most important things you will need on appeal is a copy of all of the relevant transcripts from the district court. As this Handbook notes, you should order these transcripts as soon as possible due to the amount of time it generally takes for court reporters to respond to an order. When ordering the transcripts, you should fill out the CJA-24 form. *See* Sample 14 Each district court has its own procedure for the ordering of transcripts. Some, like the Northern District of Illinois, have an online form that can be filled out and transmitted to the court reporter directly by the Clerk's Office. Others, like the Western District of Wisconsin, require a phone call to the Clerk's Office to place an order. As soon as you are appointed, visit the website for the district court to find out specifically what process must be followed to obtain your transcripts.

Do not sign the Attorney Certification in Box 22 until you actually receive the transcripts. Occasionally, a court reporter will ask you to sign the Certification in advance of receiving your transcripts because it expedites payment for their services. However, this Certification is a representation to the Court that you have received the transcripts and may cause problems later if you need to move for an extension of time but have already acknowledged receipt of the necessary documents.

10.03.03: Travel Expenses

Generally, you may submit a voucher claiming mileage expenses incurred for traveling to argue in the Seventh Circuit in Chicago, Illinois. The reimbursement rate for mileage is currently 55.5 cents per mile. If you must fly to Chicago for oral argument, make arrangements through the National Travel Service, which offers government travel rates at substantial reductions from ordinary commercial rates.

Occasionally, you may feel that it is important to meet with your client in person. With BOP facilities spread across the country, an in-person meeting may require a substantial amount of travel. In the event that you intend to travel for the purposes of meeting a client you are representing on appeal, you must submit a Motion for Approval of Travel Expenses prior to incurring the cost. Do *not* incur the expense and submit a voucher at a later time because it may be denied. Once approved by the Court, you will receive instructions on making arrangements through the National Travel Service.

10.03.04: Miscellaneous Expenses

Any expense over $50 needs to be claimed with a receipt. You may request

reimbursement for additional expenses such as computer-assisted legal research, postage, telephone and copying charges, and long-distance telephone calls. For computer-assisted legal research, you may request reimbursement up to $500. If the amount exceeds $500, you must include a brief memorandum justifying the expense. For copying charges, you will be reimbursed at a reasonable rate around $0.15 per page and your request must be supported with an itemized statement containing the date, number of copies and cost per page. The Court is flexible on the amount paid for copying and generally will reimburse you for rates charged by the average copying service. You will not be reimbursed for the cost of printing briefs although the cost of photocopying is reimbursed.

10.03.05: Impermissible Expenditures

The CJA Plan does not authorize expenditures on the following things: general office overhead (such as rent, telephone service, secretarial expense); parking fines or fees for traffic violations; personal automobile expenses (such as insurance).

10.04: When Do I Submit My Voucher?

When you are appointed on an appeal, you should receive a CJA-20 form from the Clerk's Office in the Seventh Circuit with the top portion (Boxes 1 through 14) already filled in. The remaining boxes must be filled in by you at the conclusion of the case. All CJA vouchers must be submitted within 45 days of the final disposition of your case. Unless there are extraordinary circumstances, compensation should be received from the Court within 30 days after submission.

Completed vouchers should be mailed, along with appropriate documentation including a spreadsheet detailing your in-court and out-of-court time along with copies of your billing records, to the Clerk's Office, Seventh Circuit Court of Appeals, Room 2722, 219 South Dearborn Street, Chicago, Illinois, 60604.

If an appeal is taking a long time to resolve and you require compensation at some point prior to the final resolution of the case, you can submit an Interim Fee Voucher by filling in Boxes 15 through 22 and selecting "Interim Payment" in Box 22. However, the Seventh Circuit rarely grants requests for interim fees.

For more information on CJA vouchers, visit the National CJA Voucher Reference Tool at http://www.uscourts.gov/uscourts/cjaort/index.html.

Sample 1: Notice of Non-Involvement

[HEADING]

NOTICE OF NON-INVOLVEMENT

COMES NOW undersigned counsel [ATTORNEY'S NAME] and notifies the Court of counsel's non-involvement in the above-captioned case. In support thereof, counsel states as follows:

1. On July 29, 2012, counsel received notice from this Court of the pending appellate case involving the Defendant-Appellant [NAME].

2. This Court's Notice of Docketing Appeal dated July 26, 2012, assumed that undersigned counsel represented the Defendant-Appellant in the district court.

3. The district court granted the Defendant-Appellant's motion to proceed *pro se* on January 3, 2010. At the same time, the district court directed undersigned counsel to act as "stand-by" counsel for the Defendant-Appellant.

4. Seventh Circuit Rule 51(a) requires trial counsel in a criminal case to continue to represent a defendant on appeal. It states: "Trial counsel in a criminal case, whether retained or appointed by the district court, is responsible for the continued representation of the client desiring to appeal unless specifically relieved by the Court of Appeals upon a motion to withdraw."

5. Because the Defendant-Appellant proceeded *pro se* in the district court and continues to do so on appeal, undersigned counsel has not and does not now represent the Defendant-Appellant.

WHEREFORE, counsel respectfully notifies the Court of counsel's non-involvement in the above-captioned case.

[CLOSING]

Sample 2: Motion to Proceed on Appeal *In Forma Pauperis*

[HEADING]

MOTION TO PROCEED ON APPEAL
IN FORMA PAUPERIS

COMES NOW the Defendant, by his attorney, motioning this Court for leave to proceed on appeal *in forma pauperis* and in support therefore states:

1. On [DATE], the Seventh Circuit Court of Appeals appointed undersigned counsel to represent the Defendant [NAME] for the limited purpose of seeking leave in the district court to proceed on appeal *in forma pauperis*, a copy of the order being attached hereto.

2. Also attached hereto is the signed affidavit of [NAME] pertaining to his financial status and a copy of his account balance from his prison commissary account.

3. Based on [NAME]'s affidavit in support of this motion, it appears that his financial status is such that this Court should grant him leave to appeal *in forma pauperis*.

4. Because counsel has been appointed by the Seventh Circuit Court of Appeals solely for the purpose of obtaining *in forma pauperis* status in this Court, counsel does not have a copy of the record on appeal, the Presentence Investigation Report, or the transcripts of the proceedings in this Court. Accordingly, counsel cannot determine what, if any, issues will be raised on appeal.

WHEREFORE, Defendant [NAME] requests leave of this Court to proceed on appeal *in forma pauperis.*

[CLOSING]

Sample 3: Affidavit in Support of *In Forma Pauperis Status*

AFFIDAVIT IN SUPPORT OF *IN FORMA PAUPERIS* STATUS

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. §1746; 18 U.S.C. §1621.)

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount		Amount expected next month during the past 12 months	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (Such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$____	$_____
Gifts	$____	$_____	$____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$____	$_____

Unemployment payments	$____	$_____	$____	$_____
Public-assistance (such as welfare)	$____	$_____	$____	$_____
Other (specify):_____	$____	$_____	$____	$_____
Total monthly income	$____	$_____	$____	$_____

2. List your employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.

Employer	Address	Dates of Employment	Gross monthly pay

3. List your spouse's employment history, most recent employer first. (Gross monthly pay is before taxes or other deductions.

Employer	Address	Dates of Employment	Gross monthly pay

4. How much cash do you have? $_____. Below, state any money you have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	(Value)	Other real estate	(Value)	Motor vehicle #1	(Value)

_____	_____	Make & year _____
_____	_____	Model: _____
_____	_____	Registration # _____

Motor Vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year: _____	_____	_____
Model: _____	_____	_____
Registration #: _____	_____	_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you/your spouse	Amount owed to you	Amount owed to your spouse
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (including lot rented for mobile home)	$_____	$_____
Are real estate taxes included? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____

Laundry and dry-cleaning	$_____	$_____ –
Medical and dental expenses	$_____	$_____ –
Transportation (not including motor vehicles expenses)	$_____	$_____ –
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____ –
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____ –
Homeowner's or renter's	$_____	$_____ –
Life	$_____	$_____ –
Health	$_____	$_____ –
Motor vehicle	$_____	$_____ –
Other_____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify):_____	$_____	$_____ –
Installment payments	$_____	$_____ –
Motor vehicle	$_____	$_____ –
Credit card (name): _____	$_____	$_____ –
Department store (name): _____	$_____	$_____ –
Other: _____	$_____	$_____ –
Alimony, maintenance, and support paid to others	$_____	$_____ –
Regular expenses for operation of business, profession, or farm (attach detail)	$_____	$_____ –
Other (specify): _____	$_____	$_____

Total monthly expenses	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

[ ] Yes [ ] No If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form?

[ ] Yes [ ] No. If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:

_____

11. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

[ ] Yes [ ] No. If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal. Because I am incarcerated I have no money coming in.

13. State the address of your legal residence.

_____

Your daytime phone number: (____) _____

Your age:_____ Years of schooling: _____

Your date of birth: _____

Your social security number: _____

Further affiant sayeth naught.

_____
Affiant

Subscribed and sworn to before me this _____ day of _____, 2012.

