POWER, PROTOCOL, AND PRACTICALITY: COMMUNICATIONS FROM THE DISTRICT COURT DURING AN APPEAL

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* Professor, University of Pennsylvania Law School. My acquaintance with many of the topics treated in this article came about through my service as reporter to the Judicial Conference Advisory Committee on Appellate Rules, and I have learned much from the members of that Committee as well as the members and reporters of the other rules committees. I am grateful to Stephen Burbank, Edward Cooper, Harris Hartz, Mark Kravitz, Mark Levy, and Anthony Scirica for very helpful comments on a draft. Of course, the views expressed here are solely my own.

I dedicate this Article to the memory of Mark I. Levy—a brilliant lawyer and a kind, generous, and good friend.

INTRODUCTION

It is a commonplace that when a litigant files a notice of appeal from the judgment of a district court, authority over the matters encompassed within the appeal passes from that court to the court of appeals.[1] As the Supreme Court stated in *Griggs v. Provident Consumer Discount Co.*,[2] "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously."[3] Thus, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."[4]

But, as the Supreme Court has suggested in other contexts,[5] describing this transfer in jurisdictional terms may cause confusion. In particular, the term "jurisdiction" might suggest that the vesting of appellate control over the appeal entirely deprives the district court of the ability to communicate any views that bear upon the merits of the appeal.[6] This Article takes issue with that absolutist view. It is true that control passes from the trial court with the filing of a valid notice

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1 For an excellent discussion of the implications of this principle, see Allan Ides, *The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed*, 143 F.R.D. 307 (1992), and Mark I. Levy, *Divesting Jurisdiction*, NAT'L L.J., Sept. 22, 2008, at 14.

Many cases can be found which treat the filing of the notice as the relevant event. *See, e.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 71 F.3d 1197, 1203 (6th Cir. 1995); Kusay v. United States, 62 F.3d 192, 193–94 (7th Cir. 1995) (quoting Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)); Venen v. Sweet, 758 F.2d 117, 120 (3d Cir. 1985) (citing *Griggs*, 459 U.S. at 58). In the Fourth Circuit, this principle may be complicated by case law that might, under some rare circumstances, permit district court action on a Rule 60(b) motion after the filing of the notice of appeal but prior to the appeal's docketing. *See* Williams v. McKenzie, 576 F.2d 566, 570 (4th Cir. 1978) ("We hold that on the facts of this particular case, and especially since the appeal was not docketed in this court at the time the district judge reopened the habeas hearing for the taking of additional testimony, that the entertainment of the F.R.C.P. 60(b)(2) motion was appropriate."). *See generally* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3949.1, at 50–52 & nn.25–26 (4th ed. 2008) (discussing the transition of authority from the district court to the court of appeals). For simplicity's sake, this Article will treat the notice's filing as the operative event.

2 459 U.S. 56 (1982).

3 *Id.* at 58.

4 *Id.*

5 *See* Kontrick v. Ryan, 540 U.S. 443, 454 (2004) ("'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90 (1998))).

6 Thus, for example, Professor Bradley Scott Shannon commented as follows on proposed Civil Rule 62.1's formalization of the indicative-ruling procedure:

of appeal, and that the trial court generally must not act with respect to the subject matter of the appeal except to facilitate the appeal's progress. But that does not mean that the district court's views on the case are invariably set in amber as of the filing of the notice of appeal.

In this Article, I survey the opportunities for the district court to communicate to the court of appeals its views on matters touching the merits of the appeal, even after the notice is filed. Part I.A observes that a number of matters, ancillary to the appeal, that are entrusted to the district court may permit or require the district judge to reflect on the merits of the appeal. Part I.B notes that, even apart from such ancillary rulings, the district court may sometimes add to its prior statements on the merits of the case even after the filing of the notice of appeal. And Part I.C discusses instances in which the court of appeals may invite or direct such augmentation. The activities canvassed in Part I may provide opportunities for the district court to opine on merits-related issues while the appeal is pending, but—except in rare instances at the margins—they do not permit the district court to alter the judgment that is under review, because it is well established that such an alteration lies beyond the power of the lower court during the appeal. Part II describes a mechanism by which the district court can nonetheless express its view on a request for such relief: when asked for relief that it lacks power to grant because of the appeal, the district court may indicate its view that the request has merit. That "indicative ruling" can then be communicated to the court of appeals, which can decide whether to remand for the purpose of permitting the district court to grant the motion.

As this summary suggests, the interaction between the trial and appellate court, during an appeal, can be much more dynamic than a bald quotation of the *Griggs* rule might suggest. The boundaries of the trial court's authority are, of course, set by the *Griggs* rule; the

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> I object to this (and any) rule that purports to authorize courts to decide matters (or indicate how they might decide matters) that are not currently before them. . . . Though discerning "jurisdiction" in this context (if this is indeed a jurisdictional matter) might, at times, be difficult, that is beside the point. Either a court has "jurisdiction" of a case or it does not, and if it does not, then deciding matters relating to that case is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability.

Letter from Professor Bradley Scott Shannon, Associate Professor of Law, Florida Coastal School of Law, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Feb. 14, 2008), *available at* http://www.uscourts.gov/rules/CV%20Comments%202007/07-CV-012.pdf. Proposed Civil Rule 62.1 is described in Part II.B below; justiciability objections to indicative rulings are discussed in Part II.C.

lower court must not take actions that would impinge on the appellate court's control over the judgment that is under review. The nuances of those boundaries, though, are influenced by practical considerations—such as efficiency and fairness to litigants—as well as by concerns stemming from notions of the appropriate judicial role.

I. COMMUNICATIVE RULINGS

Parts I.A through I.C present a taxonomy of district court actions that—though they do not alter the judgment under review—provide an opportunity for the district judge to comment upon the merits of that judgment.[7] Part I.D then assesses factors that may influence the way in which such actions are viewed by the court of appeals.

A. Incidental Communications

The district court often serves a gatekeeping role with respect to appeals. Part I.A.1 observes that, in such a role, the district judge may issue rulings that incidentally provide the court of appeals with the trial court's views on aspects of the merits of the appeal. Likewise, as Part I.A.2 discusses, in the many instances in which litigants are directed first to seek rulings from the district court on matters ancillary to the appeal, the trial court's determination of those issues may further illuminate its views on the appeal's merit.

1. Gatekeeping Decisions

In a number of contexts, the district court has the task of making decisions that affect whether an appeal may proceed.[8] In some of those contexts, the district judge's ruling should be made indepen-

7 One topic not addressed in the text concerns interlocutory appeals from orders concerning preliminary injunctions. Such an interlocutory appeal does not prevent the district court from proceeding with the case pending disposition of the appeal, *see* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3921.2, at 53 (2d ed. 1996), and the trial court may thus issue rulings as the case proceeds which shed light on issues relevant to the merits of the interlocutory appeal.

Another example not discussed in the text concerns applications for attorney fees. The district court may rule upon such applications while an appeal from the judgment is pending, and the fee ruling may require or permit the judge to opine on the merits of the case.

8 The reader might at first glance wonder whether gatekeeping decisions come within the scope of this Article: if a ruling determines whether an appeal can be brought at all, does it count as a ruling that is made while the appeal is pending? But that question overlooks the fact that gatekeeping decisions may be made after the filing of a notice of appeal. Thus, to take one example, a certificate-of-appealability ruling can be made after a habeas petitioner files a notice of appeal.

dently of the judge's view of the merits of the proposed appeal.[9] But in other instances, the ruling may entail reasoning that reveals a view on the merits (even though the ruling itself concerns only a preliminary issue).

Thus, for example, a district judge's certification under 28 U.S.C. § 1292(b) that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation"[10] may serve to flag the district judge's view that the ruling in question is a relatively close call.