_____
Notary Public

Sample 4: Status Report

[HEADING]

STATUS REPORT

COMES NOW Defendant-Appellant [NAME], by his attorney, presenting this Status Report pursuant to this Court's order, and states as follows:

1. On [DATE], this Court appointed undersigned counsel to represent [NAME] in the district court for purposes of seeking leave to proceed on appeal *in forma pauperis* ("IFP,") and directed counsel to file a status report regarding the status of the IFP motion in the district court.

2. Since appointment counsel has contacted [NAME], received the affidavit in support of the IFP motion from him, and filed a Motion for Permission to Appeal *in Forma Pauperis* in the district court on [DATE].

3. The district court now has that motion pending before it.

4. Accordingly, counsel requests leave to file another status report on or before [DATE].

5. If the district court rules on the IFP motion before [DATE], then counsel will immediately file a status report with this Court.

WHEREFORE, Defendant-Appellant [NAME] requests that this Court enter an order directing counsel to file a further status report on or before [DATE].

[CLOSING]

Sample 5: Notification of *IFP* Status

[HEADING]

NOTIFICATION OF
***IN FORMA PAUPERIS* STATUS**

COMES NOW Defendant-Appellant [NAME], by his attorney, presenting this Status Report pursuant to this Court's Order, and states as follows:

1. On [DATE], this Court appointed undersigned counsel to represent [NAME] in the district court for purpose of seeking leave to proceed on appeal *in forma pauperis* ("IFP") and directed counsel to file a status report by [DATE].

2. Since appointment counsel has contacted [NAME], sent him a financial affidavit for, received from him the completed affidavit in support of the IFP motion, and filed a Motion for Permission to Appeal *in Forma Pauperis* in the district court on [DATE].

3. On [DATE], the district court granted [NAME]'s motion for IFP status, a copy of the order being attached hereto.

WHEREFORE, Defendant-Appellant [NAME] requests that this Court enter an order appointing current counsel as counsel on appeal pursuant to the provisions of the Criminal Justice Act and set a schedule for briefing in this cause.

[CLOSING]

Sample 6: Motion to Withdraw and Suspend Briefing

[HEADING]

MOTION TO WITHDRAW AND SUSPEND BRIEFING

COMES NOW counsel for Defendant-Appellant [NAME], moving to withdraw as counsel on appeal, and in support thereof states as follows:

1. Undersigned counsel represented the Defendant-Appellant in the district court pursuant to the provisions of the Criminal Justice Act.

2. On [DATE], the Defendant-Appellant was sentenced in the district court, and undersigned counsel filed a Notice of Appeal in this cause that same day.

3. Undersigned counsel does not ordinarily litigate cases on appeal in the Seventh Circuit Court of Appeals.

4. The interests of the Defendant-Appellant would be best served by allowing undersigned counsel to withdraw as counsel on appeal and appointment of new appellate counsel.

5. To allow for the Court to consider this motion and find new appellate counsel, should this Court grant undersigned counsel's motion to withdraw, briefing in this case should be suspended.

WHEREFORE, counsel requests that this Court allow counsel to withdraw as counsel on appeal, appoint new counsel for the Defendant-Appellant, and suspend briefing while this motion is pending.

[CLOSING]

Sample 7: Motion to Extend Time for Filing Notice of Appeal

[HEADING]

MOTION TO EXTEND TIME FOR FILING NOTICE OF APPEAL

COMES NOW the Defendant [NAME], by his attorney motioning this Court for an order extending the time to file his notice of appeal under Fed. R. App. P. 4(b)(4) and in support therefore states:

1. Pursuant to Federal Rule of Appellate Procedure 4(b)(4), a district court may upon finding either excusable neglect or good cause extend for up to 30 days the time for filing a notice of appeal.

2. Defendant respectfully requests an extension of ____ days in which to file his notice of appeal.

3. The Judgment in a Criminal Case was entered in this case on [DATE] and Defendant's Notice of Appeal was filed on [DATE].

4. Defendant's trial counsel [or Defendant *pro se*] filed the notice of appeal _____ days after the 14 day limit provided for in Federal Rule of Appellate Procedure 4. He did not file a motion for permission to file a late notice of appeal or otherwise explain why the notice was late. However, he dated the notice of appeal [DATE] and the certificate of service is dated [DATE].

5. Defendant states that on [DATE], he asked [trial counsel] to file a notice of appeal on his behalf. (Exhibit A, affidavit of Defendant.)

6. Defendant further states that when he found out that his notice of appeal was not filed until [DATE], he tried to contact his former trial counsel to ask him why it was not filed sooner. However, former trial counsel did not respond to any attempts to contact him.

7. Undersigned counsel attempted to contact prior counsel, but has not yet been able to do so. (Exhibit B, Affidavit of Undersigned Counsel.)

8. In determining the filing date of a notice of appeal filed by an

incarcerated person, the "prisoner mailbox rule provides that a notice of appeal submitted by a prisoner is deemed filed on the date he deposits the notice in the prison mail system, and not on the date when the Clerk of Court receives it. Fed. R. App. P. 4(c)(1). Rule 4(c)(1) specifically states that "[i]f an inmate confined in an institution files a notice of appeal . . ., the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing." *Ingram v. Jones,* 507 F.3d 640, 643 (7th Cir. 2007) (citing *Houston v. Lack,* 487 U.S. 266, 275-76 (1988)).

WHEREFORE, Defendant [NAME] respectfully requests that his notice of appeal be construed as a motion for extension of time in which to file such notice and that this Court grant an order permitting him _____ additional days in which to file his notice of appeal.

[CLOSING]

Sample 8: Notice of Appeal

[HEADING]

NOTICE OF APPEAL

Notice is hereby given that the Defendant, [NAME], appeals to the United States Court of Appeals for the Seventh Circuit from the conviction, judgment, and order of the district court imposed on [DATE] and entered on [DATE], sentencing the Defendant to a term of imprisonment of [TERM OF IMPRISONMENT] in the United States Bureau of Prisons for the offense of [name and statutory reference to offense(s) of conviction].

[CLOSING]

Sample 9: Docketing Statement

[HEADING]

CIRCUIT RULE 3(c) DOCKETING STATEMENT

COMES NOW Defendant-Appellant [NAME], by his attorney, and pursuant to Circuit Rule 3(c), submits the following docketing statement:

1. The jurisdiction of the United States District Court for the _____ District of _____, _____ Division, was founded upon 18 U.S.C. § 3231. A grand jury sitting in the aforementioned district charged the Appellant by indictment with [name of offense], in violation of [statutory citation].

2. The jurisdiction of the United States Court of Appeals for the Seventh Circuit is founded upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and is based upon the following particulars:

i. Date of entry sought to be reviewed: Judgment in a Criminal Case entered on [DATE];
ii. Filing date of motion for a new trial: [DATE or n/a]
iii. Disposition of motion and date of entry: [disposition and date or n/a]
iv. Filing date of notice of appeal: [DATE].

[CONCLUSION]

Sample 10: Disclosure Statement

[HEADING]

DISCLOSURE STATEMENT (motion format)

The undersigned counsel for Defendant-Appellant furnishes the following list in compliance with Federal Rule of Appellate Procedure 26.1:

1. The full name of every party or amicus the attorney represents in the case: [CLIENT NAME].

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates have appeared for a party in the district court or are expected to appear for the party in the case: [YOUR NAME AND LAW FIRM]; and the following attorney(s) in the district court: [ALL PREVIOUS LAWYERS' NAMES AND FIRMS WHO HAVE APPEARED PREVIOUSLY IN DISTRICT AND APPELLATE COURTS].

Dated: [DATE]

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT (form format)

Appellate Court No: _____

Short Caption: United States v. [NAME]

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

✓ PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

[NAME]

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

[ATTORNEYS AND FIRMS]

(3) If the party or amicus is a corporation: n/a

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

==========

Attorney's Signature: s/ _____ Date: A ugust 15, 2012

Attorney's Printed Name: _____

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ___

Address: 401 Main Street, Suite 1500, Peoria, IL 61602

Phone Number: (309) 671-7891

Fax Number: (309) 671-7898

E-Mail Address: _____

rev. 01/08 AK

Sample 11: Motion to Supplement the Record on Appeal

[HEADING]

MOTION TO SUPPLEMENT THE RECORD ON APPEAL

COMES NOW Defendant [NAME] through his counsel and moves this Honorable Court to supplement the record on appeal and states as follows:

1. The Defendant has appealed the final judgment of conviction and sentence imposed against him by this Court on [DATE].

2. Fed. R. App. P. 10(a) states that the record on appeal is to contain, "the original papers and exhibits filed in the district court."

3. One of the arguments the Defendant may raise on appeal is _____.

4. [Details on how document was introduced or discussed at the district court level.]

5. Counsel has obtained _____ from the United States Attorney's office and copies thereof are included with this motion.

6. The Defendant wishes to supplement the record on appeal, so the additional evidence that was considered by the District Court at sentencing will be available for review by the Court of Appeals.