Conversely, there exists an interesting line of cases concerning the appealability, under the collateral order doctrine,[11] of orders

9 For example, 28 U.S.C. § 2107(c) and Appellate Rule 4(a)(6) permit the district court to reopen the time to take a civil appeal if certain conditions are met. 28 U.S.C. § 2107(c) (2006); FED. R. APP. P. 4(a)(6). The Ninth Circuit has held that in exercising its discretion whether to reopen the time to appeal, the district court may not consider the appeal's merits; otherwise, "[a] district court could effectively insulate its own ruling from appellate review every time the clerk failed to provide notice to the parties by denying the motion to reopen the time to appeal because, in its view, the appeal has no merit." Arai v. Am. Bryce Ranches Inc., 316 F.3d 1066, 1070 (9th Cir. 2003).

Section 2107(c) and Appellate Rule 4(a)(5) also permit the district court to grant a limited extension of the time to file a notice of appeal in a civil case if the would-be appellant shows "excusable neglect or good cause." 28 U.S.C. § 2107(c); FED. R. APP. P. 4(a)(5). The factors that courts apply in weighing requests for such extensions typically do not include the merits of the appeal. *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 395 (1993)) (stating a four-factor test for determining excusable neglect). The same is true of the analysis, under Appellate Rule 4(b)(4), of a request to extend the time to take a criminal appeal. *See* FED. R. APP. P. 4(b)(4); *see also, e.g.*, United States v. Vogl, 374 F.3d 976, 981 (10th Cir. 2004) ("The four factors to be considered are: (1) the danger of unfair prejudice to the nonmoving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.").

10 28 U.S.C. § 1292(b) (2006).

11 28 U.S.C. § 1291 grants the courts of appeals (other than the Federal Circuit) "jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *Id.* § 1291. Ordinarily, this means that appellate review in the federal courts must await the end of the litigation. However, the "collateral order doctrine" provides that § 1291 may also be used to seek appellate review of "a narrow class of decisions that do not terminate the litigation, but must . . . nonetheless be treated as 'final'" in order to serve certain strong policy interests. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994). To qualify for interlocutory review under the collateral order doctrine, the decision in question must be "conclusive," must "resolve important questions completely separate from the merits" of the case, and must present "important

denying claims of qualified immunity or double jeopardy. An order denying such a claim qualifies, at least in some instances,[12] as a final judgment under the collateral order doctrine because of the strong policies favoring immediate review: both of these defenses provide protection not only from liability but also from litigation, and thus interlocutory review is necessary in order to prevent the irreparable loss of the protection.[13] But some courts have noted that the availability of collateral order review creates the risk of abuse by defendants who seek to delay the trial court proceedings through the assertion, on interlocutory appeal, of a frivolous immunity or double jeopardy contention.[14] Accordingly, some circuits take the view that the district court may proceed with the action—despite the filing of an interlocutory appeal on qualified immunity or double jeopardy grounds—if the district court certifies that the appeal is frivolous.[15] Circuits recogniz-

questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.*

12 The appealability, under the collateral order doctrine, of a denial of qualified immunity hinges upon the basis for the immunity ruling. "[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The Court has since stressed the importance of "limiting interlocutory appeals of 'qualified immunity' matters to cases presenting more abstract issues of law," Johnson v. Jones, 515 U.S. 304, 317 (1995), and thus has concluded that "a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial . . . is not appealable" under the collateral order doctrine. *Id.* at 313. The complexities that arise from this distinction are beyond the scope of this Article.

13 *See Mitchell*, 472 U.S. at 526 (declaring that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial"); Abney v. United States, 431 U.S. 651, 660 (1977) ("[T]he rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.").

14 *See, e.g.*, Stewart v. Donges, 915 F.2d 572, 576 (10th Cir. 1990) ("Because the district court is divested of jurisdiction to proceed to trial by the filing of a notice of interlocutory appeal raising a double jeopardy or qualified immunity issue, there is the risk that such interlocutory appeals will be subject to abuse.").