WHEREFORE, Defendant respectfully requests that this Court issue an order directing the clerk to supplement the record on appeal with _____ and _____ that were introduced at his sentencing hearing.

[CLOSING]

Sample 12: Motion for Copies of Sealed Documents

[HEADING]

MOTION FOR COPIES OF SEALED DOCUMENTS

COMES NOW the Defendant by his attorneys and moves this Court for the entry of an Order allowing appellate counsel to receive copies of the sealed documents filed in the above captioned case. In support of this motion, counsel states that:

1. On [DATE], the United States Court of Appeals for the Seventh Circuit appointed undersigned counsel to represent the Defendant on appeal from his criminal conviction and sentence in this Court.

2. Undersigned counsel was not defense counsel during the District Court proceedings in this matter.

3. Undersigned counsel received the District Court record on [DATE]; however, several sealed documents entered at trial were not included in the record.

4. From counsel's preliminary review of the materials received as part of the record, this case appears to be particularly complex in nature and any issues raised on appeal may have significant consequences for the Defendant and many other parties.

5. Therefore, it is extremely important counsel has a full understanding of all matters which occurred in the district court in order to completely and accurately research potential issues for appeal.

6. As counsel is unaware of the specific contents of the requested documents, counsel is unable to inform the Court of the potential issues to which these documents may pertain on appeal.

7. Therefore, counsel requests copies of the following documents currently filed under seal with the District Court: [LIST DOCKET NUMBER AND NAME OF ITEMS].

8. Counsel does not wish to have the requested documents unsealed and does not believe it would be in the Defendant's best interests to unseal any of the sealed documents at this time.

WHEREFORE, Defendant respectfully requests the Court provide copies of the specified sealed documents and trial exhibits to undersigned counsel.

[CLOSING]

Sample 13: Transcript Information Sheet

SEVENTH CIRCUIT TRANSCRIPT INFORMATION SHEET

PART I – Must be completed by party or party's attorney pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure and Rule 11(a) of the Circuit Rules. The appellant must file this form with the court reporter within 10 days of filing the notice of appeal, whether transcript is being ordered or not. (FRAP 10(b)(1)) "Satisfactory arrangements with the court reporter for payment of the costs of the transcripts" must also be made at that time. (FRAP 10(b)(4)) (Note: Appellees as well as appellants are expected to use this form when ordering transcripts.)

Short Title	District	D.C. Docket No.
	District Judge	Court Reporter

☐ I am ordering transcript.
☐ I am not ordering transcript, because:

☐ The transcript has been prepared.

Sign Below and return original and one copy to court reporter. Distribute remaining copies to Clerk of the District Court and opposing party, retaining one copy for yourself

Indicate proceedings for which transcript is required. Dates must be provided:

Date(s)

☐ Pre-Trial Proceedings. Specify: _____ _____

☐ Voir Dire _____

☐ Trial or Hearing. Specify: _____ _____

☐ Opening Statement _____

☐ Instruction Conference _____

☐ Closing Statements _____

☐ Court Instructions _____

☐ Post-Trial Proceedings Specify: _____ _____

☐ Sentencing _____

☐ Other Proceedings Specify: _____ _____

Method of Payment: ☐ Cash ☐ Check or Money Order ☐ C.J.A. Voucher
Status of Payment: ☐ Full Payment ☐ Partial Payment ☐ No Payment Yet

Signature: _____ Telephone No. _____
Address: _____
_____ Date: _____

PART II – Must be completed by Court Reporter pursuant to Rule 11(b) of the Federal Rules of Appellate Procedure. By signing this Part II, the Court Reporter certifies that *satisfactory arrangements for payment* have been made.

U.S.C.A. Docket No.	Date Order Received	Estimated Completion Date	Estimated Length

Signature of Court Reporter: _____ Date: _____

NOTICE: The Judicial Conference of the United States, by its resolution of March 11, 1982, has provided that a penalty of 10 percent must apply, unless a waiver is granted by the Court of Appeals' Clerk, when a "transcript of a case on appeal is not delivered within 30 days of the date ordered and payment received therefor." The penalty is 20 percent for transcript not delivered within 60 days.

Sample 14: CJA 24 Form

CJA 24 AUTHORIZATION AND VOUCHER FOR PAYMENT OF TRANSCRIPT (Rev. 5/99)

1. CIR./DIST./ DIV. CODE	2. PERSON REPRESENTED	VOUCHER NUMBER
3. MAG. DKT./DEF. NUMBER	4. DIST. DKT./DEF. NUMBER	5. APPEALS DKT./DEF. NUMBER	6. OTHER DKT. NUMBER
7. IN CASE/MATTER OF *(Case Name)*	8. PAYMENT CATEGORY ☐ Felony ☐ Petty Offense ☐ Misdemeanor ☐ Other ☐ Appeal	9. TYPE PERSON REPRESENTED ☐ Adult Defendant ☐ Appellant ☐ Juvenile Defendant ☐ Appellee ☐ Other	10. REPRESENTATION TYPE *(See Instructions)*

11. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) *If more than one offense, list (up to five) major offenses charged, according to severity of offense.*

REQUEST AND AUTHORIZATION FOR TRANSCRIPT

12. PROCEEDING IN WHICH TRANSCRIPT IS TO BE USED *(Describe briefly)*

13. PROCEEDING TO BE TRANSCRIBED *(Describe specifically). NOTE: The trial transcripts are not to include prosecution opening statement, defense opening statement, prosecution argument, defense argument, prosecution rebuttal, voir dire or jury instructions, unless specifically authorized by the Court (see Item 14).*

14. SPECIAL AUTHORIZATIONS — JUDGE'S INITIALS

A. Apportioned Cost _____ % of transcript with *(Give case name and defendant)*

B. ☐ Expedited ☐ Daily ☐ Hourly Transcript ☐ Realtime Unedited Transcript

C. ☐ Prosecution Opening Statement ☐ Prosecution Argument ☐ Prosecution Rebuttal
☐ Defense Opening Statement ☐ Defense Argument ☐ Voir Dire ☐ Jury Instructions

D. In this multi-defendant case, commercial duplication of transcripts will impede the delivery of accelerated transcript services to persons proceeding under the Criminal Justice Act.

15. ATTORNEY'S STATEMENT

As the attorney for the person represented who is managed above, I hereby affirm that the transcript requested is necessary for adequate representation. I, therefore, request authorization to obtain the transcript services at the expense of the United States pursuant to the Criminal Justice Act.

Signature of Attorney _____ Date _____

Printed Name _____

Telephone Number: _____

☐ Panel Attorney ☐ Retained Attorney ☐ Pro-Se ☐ Legal Organization

16. COURT ORDER

Financial eligibility of the person represented having been established to the Court's satisfaction the authorization requested in Item 15 is hereby granted.

Signature of Presiding Judicial Officer or By Order of the Court _____

Date of Order _____ Nunc Pro Tunc Date _____

CLAIM FOR SERVICES

17. COURT REPORTER/TRANSCRIBER STATUS

☐ Official ☐ Contract ☐ Transcriber ☐ Other

18. PAYEE'S NAME *(First Name, M.I., Last Name, including any suffix)*, AND MAILING ADDRESS

19. SOCIAL SECURITY NUMBER OR EMPLOYER ID NUMBER OF PAYEE

Telephone Number: _____

20. TRANSCRIPT	INCLUDE PAGE NUMBERS	NO. OF PAGES	RATE PER PAGE	SUB-TOTAL	LESS AMOUNT APPORTIONED	TOTAL
Original						
Copy						
Expense *(Itemize)*						
					TOTAL AMOUNT CLAIMED:	

21. CLAIMANT'S CERTIFICATION OF SERVICE PROVIDED

I hereby certify that the above claim is for services rendered and is correct, and that I have not sought or received payment *(compensation or anything of value)* from any other source for these services.

Signature of Claimant/Payee _____ Date _____

ATTORNEY CERTIFICATION

22. CERTIFICATION OF ATTORNEY OR CLERK I hereby certify that the services were rendered and that the transcript was received.

Signature of Attorney or Clerk _____ Date _____

APPROVED FOR PAYMENT — COURT USE ONLY

23. APPROVED FOR PAYMENT

Signature of Judicial Officer or Clerk of Court _____ Date _____

24. AMOUNT APPROVED

Sample 15: Motion for Transcripts

[HEADING]

MOTION FOR TRANSCRIPTS

COMES NOW the Defendant by his attorney and requests that this Court authorize payment, under the Criminal Justice Act, for the previously ordered additional transcripts counsel must review in order to adequately represent Defendant on appeal.

1. [NAME] is indigent. On [DATE], the Seventh Circuit Court of Appeals appointed counsel to represent the Defendant in his appeal to that Court.

2. Counsel ordered the trial transcripts that had not already been prepared. However, the court reporter indicated she was not authorized to provide a complete transcript. As a result, the jury instruction conference, jury instructions, closing arguments, and verdict have not been transcribed.

3. Counsel needs the requested transcripts in order to analyze potential issues in Defendant's appeal and prepare Defendant's opening brief. Counsel has attached a copy of the Seventh Circuit's order appointing counsel and authorizing payment of transcripts from the Criminal Justice Act Fund in the district where the case was indicted.

4. Counsel needs to review the transcript of the jury instruction conference and closing arguments in order to provide effective assistance of counsel.

5. This Court's minutes of the trial reflect that the parties suggested changes to the instructions. However, the minutes do not indicate what those requested changes were; if there was any objection to the proposed changes; or how this Court ruled on the requests. Defendant's trial counsel does not remember what happened because the trial was almost a year ago. Therefore, counsel can not determine whether the issues discussed at this conference would support an appealable issues or how the discussion may affect the standard of review for any jury instruction issues.

6. In addition, closing arguments are a frequent source of issues to be raised on appeal. Even if there were no objections to the government's initial

closing argument or rebuttal argument, counsel needs to determine whether there was any error that is plain. Closing arguments can be important on appeal even when there was no error in the argument. The emphasis that is put on an issue during closing arguments can help to show that another trial error was prejudicial.

7. Finally, counsel needs to review the transcripts of the instructional portions of the trial and the closing arguments by the government and defense counsel, including the government's rebuttal argument even if there are no arguable issues to raise on appeal. If counsel determines that there are no arguable issues, he will file an *Anders* brief. However, as part of an *Anders* brief, counsel must be able to tell the Court of Appeals that he has reviewed all relevant portions of the record. Counsel can not make that representation without first reviewing the instructional and closing argument portions of the trial transcript.

WHEREFORE, counsel respectfully requests that this Court issue an order authorizing payment, under the Criminal Justice Act, for the transcripts of the portions of Defendant's trial consisting of: the jury instruction conference and instructions; the government's initial closing argument, defense counsel's closing argument, the government's rebuttal argument, and the verdict.

[CLOSING]

Sample 16: Motion for Extension of Time

[HEADING]

DEFENDANT'S FIRST
MOTION FOR EXTENSION OF TIME

Now comes the Defendant-Appellant, [NAME], by his attorney, and pursuant to Federal Rule of Appellate Procedure 26(b) and Circuit Rule 26, moves this Court for the entry of an Order granting an extension of time up to and including [DATE], to file the Defendant-Appellant's brief in the above-entitled case currently due for filing on [DATE], and in support thereof, submits the attached affidavit of counsel. Current counsel has filed no previous motion for extension of time in this case. The Appellant is in the custody of the United States Bureau of Prisons.

[CLOSING]

Sample 17: Example No. 1 of Affidavit in Support of Motion for Extension of Time

STATE OF [_____])
) SS
COUNTY OF [_____])

AFFIDAVIT OF COUNSEL

[YOUR NAME], being first duly sworn on oath, deposes and states as follows:

1. I am the attorney appointed by order of this Court on [DATE] to represent the Defendant-Appellant, [NAME] in Cause Number [NUMBER] that is pending before the United States Court of Appeals for the Seventh Circuit.

2. Within ten days of being appointed as counsel, I requested the record on appeal, a copy of the presentence investigation report, and ordered the necessary transcripts.

3. I have not yet received the transcripts.

4. On [DATE], I spoke with the court reporter, and she estimated that she will be able to complete and deliver the transcripts to me within the next 14 days.

5. Without the transcripts of the proceedings below, it is impossible for me to litigate this appeal.

6. I need the time requested in the motion for extension of time to received the transcripts of the proceedings below, review them, discuss them with the Appellant, and draft the brief.

7. I will make every effort to complete the brief in the cause within the time requested in the motion.

_____
[YOUR NAME]

Under penalty of perjury, the undersigned attorney declares that the

contents of the foregoing affidavit are true and correct to the best of his knowledge and belief.
Date: [DATE]

_____
[YOUR NAME]

Sample 18: Example No. 2 of Affidavit in Support of Motion for Extension of Time

STATE OF [_____])
) SS
COUNTY OF [_____])

AFFIDAVIT OF COUNSEL

[YOUR NAME], being first duly sworn on oath, deposes and states as follows:

1. I am the attorney appointed by order of this Court on [DATE] to represent the Defendant-Appellant, [NAME] in Cause Number [NUMBER] that is pending before the United States Court of Appeals for the Seventh Circuit.

2. Within ten days of being appointed as counsel, I requested the record on appeal, a copy of the presentence investigation report, and ordered the necessary transcripts, and on [DATE] I received the last of these documents.

3. Since receiving the documents necessary to litigate this appeal, I have begun reviewing the documents, consulting with the Appellant, performing research, and drafting the brief.

4. However, other cases in both the District Court and this Court have occupied a significant amount of my time during the last thirty days. These cases include:

a. *United States v. Jones*, Northern District of Illinois, Case No. __ CR _____, 4-day jury trial from [DATES];

b. *United States v. Smith*, 7th Cir. Number __-____, Appellant's brief due on [DATE];

c. *United States v. Doe*, 7th Cir. Number __-____, Appellant's brief due on [DATE];

5. I will give this case my highest priority and make every effort to file the brief in this cause within the time requested in the Motion for Extension of Time.

_____

[YOUR NAME]

Under penalty of perjury, the undersigned attorney declares that the contents of the foregoing affidavit are true and correct to the best of his knowledge and belief.

Date: [DATE]

_____

[YOUR NAME]

Sample 19: Acknowledgment and Consent Form

[HEADING]

DEFENDANT'S ACKNOWLEDGMENT OF ATTORNEY'S MOTION FOR DISMISSAL AND CONSENT TO THE DISMISSAL OF THE APPEAL

To: Clerk of the Court
United States Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

I have been informed of my attorney's intention to move to dismiss my appeal.

I concur in my attorney's decision and hereby waive all rights to object or raise any points on appeal.

__[SIGNATURE]_____
[CLIENT NAME]
[CLIENT REG. NUMBER]
[CLIENT ADDRESS]

Sample 20: Motion to Voluntarily Dismiss Appeal

[HEADING]

MOTION TO DISMISS APPEAL

COMES NOW Defendant-Appellant,[NAME], by his attorney, and pursuant to Federal Rule of Appellate Procedure 42(b) and Circuit Rule 51(f), moves this Court for the entry of an Order dismissing, with prejudice, the Defendant-Appellant's appeal in the above-entitled case.

Submitted herewith is the Defendant-Appellant's written acknowledgment of the undersigned counsel's motion for dismissal and consent to the dismissal of this appeal as required by Circuit Rule 51(f).

[CLOSING]

Sample 21: Motion to Waive Oral Argument

[HEADING]

UNOPPOSED MOTION TO WAIVE ORAL ARGUMENT

COMES NOW the Defendant-Appellant by his attorneys and moves this Court for the entry of an order pursuant to Federal Rule of Appellate Procedure 34(f) and Circuit Rule 34(e) dismissing the oral argument in this matter currently scheduled for February 22, 2012. In support thereof, the Appellant states as follows:

1. The Appellant pled guilty to _____ in violation of _____. The district court sentenced the Appellant to a term of ___ months imprisonment.

2. In his brief on appeal, the Appellant raised the following issue: _____.

3. The Appellant acknowledged that this Court had already rejected his arguments. He simply raised them to preserve them for possible review by the Supreme Court or rehearing *en banc* by this Court.

4. There does not seem to be any realistic possibility that this Court will reconsider its prior decisions which have rejected the Appellant's arguments, unless the Supreme Court decides the issues in a way that is contrary to this Court's decisions.

5. Therefore, oral argument is not necessary in this matter because the dispositive issue has been authoritatively decided. Fed. R. App. P. 34(a)(2)(B). In addition, the facts and legal arguments have been adequately presented in the briefs and the record and the decisional process would not be significantly aided by oral argument. Fed. R. of App. P. 34(a)(2)(C).

6. Counsel discussed this motion with the Assistant United States Attorney in a telephone call on January 29, 2012. He stated that he agrees that oral argument is not necessary in this case. Therefore, he has no objection to waiver of oral argument.

7. Counsel has also discussed this motion with the Appellant. He understands that oral argument would not serve any purpose in his case.

WHEREFORE, Defendant-Appellant respectfully requests, pursuant to Federal Rule of Appellate Procedure 34(f) and Seventh Circuit Rule 34(e), that this Court enter an order vacating the oral argument currently scheduled in this matter on [DATE], and submit his appeal on the briefs.

[CLOSING]

Sample 22: Acknowledgment and Consent to Waiving Oral Argument

[HEADING]

DEFENDANT'S ACKNOWLEDGMENT OF AND CONSENT TO ATTORNEY'S MOTION TO WAIVE ORAL ARGUMENT

To: Clerk of the Court
United States Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

I have been informed of my attorney's intention to waive oral argument in my appeal.

I concur in my attorney's decision to waive oral argument and allow my case to be considered on the briefs only.

__[SIGNATURE]_____
[CLIENT NAME]
[CLIENT REG. NUMBER]
[CLIENT ADDRESS]

Sample 23: Motion to Expedite Appeal

[HEADING]

MOTION TO EXPEDITE APPEAL

COMES NOW the Defendant-Appellant by his attorney, and moves this Court to expedite the argument and decision of his appeal.