15 *See, e.g.*, Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989) ("[A] district court may certify to the court of appeals that the appeal is frivolous and get on with the trial."); United States v. Dunbar, 611 F.2d 985, 988 (5th Cir. 1980) (en banc) ("Henceforth, the district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or nonfrivolous. If the claim is found to be frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of jurisdiction over the case."); *see also* United States v. Montgomery, 262 F.3d 233, 240 (4th Cir. 2001) ("[A]ppellate courts, including this

ing this power in the district court stress that it must be employed cautiously, lest it deprive the defendant of the opportunity to take a meritorious appeal.[16] Those courts of appeals reserve to themselves the ultimate authority to decide the issue of frivolity: if the district judge certifies the appeal as frivolous, the defendant-appellant may ask the court of appeals to stay the trial court proceedings pending the appeal.[17] The requirement of a certification by the district court provides clarity on the jurisdictional question: absent the certification, the trial court ordinarily lacks authority to proceed to trial.[18] In addition, the requirement that the district court make a reasoned finding

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one, have developed a 'dual jurisdiction' rule, which allows a district court to proceed with trial while a defendant pursues an *Abney* double jeopardy appeal, where the district court has concluded that the appeal is frivolous."); United States v. Powell, 24 F.3d 28, 31 (9th Cir. 1994) ("[A]n appeal from the denial of a motion seeking to establish a right not to be tried does not divest the district court of jurisdiction if the district court has found that motion to be frivolous.").

The Supreme Court has noted the certification mechanism, with apparent approval, in discussing measures that can minimize the risk of delay from meritless qualified immunity appeals:

> In the present case . . . the District Court appropriately certified petitioner's immunity appeal as "frivolous" in light of the Court of Appeals' (unfortunately erroneous) one-appeal precedent. This practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings.

Behrens v. Pelletier, 516 U.S. 299, 310–11 (1996).

16 *See, e.g.*, McMath v. City of Gary, 976 F.2d 1026, 1030 (7th Cir. 1992) (warning that the right to an interlocutory appeal on a qualified immunity issue "would be eviscerated if district courts, cloaked with the authority of *Apostol*, could too easily certify even potentially meritorious appeals as frivolous"); *Apostol*, 870 F.2d at 1339 ("Such a power must be used with restraint, just as the power to dismiss a complaint for lack of jurisdiction because it is frivolous is anomalous and must be used with restraint.").

17 *See, e.g.*, *Apostol*, 870 F.2d at 1339 ("A party aggrieved by a finding of frivolousness or forfeiture . . . may seek a stay from this court, for we have jurisdiction to determine our jurisdiction."); *Dunbar*, 611 F.2d at 989 ("This Court is, of course, empowered to protect the defendant's double jeopardy rights by staying proceedings below pending appeal, or by issuing a writ of mandamus or prohibition." (citations omitted)).

18 *See, e.g.*, *Stewart*, 915 F.2d at 577 (explaining that the certification requirement "provides valuable certainty and clarity by creating a bright jurisdictional line between the district court and the circuit court").

The Fourth Circuit has recognized an exception to the requirement of district court certification in a case where, by the time of trial, the court of appeals had dismissed the defendant's double jeopardy appeal as frivolous but the court of appeals' mandate had not yet issued. *See Montgomery*, 262 F.3d at 240.

of frivolity[19] serves to ensure that the district court has considered the issue carefully and also helps to inform the court of appeals' consideration of the issue.[20]

The district judge's gatekeeping role in habeas appeals is well known. A state prisoner seeking to appeal the denial of habeas relief (or a federal prisoner seeking to appeal the denial of relief under 28 U.S.C. § 2255)[21] must obtain a certificate of appealability (COA).[22] A COA may only be issued if "the applicant has made a substantial show-