1. The Appellant was sentenced to ___ months in prison for _____ in violation of _____.

2. In his initial brief, the Appellant argued _____. If his argument is successful _____.

3. According to the Bureau of Prisons, the Appellant's projected release date is now [DATE]. (See attached printout from the Bureau of Prisons website.) Therefore, an expedited decision will be necessary in order for the Appellant to benefit from any favorable decision. A favorable decision regarding the length of the Appellant's sentence will mean that he has already served more than his entire lawful sentence.

WHEREFORE, the Appellant respectfully requests that this Court expedite the argument and decision of his appeal

[CLOSING]

Sample 24: Motion to Deconsolidate

[HEADING]

MOTION TO DECONSOLIDATE APPEALS

COMES NOW the Defendant-Appellant, by her attorney, and pursuant to Circuit Rule 27, moves this Court for the entry of an order deconsolidating the above captioned appeal from appeal number [NUMBER], and in support thereof states as follows;

1. On [DATE], this Court appointed undersigned counsel to represent the Appellant on appeal in the above-captioned cause.

2. On [DATE], the Appellant's brief was filed in this cause.

3. On [DATE], counsel received notice that this Court had consolidated this cause with a co-defendant's appeal numbered [NUMBER].

5. A deconsolidation of these two appeals will better serve the interests of both Appellants and this Court.

6. Neither Appellant had hearings in common in the district court below which would be jointly appealable by the Appellants given that both Appellants pleaded guilty to the charged indictment at different hearings and had separate sentencing hearings.

7. The brief on behalf of Appellant is completed and has been filed in this Court.

8. The Appellant's appeal is inconsistent with any appeal filed by the co-defendant given that the Appellant's sole issue on appeal involves an attack on the credibility of the co-defendant and the district court's error in relying upon statements made by the co-defendant which were used to enhance the Appellant's sentence.

WHEREFORE, in the interests of both Appellants and this Court, Defendant-Appellant respectfully requests this Court enter and order deconsolidating the appeal of the Appellant from the appeal of her co-defendant, and setting a new date on which the government's response and the Appellant's reply be due.

[CLOSING]

Sample 25: Table of Contents

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Sample 26: Table of Authorities

TABLE OF AUTHORITIES

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CASES

STATUTES

OTHER AUTHORITIES

Sample 27: Statement of the Case

This is a direct appeal in a criminal case.

On October 6, 2010, Defendant-Appellant John A. Smith was charged by superseding indictment with five counts of transportation of stolen vehicles in violation of 18 U.S.C. § 2312. (R. at # 14.) On November 12, 2011, the government moved to dismiss Counts 2 and 3 of the superseding indictment. (R. at # 60.) The motion was granted on the same date. (R. at # 63.) Mr. Smith entered into a written plea agreement with the government on November 8, 2011, and agreed to pled guilty to Count 4 of the superseding indictment. (R. at # 67.) The district court held a change of plea hearing also on November 8, 2011. (R. at # 68.)

On January 17, 2012, the United States Probation Office prepared the Presentence Investigation Report ("PSR.") (PSR at 1.) Mr. Smith filed a letter on January 23, 2012, stating he had no objections to the PSR. R. at # 75.) The probation officer issued an addendum to the PSR on January 25, 2012. (Add. PSR at 1.) The government filed a sentencing memo on January 30, 2012. (R. at # 78.)

The district court held a sentencing hearing on February 3, 2012. (R. at # 80.) The court imposed a sentence of 90 months in prison, a three year term of supervised release, and a $100 special assessment. (R. at # 83; App. at __.) Mr. Smith filed a timely notice of appeal on February 17, 2012. (R. at # 85.)

Sample 28: Footnote Explaining Citations in the Brief

STATEMENT OF THE CASE[4]

This a direct appeal in a criminal case.

On October 12, 2011, Defendant-Appellant William H. Doe was charged by information with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (R. at # 2.) On the same date, Mr. Doe signed a written waiver of indictment, filed a written plea agreement with the government, and pled guilty to the sole count of the indictment. (R. at ## 1, 4, 5.) The district court accepted his guilty plea. (COP Tr. at 23.)

On December 8, 2011, the United States Probation Office prepared the Presentence Investigation Report ("PSR"). (PSR at 1.) Mr. Doe filed objections to the report on January 12, 2012. (Def. Obj. at 1.) The district court held a sentencing hearing on January 13, 2012, and sentenced Mr. Doe to a term of 108 months in prison, a three year term of supervised release, a fine of $200, and a special assessment of $ 100. (App. at 38.) Mr. Doe filed a timely notice of appeal on January 19, 2012. (R. at # 23.)

[4] The following abbreviations are used herein: Record on appeal: "R. at #__;" Appendix: "App. at __;" Change of Plea hearing transcript: "COP Tr. at __;" Sentencing Hearing Transcript: "Sent. Tr. at __;" and Presentence Investigation Report: "PSR. at __."

Sample 29: Certificate of Compliance

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains _____ words and _____ lines of text as shown by [NAME OF YOUR WORD PROCESSING PROGRAM] used in preparing this brief.

_____
[ATTORNEY'S NAME]

Dated: _____

Sample 30: Certificate of Compliance with Circuit Rule 30

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

The undersigned counsel for Defendant-Appellant, hereby states that all of the materials required by Circuit Rule 30(a) and 30(b) are included in the Appendix to this brief.

By:_____
[ATTORNEY'S NAME]

Date: _____

Sample 31: Appendix Table of Contents

APPENDIX TABLE OF CONTENTS

Sample 32: Brief Cover Sheet

No. 05-3598

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

[APPELLANT'S NAME],
Defendant-Appellant.

Appeal From the United States District Court
For the [DISTRICT COURT AND DIVISION]
Case No. [DISTRICT COURT CASE NUMBER]
The Honorable Judge [DISTRICT JUDGE'S NAME

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT, [APPELLANT'S NAME]

[ATTORNEY'S NAME]
[ATTORNEY'S ADDRESS]
[ATTORNEY'S TELEPHONE, FAX, EMAIL]

Attorneys for Defendant-Appellant,
[DEFENDANT'S NAME]

ORAL ARGUMENT REQUESTED

Sample 33: Special Notice to Counsel Who Will Present Oral Argument

SPECIAL NOTICE TO COUNSEL WHO WILL PRESENT ORAL ARGUMENT

1. Counsel for all parties are directed to contact the court's calendar clerk at (312) 435-5850, no later than two business days prior to your scheduled oral argument to verify that he or she will be appearing to present oral argument. Counsel for appellants must also advise the calendar clerk how much of your allotted time is to be reserved for rebuttal. Because the clerk must provide this information in advance to the panel of three judges who will hear oral arguments, failure to notify the calendar clerk of the time to be reserved will result in no officially reserved time for rebuttal. Counsel for the appellee does not receive the opportunity for rebuttal. Whenever more than one attorney will share the total time allotted for oral argument by a "side" the sequence of argument and the amount of time each attorney is to speak (to be arrived at by consensus between or among counsel) must also be provided to the calendar clerk.

2. Every attorney who will present oral argument must be admitted to practice in this court. Lead counsel must be admitted to the Bar of this court within 30 days of the appeal's docketing. Circuit Rule 46(a). Government attorneys are exempted from this requirement by Circuit Rule 46(c).

3. Counsel presenting oral argument to the court must be seated at the appropriate counsel table when the case is called for oral argument. When facing the bench, appellant's counsel is seated to the left, appellee's counsel to the right. Counsel should remain seated at counsel table during their opponent's entire argument.

4. Because oral arguments occasionally end before their allotted time expires, counsel are expected to be in the courtroom during the argument of the case immediately preceding theirs. To allow a prompt transition between arguments, counsel for the next scheduled case should be seated in the front row of the public gallery, if possible. Please be prepared to move to the appropriate counsel table for the commencement of your argument.

5. Please be advised that the judges have read the briefs, and proceed accordingly in planning your oral argument. Lengthy expositions of the facts should be avoided, unless requested by the court.

6. The podium is equipped with three lights: white, yellow, and red. The courtroom deputy clerk will activate the white light when an appellant is entering the time reserved for rebuttal or when an appellee has five minutes remaining. The yellow light will indicate when one minute of an attorney's entire allotted time remains. The red light indicates that all of the time allocated to a side has expired or when an individual attorney's time has expired in an instance where more than one attorney is presenting oral argument for one "side". When time expires, counsel should quickly finish their thought, but not continue argument beyond the allotted time unless instructed to do so by the court. Please do not use the court's time and your own by initiating your argument with a recitation of who will be splitting time with whom and/or how much time you have decided to reserve for rebuttal. The judges will already have this information.

7. Counsel presenting oral argument must sign in with the clerk's office at least 15 minutes prior to their scheduled time. Please read the bulletin board located in the hallway by the entrance to the main courtroom for additional information regarding oral arguments. The panel of judges and the order of cases to be argued that day is posted by 9:00 a.m. each morning the court is in session.

8. Attire for counsel should be restrained and appropriate to the dignity of a Court of Appeals of the United States.

9. All cellular telephones, pagers, or personal digital devices must be switched off while in the courtroom.

10. The court is handicap accessible. Anyone needing special accommodations should call the clerk's office.

Thank you for your cooperation.

Sample 34: Motion to Withdraw After Remand

[HEADING]

MOTION FOR SUBSTITUTION OF COUNSEL

COMES NOW the Defendant his undersigned appellate counsel in Seventh Circuit case number _____, and moves this Honorable Court for entry of an Order substituting previous trial counsel, [NAME], for purposes of the hearing upon remand by the Seventh Circuit Court of Appeals, and in support thereof states as follows:

1. On April 1, 2012, the Seventh Circuit Court of Appeals issued an opinion in the above-captioned case, remanding the case to this Court. Specifically, the Court of Appeals stated:

> Because the district court did not have the statutory authority to impose restitution with respect to John Doe and Jane Doe, that portion of the court's sentence requiring restitution be paid to those two individuals is hereby VACATED; and this case is REMANDED for resentencing in accordance herewith.

2. A resentencing hearing is necessary to amend the judgment in this case as noted by the Court of Appeals.

3. The Appellant's current counsel's office is located in a district different from that in which this case has been remanded and undersigned counsel ordinarily only litigates cases in the district court where venue is in his home district. In the present case, [NAME OF PRIOR TRIAL COUNSEL] represented the Appellant in the proceedings before this Court. Undersigned counsel has discussed the remand with prior counsel, and he is aware of the circumstances surrounding the remand by the Court of Appeals. Moreover, he expressed to undersigned counsel his willingness to appear on the Appellant's behalf in this Court.

WHEREFORE, for the reasons set forth above, undersigned counsel moves this Honorable Court to enter an order substituting [NAME OF PRIOR TRIAL COUNSEL] as counsel in this case.

[CLOSING]

Sample 35:
Certificate of Compliance with Fed. R. App. P. 35(b)(2)

[HEADING]

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 35 (b)(2)

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 35(b)(2) in that the Petition for Rehearing En Banc is less than 15 pages, exclusive of material not counted under Federal Rule of Appellate Procedure 32.

_____
[YOUR NAME]

Dated: _____

Sample 36: *Certiorari* Petition Title Page

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 20__

_____

[NAME],

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

_____

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

_____

[YOUR NAME]
[ADDRESS]
[TELEPHONE AND FAX NUMBERS]

COUNSEL FOR PETITIONER

Sample 37: *Certiorari* Petition "Petition for Writ of *Certiorari* to the United States Court of Appeals For the Seventh Circuit," Page 1

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 20__

_____

[NAME],

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

_____

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner,[NAME], respectfully prays that a writ of *certiorari* issue to review the opinion of the United States Court of Appeals for the Seventh Circuit issued on [DATE], affirming the Petitioner's convictions and sentences.

Sample 38: Motion to Proceed *in Forma Pauperis* in the Supreme Court

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 20__

[NAME],

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Now comes the Petitioner, [NAME], by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed *in forma pauperis* before this Court, and to file the attached Petition for Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent and was

sentenced to a term of imprisonment in the United States Bureau of Prisons, and was represented by the undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

[NAME], Petitioner

_____[signature]_____
[YOUR NAME]
[YOUR ADDRESS]
[YOUR TELEPHONE AND FAX NUMBER]

COUNSEL FOR PETITIONER

Date:_____

Sample 39:
Rule 11 Checklist

The district court must address the defendant personally and in open court and inform the defendant of or determine the defendant understands:

_____ (1) The nature of the charge(s) *(b)(1)(G)*

_____ (2) The mandatory minimum sentence, if any *(b)(1)(I)*

_____ (3) The maximum sentence possible (imprisonment, fine, supervised release) *(b)(1)(H)*

_____ (4) Court must consider sentence under guidelines, but may depart *(b)(1)(M)*

_____ (5) Court may order forfeiture and/or restitution, if applicable *(b)(1)(J)&(K)*

_____ (6) Court must impose special assessment *(b)(1)(L)*

_____ (7) Defendant has the right to plead not guilty *(b)(1)(B)*

_____ (8) Defendant has right to be tried by a jury *(b)(1)(C)*

_____ (9) Defendant has right to assistance of counsel (court-appointed if necessary) *(b)(1)(D)*

_____ (10) Defendant has right to confront witnesses *(b)(1)(E)*

_____ (11) Defendant has right to cross-examine witnesses *(b)(1)(E)*

_____ (12) Defendant has right against compelled self-incrimination *(b)(1)(E)*

_____ (13) Defendant has right to testify and present evidence *(b)(1)(E)*

_____ (14) Defendant has right to compel attendance of witnesses *(b)(1)(E)*

_____ (15) Defendant is waiving trial rights by pleading guilty *(b)(1)(F)*

_____ (16) If the defendant is questioned under oath, the answers may be used against the defendant in a prosecution for perjury or false statement. *(b)(1)(A)*

_____ (17) Whether, by the terms of the plea agreement, defendant is waiving the right to appeal or collaterally attack conviction. *(b)(1)(N)*

_____ (18) Whether the plea is voluntary, or the result of threats, force, or promises other than plea agreement *(b)(2)*

_____ (19) Disclose the existence of a plea agreement on the record *(c)(2)*

_____ (20) Whether the court accepts or rejects plea agreement *(c)(4) & (5)*

_____ (21) Whether a factual basis exists for the plea *(b)(3)*

Not in Rule 11, but considered by Court of Appeals:

_____ determine whether the defendant is competent to enter a guilty plea

_____ If the court accepts defendant's plea, there will not be a trial (old Rule 11)

_____ The effect of any term of supervised release (penalty for violation) (old Rule 11)

_____ Whether the plea is "wired" or a package deal with any other defendants (*US v. Bennett*)

Sample 40:
Motion to Withdraw
Filed with an *Anders* Brief

[HEADING]

MOTION TO WITHDRAW AS DEFENDANT-APPELLANT'S APPOINTED COUNSEL ON APPEAL

COMES NOW the Appellant's counsel and pursuant to *Anders v. California*, 386 U.S. 738 (1967) and Circuit Rule 51(a), moves this Court for the entry of an Order granting counsel leave to withdraw as the Defendant-Appellant's appointed counsel on appeal, and in support thereof, states as follows:

1. The undersigned attorney is the appointed counsel of record for the Defendant-Appellant in the above-entitled appeal by order of this Court.

2. Pursuant to his duties as the Defendant-Appellant's appointed counsel in this appeal, the undersigned attorney has made a thorough and conscientious review of the entire record of the proceedings in the District Court below to determine whether there exists any non-frivolous issue that can be raised in this appeal.

3. The undersigned attorney has further corresponded and communicated with the Defendant-Appellant to ascertain what issues the Defendant-Appellant believes should be raised in this appeal.

4. Based upon his thorough and conscientious review of the entire record of the proceedings in the District Court below, and from communications with the Defendant-Appellant, the undersigned attorney has concluded that there exists no non-frivolous issue that can be raised in this appeal on behalf of the Defendant-Appellant.

5. The undersigned attorney has prepared a brief in conformity with *Anders v. California*, 386 U.S. 738 (1967) and *United States v. Edwards*, 777 F.2d 364 (7th Cir. 1985) to be filed in support of this motion to withdraw as counsel and has served copies thereof to the Defendant-Appellant.

6. The Defendant-Appellant current resides at: _____ .

WHEREFORE, undersigned counsel respectfully requests the entry of an Order granting him leave to withdraw as the Defendant-Appellant's appointed counsel on appeal in the above-entitled cause.

[CLOSING]

Sample Letter 1: Record Request

[Clerk's Office Address}

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear Clerk:

On [DATE], the United States Court of Appeals for the Seventh Circuit appointed me to represent the above-named individual during her appeal originating from a conviction in your District. (See attached Order)

As such, please accept this letter as our request to provide us with the record on appeal in the above-captioned case. In addition to the normal documents contained in the record, please also include the docket sheets and any transcripts that have been prepared. You will notice that the Court of Appeals has authorized us to withdraw the record on appeal which includes the expense of shipping the record to us. Please mail the record to:

[YOUR NAME AND ADDRESS]

A briefing schedule has been set and our brief is due by [DATE]. Therefore, your prompt attention to this matter will be greatly appreciated. If you have any questions regarding this matter, please do not hesitate to contact me at the address of telephone number listed in the letterhead. Thank you in advance for your cooperation.

[CLOSING]

Sample Letter 2: Designation of Item for Record on Appeal

[Clerk's Office Address}

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear Clerk:

I would like to designate the following items for inclusion in the record on appeal in the above-captioned case:

[DOCKET NUMBER AND NAME OF ITEMS TO BE INCLUDED]

Although some of the above-listed items may already be required by Circuit Rule 10 to be included in the Record on Appeal, I thought, in an abundance of caution, that I would include everything I believe will be necessary for inclusion in the record.

Thank you for your assistance, and please call me if there are any problems.

[CLOSING]

Sample Letter 3: Transcript Request

[Court Reporter's Address}

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [NAME]:

On [DATE], the United States Court of Appeals for the Seventh Circuit issued an order in the above-captioned case appointing me to represent [CLIENT'S NAME] during his appeal from a conviction originating in your district.

To effectively represent my client, I am requesting that you prepare the transcripts of the status hearing held on March 24, 2012; the final pretrial conference held on June 2, 2012; the change of plea hearing held on June 17, 2012; and the sentencing hearing held on June 23, 2012. Upon completion, please email it to me at [EMAIL ADDRESS]. You will notice that a briefing schedule has been set by the Court of Appeals and our brief is due by **March 19, 2013**. Therefore, your prompt attention to this matter will be greatly appreciated. I have enclosed a CJA 24 form as payment for these transcripts.

If you have any questions regarding this matter, please feel free to contact me.

[CLOSING]

Sample Letter 4: Letter Requesting PSR

[Probation Officer's Address]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [NAME]:

On [DATE], the United States Court of Appeals for the Seventh Circuit issued an order in the above-captioned case appointing the Federal Public Defender for the Central District of Illinois to represent the individual named above during his appeal from a conviction in your district. Please see the enclosed order.

To represent our client effectively, and to file our brief by [DATE], as ordered by the Court of Appeals, I request that you provide us with a copy of the presentence report prepared by your office in this case, as well as all objections and responses thereto, any other letters sent to your office that relate to the report, and the statement of reasons. You may mail these documents to me at [EMAIL] or to the address listed below.

Thank you for your prompt attention to this request and please feel free to contact me if you have any questions regarding this matter.

[CLOSING]

Sample Letter 5: Citation of Supplemental Authority

Mr. Gino Agnello
Clerk of the Court
Seventh Circuit Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear Mr. Agnello:

Appellant is submitting the following supplemental authority, pursuant to Federal Rule of Appellate Procedure 28(j) , in support of his argument that it was error for the district court to calculate his advisory Guidelines range by both adding two levels to his offense level, pursuant to U.S.S.G. § 2G2.4(b)(2), because he possessed ten or more CDs containing child pornography and applying an additional five level enhancement, pursuant to U.S.S.G. § 2G2.4(b)(5)(D), because he possessed at least 600 images of child pornography. (Appellant's opening brief p. 10-12; Appellant's reply brief p. 13.)

On April 7, 2012, the Fifth Circuit Court of Appeals decided *United States v. Gonzalez*, 2012 U.S. App. LEXIS 8508 (5th Cir. April 7, 2012). In that case, the Court considered exactly the same argument that the Appellant has raised. The Court held that it was improper for the district court to apply both enhancements because Congress effectively repealed U.S.S.G. § 2G2.4(b)(2) when it passed the PROTECT Act. Id. at *3-*6. Pursuant to Circuit Rule 28(c), Appellant attached to this latter the decision in *Gonzalez*.

[CLOSING]

Sample Letter 6:
Unavailability for Oral Argument

Mr. Gino Agnello
Clerk of the Court
Seventh Circuit Court of Appeals
219 South Dearborn Street
Chicago, Illinois 60604

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear Mr. Agnello:

I am writing to inform you that I will be unavailable for oral argument in this case on certain days.

I will be out of the office on vacation from approximately November 21 to December 2, 2011 and December 19, 2011 to January 6, 2012.

Therefore, I would greatly appreciate if the Court would schedule oral argument in this case for a date other than those I mentioned.

[CLOSING]

Sample Letter 7:
Closed Case Letter

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [NAME]:

I regret to inform you that the United States Court of Appeals affirmed your [conviction] [sentence]. A copy of the Court's decision is enclosed.

I am very disappointed by this decision because I believed we had good arguments and a basis to reverse the lower court's judgment. At this point, however, it is my duty to make a new assessment of your case and suggest what remedies may be open to you at this time.

You have two remedies remaining. One is to petition the panel of judges who heard your case to rehear it or to petition all of the judges of the Seventh Circuit to rehear your case (Petition for Rehearing *En Banc*). Either petition must be filed with the Court within fourteen days of the decision. Generally, an appellant asks the panel to reconsider if the court relied on a significant, obvious mistake, usually a factual one.

However, I have found no such mistake. The criteria for a hearing *En Banc*, however, are specified by Rule 35 of the Federal Rules of Appellate Procedure and Circuit Rule 35. To suggest a Petition for Rehearing *En Banc*, the Court requires that such consideration is necessary to secure or maintain uniformity with decisions of the Court or with the Supreme Court or the proceeding involves a question of exceptional importance. The opinion in this case does not conflict with any Seventh Circuit opinion, any decisions from any other circuit, or any Supreme Court decisions. In your case, the issues we raised were _____. The Seventh Circuit held _____.

As important as this case is to you, based on my review of the Court's opinion and the rules surrounding petitions for rehearing, I have reluctantly concluded that your case does not meet any of the Seventh Circuit's criteria. For that reason, I have determined that a Petition for Rehearing *En Banc* would be, legally speaking, frivolous.

The other remedy is to file a Petition for Writ of *Certiorari* asking the United States Supreme Court to review your conviction/case. Such a petition can be filed whether or not we seek a Petition for Rehearing. It is due 90 days from the date of opinion. Although we can ask the Supreme Court to hear your case, it can refuse to do so for any or no reason. Several thousand *certiorari* petitions are filed each year but the Court grants only about 100 of that number.

The Supreme Court's rules are similar to the Seventh Circuit's rules. Supreme Court Rule 10 explains that when deciding whether to grant a Petition for Writ of *Certiorari,* the Court considers whether the decision conflicts with the decision of another United States court of appeals on the same important matter; whether the decision decides an important federal question in a way that conflicts with a decision by a state court of last resort; or whether the decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of the Supreme Court's supervisory powers. Another consideration is if the Seventh Circuit decided an important question of federal law that has not been, but should be, settled by the Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. Finally, a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Unfortunately, I have carefully reviewed your case and I have concluded that there are no reasonable grounds to file a Petition for Writ of *Certiorari* in your case. I have made that decision because _____.

For these reasons, I cannot recommend that we pursue your case further. If you disagree with my conclusion and still wish to file a *Certiorari* Petition, you may file a motion in the Seventh Circuit Court of Appeals, requesting that the Court compel me to file the petition. Absent such an order from the Court, however, I will not file a petition in this case.

Do not hesitate to contact me if you have any questions or concerns about your case or what I have discussed in this letter.

[CLOSING]

Sample Letter 8:
Initial Client Letter

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

By an order entered on [DATE], United States Court of Appeals for the Seventh Circuit appointed me to represent you during your appeal. I look forward to working with you on your appeal, and would like to take this opportunity to explain a little bit about the appellate process.

The Court of Appeals considers only evidence presented to the district court and does not hear witnesses or consider evidence not presented in the lower court. Rather, the Court will decide your case based on the written briefs that I will prepare on your behalf and the brief prepared by the United States Attorney, who represents the prosecution. Our brief is due by [DATE], and the Government's brief is due a month thereafter. If I determine that a reply brief is necessary, it must be filed by [DATE]. It is often necessary for attorneys to obtain extensions of time to file the briefs. I will let you know if either the United States Attorney or I need additional time to file a brief and will also send you copies of all of the briefs filed in your case. For this reason, it is extremely important that you keep me apprised of your location if you are transferred to another facility so I know where to contact you at all times.

After all of the briefs are filed, the Court of Appeals will decide whether they want to hear oral argument in the case. If the Court orders oral argument, I will present the case on your behalf before a panel of three United States Circuit judges. Although the hearing is open to the public, you will not be permitted to attend the argument. The arguments will be based quite substantially on the briefs submitted.

Whether the Court decides the case with or without oral argument, the case will be decided in a written decision by three judges. The decision will be sent to both of us when it is issued. If the case is argued, the decision will generally be issued about 90 days after argument, although sometimes it can be earlier and sometimes it can take considerably longer.

It is hard to predict entirely how long it will take to decide your case. This depends on whether the briefs are filed without extension, how soon the case is scheduled for argument, and how long it takes the Court to decide the case. My experience is that most criminal cases are decided between six months and one year after the notice of appeal is filed. If the Court of Appeals affirms your conviction and sentence, I will inform you of what additional remedies you have at that time.

If necessary, I would certainly come to see you to discuss your case, but generally that is not necessary. Because the appeal is based on the record already before the Court, I have found that in most cases I can communicate by letter or telephone with my appellate clients who are incarcerated. I encourage you to write to me about the issues you think should be raised in your appeal but it is ultimately my duty to decide what issues to actually include in the brief. I will respond promptly to your letters. If it is easier, you may call me collect at [NUMBER]. I will accept your call if I am in the office and not otherwise busy. Please understand, however, that sometimes I will not be here or I will not be able to take your call, in which case you should try your call again later.

I look forward to representing you in your appeal. If you have any questions about anything contained in this letter, please do not hesitate to contact me.

[CLOSING]

Sample Letter 9:
Anders Letter

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

I have now received all the documents necessary for me to evaluate your appeal, and would like to convey my opinions to you concerning your case.

As you read this, please keep in mind that appeals are about mistakes that occurred in the district court. The participants tend to be experienced and careful. Moreover, I am unable to add evidence to record that already exists. With these limitations in mind, you can see how some cases do not have many, if any, mistakes. Moreover, even in cases where there is a mistake, it may not be significant enough to raise on appeal. For some mistakes, there is no remedy. For others, the Seventh Circuit has reviewed the particular mistake in an earlier case and concluded that the mistake did not sufficiently affect the defendant's substantial rights. Unfortunately, as I explain in more detail in the rest of the letter, I have been unable to find an appealable mistake in your case.

First, there are essentially two critical stages to every federal criminal case in the district court, conviction and sentencing. At the conviction, or guilt phase, the question is whether you in fact committed the crimes in question. You may go to trial or plead guilty. In your case, you pled guilty. Thus, regarding any issues related to your conviction, not your sentence, in order to preserve any issues for appeal, you must explicitly reserve the right to appeal that issue in writing. This was not done in your case.

Morever, I do not see any issue which could have been preserved for appellate review. Such issues would consist of motions to suppress evidence, motions to dismiss the indictment, etc. Thus, the only question concerning the guilt phase of your case would be whether your guilty plea was entered into knowingly and voluntarily.

In other words, in order for your guilty plea to be valid, the district judge must comply with Federal Rule of Criminal Procedure 11. This rule requires him

to inform you of a number of things prior to taking your guilty plea, including the elements of the offense, the maximum and minimum penalties, the fact that your sentence will be determined by the United States Sentencing Guidelines, that a deviation from the Guidelines is possible, and that you have a number of trial rights you will give up by pleading guilty. In your case, I have reviewed the transcript of your change of plea hearing, and the district judge substantially complied with the requirements of Rule 11.

Furthermore, based on the language of your plea agreement alone, it appears as if you were informed of all your rights prior to pleading guilty. Even if there was a basis for withdrawing your plea of guilty, we would simply be placed back at the indictment stage of the proceedings. I cannot see how you could benefit from this.

[DISCUSS ANY GUILT PHASE ISSUES HERE]

Moving next to your sentence, the issues we can raise on appeal are generally governed by the objections made to the calculations contained in the Presentence Investigation Report ("PSR"). As you know, the judge looked at the guideline range in the PSR and then looked at other factors before determining the sentence in your case. Objections tend to be about the guideline determinations, but arguments for a lower sentence are also considered objections in some situations. As a result, whatever the result to the guideline calculations, there still may be a question of whether the sentence was reasonable based on the arguments for a lower sentence. However, if there were no objections or arguments in the district court, we cannot ordinarily raise the issue for the first time on appeal successfully.

[DISCUSS PARTICULAR SENTENCING ISSUES HERE]

Accordingly, I recommend that you voluntarily dismiss your appeal. Please understand that I do not make this recommendation lightly. It is the seriousness of the recommendation which has prompted me to write you this detailed letter. A voluntary dismissal will end your direct appeal. However, you would still retain the right to file a § 2255 petition alleging that your counsel was ineffective. Based on the record before me, however, there is simply no evidence in the record to suggest this. Thus, you would have to present some new evidence along with the § 2255 petition such as testimony or an affidavit from your previous counsel.

If you agree with me concerning the voluntary dismissal of your appeal,

please sign the enclosed Acknowledgment and Consent form and return it to me in the enclosed self-addressed stamped envelope. I will then file it along with a motion to voluntarily dismiss your appeal in the Court of Appeals.

I am, of course, more than willing to discuss your case with you further, and wish to answer all your questions before you make a decision. Should you ultimately decide that you do not wish to voluntarily dismiss your appeal, and my opinion remains unchanged, I would then file a motion to withdraw as your attorney, along with what is commonly called an *Anders* brief. That brief will essentially state in more formal terms what I have set forth in this letter.

In other words, I will inform the Court of my reasons why I believe you have no issues to present on appeal. The Court will give you an opportunity to file your own response to my motion, should you disagree with what I state in the *Anders* brief. The Court will then do one of three things. If it agrees with me, it will allow me to withdraw as your attorney and then dismiss your appeal. Your direct appeal would then be over. Alternatively, the Court could ask me to brief a specific issue, or ask another attorney to do so.

If you decide that you will not voluntarily dismiss your appeal, I must ask you another question. Because I have found no appealable issues, I must ask you if you would like to get out of your guilty plea. As I explained above, I do not see a way for you to do this. However, the Seventh Circuit requires that I ask you if you would like to face trial again even though, if convicted or even if you plead guilty again, you could face a longer sentence. Some people only appeal because they think that their sentence was too long. Those people do not want to get out of their guilty plea. They just want a lower sentence. Other people conclude that, if they had known they were going to get sentenced to as long as they did, they would have just gone to trial.

If you would like to get out of your guilty plea, I will address what occurred at the change of plea hearing for the Seventh Circuit. If you do not want to get out of your guilty plea, I will not address what occurred at the change of plea hearing. Again, if you have decided not to voluntarily dismiss your appeal, please let me know one way or the other.

Please consider the contents of this letter carefully, and contact me if you have any questions about your case. However, please let me know what you intend to do as soon as possible so that I will know as far in advance of [DATE] what you intend to do.

[CLOSING]

Sample Letter 10:
Grant of Extension of Time

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

Please find enclosed a copy of the order dated [DATE], which confirms that the United States Court of Appeals granted our motion for an extension of time to file our brief in your above-captioned appeal. You will notice that our brief is now due by [DATE], and the Government's brief is due a month thereafter. If I determine that a reply brief is necessary, it must now be filed by [DATE]. As a reminder, I will send you copies of all briefs filed in your case. Therefore, please notify me immediately if you are transferred to another facility so I know where to reach you at all times.

In the meantime, if you have any questions or concerns regarding your appeal, please do not hesitate to contact me.

[CLOSING]

Sample Letter 11:
Transmitting Opening Brief

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

Enclosed is the brief I filed in your case on [DATE]. As you will see when you read the brief, I have raised the following issues on appeal: [STATE ISSUES]. As you know, these are the issues we discussed by letter and by phone while I was preparing the brief.

If you have any questions, please do not hesitate to call or write me. The government's response to our brief is due [DATE]. I will, of course, send you a copy of the government's brief when I receive it. Our reply, if any, is due on [DATE], and once I have an opportunity to review the government's response, I will inform you of whether or not I intend to file one.

Again, please feel free to call me collect or write to me should you have any questions.

[CLOSING]

Sample Letter 12:
Transmitting Government's Brief - No Reply

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

Enclosed is a copy of the government's brief in your case. I have carefully reviewed this brief, and I have concluded that I adequately anticipated all of the arguments the government has made. Any reply brief that I might file would simply repeat what I have already written. For these reasons I will not be filing a reply brief in your case.

Please feel free to call me or write to me if you would like to discuss the government's brief.

[CLOSING]

Sample Letter 13:
Transmitting Government Brief - Reply

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

Enclosed is a copy of the Government's brief in your case. I have two weeks to file a reply brief and I will certainly send you a copy.

If you have any comment on the enclosed brief, please let me know.

[CLOSING]

Sample Letter 14:
Order Setting Oral Argument

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

I am writing to inform you that the Court of Appeals has set oral argument in your appeal for [TIME] on [DATE] at the Dirksen Federal Building at 219 South Dearborn Street in Chicago. I will go to Chicago and argue your case on your behalf.

The Court of Appeals sits on the 27th Floor of the Dirksen Federal Building. The hearing is open to the public, although incarcerated prisoners are not allowed to attend the arguments as the Court has no security facilities. Your family and friends may attend.

We will not know the names of the three judges assigned to hear your case until the morning of the argument. Generally, the panel of judges will be comprised of United States Circuit Judges from Illinois, Indiana and Wisconsin. Sometimes visiting judges sit with local circuit judges.

The Court will not decide the case on the date of your oral argument. After the argument, the Court will issue a written opinion. That usually takes approximately 90 days after I have argued your case.

I will write to you shortly after the oral argument. In the meantime, please feel free to contact me if you have any questions or concerns about your case.

[CLOSING]

Sample Letter 15:
After Oral Argument

[CLIENT'S ADDRESS]

RE: [DISTRICT COURT CASE NAME AND NUMBER]
[APPELLATE COURT NUMBER]

Dear [CLIENT]:

This morning I argued your case before the United States Court of Appeals for the Seventh Circuit in Chicago. The three judges considering your case are United States Circuit Judges [NAME] from [STATE], [NAME] from [STATE], and [NAME] from [STATE].

It is not possible to predict the outcome of a case from the oral argument. The judges were clearly prepared and interested in your case and I thought the argument went very well.

[Here, generally insert case specific information about the name of the questions asked, any unanticipated issues that were raised, or suggest how some of the judges were leaning.]

As soon as I hear anything from the Court, I will notify you. In the meantime, however, if you have any questions or concerns please feel free to contact me.

[CLOSING]