19 *See, e.g.*, *Stewart*, 915 F.2d at 577 (noting that courts have "emphasized the need for a clear and reasoned finding of frivolousness or forfeiture by the district court in order to prevent the automatic divestiture of jurisdiction"); *Apostol*, 870 F.2d at 1339 ("In the absence of the district court's reasoned finding of frivolousness or forfeiture . . . the trial is automatically put off . . . ."); *see also* Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) ("This court now adopts the rule set forth in *LaMere* in the context of interlocutory qualified immunity appeals. Should the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial."); United States v. LaMere, 951 F.2d 1106, 1109 (9th Cir. 1991) ("[T]he district court set forth its findings in writing as required under the *Dunbar* rule." (citing *Dunbar*, 611 F.2d at 988)); United States v. Farmer, 923 F.2d 1557, 1565 (11th Cir. 1991) ("If the district court makes written findings that a double jeopardy claim is frivolous or dilatory, then the interlocutory appeal does not divest the district court of jurisdiction, thus permitting the retrial to proceed.").

20 *Dunbar*, 611 F.2d at 989 ("The requirement of a written finding will enable this Court to review as expeditiously as possible a defendant's appeal and any request for relief from a district court's determination that an appeal is frivolous and does not deprive the court of jurisdiction to proceed.").

The Eighth Circuit has described the requisite procedure as follows:

> [W]e request a district court judge who denies a motion to dismiss based on double jeopardy to make a written finding of whether the motion is frivolous or nonfrivolous. If the motion is found to be frivolous, the filing of a notice of appeal will not divest the district court of jurisdiction. This court will then review the appeal on an expedited schedule. This court is already empowered to protect a defendant's rights by staying proceedings below pending disposal of an appeal. The written finding of lack of merit and the expedited review combined with existing power to issue stays should protect defendants' right not to be twice placed in jeopardy for the same crime.

United States v. Grabinski, 674 F.2d 677, 679–80 (8th Cir. 1982) (en banc) (per curiam). Without citing *Grabinski*, an Eighth Circuit panel more recently directed a different approach in the context of a qualified immunity appeal:

> Once a notice of appeal has been filed in a case in which there has been denial of a summary judgment motion raising the issue of qualified immunity, the district court should then stay its hand. Jurisdiction has been vested in the court of appeals and the district court should not act further. If the appeal is utterly lacking in merit and for the purpose of delay only, this court may take appropriate action.

Johnson v. Hay, 931 F.2d 456, 459 n.2 (8th Cir. 1991).

21 28 U.S.C. § 2255 (2006).

ing of the denial of a constitutional right,"[23] and the judge issuing the COA must also "indicate which specific issue or issues satisfy [that] showing."[24] Though the statute speaks of a "circuit justice or judge" issuing the COA,[25] Appellate Rule 22(b)(1) makes clear that the COA can be issued by a district judge,[26] and it is from the district court that the COA should ordinarily be sought in the first instance.[27] The standard for issuing a COA is, of course, distinct from the merits of the appeal itself[28]: clearly, it would make no sense to require the petitioner to seek a COA from the district judge if the standard required a favorable ruling on the merits (on which the district judge has ruled against the petitioner). But the COA standard nonetheless *relates* to

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22 The government need not obtain a COA in order to appeal. *See* FED. R. APP. P. 22(b)(3).

23 28 U.S.C. § 2253(c)(2) (2006).

24 *Id.* § 2253(c)(3).

25 *Id.* § 2253(c)(1).

26 Rule 22(b)(1) provides in part that "the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability." FED. R. APP. P. 22(b)(1); *see also, e.g.*, United States v. Mitchell, 216 F.3d 1126, 1129 (D.C. Cir. 2000) ("[A]ll the circuits addressing the issue have held that district court judges have the power to issue COAs.").

27 *See, e.g.*, Muniz v. Johnson, 114 F.3d 43, 45 (5th Cir. 1997) (remarking that Appellate Rule 22(b) "contemplates that the district court will make the first judgment whether a COA should issue and on which issues, and that the circuit court will be informed by the district court's determination in its own decisionmaking"); *see also Mitchell*, 216 F.3d at 1130 ("Rule 22(b) requires initial application in the district court for a COA before the court of appeals acts on a COA request."). If the district judge denies the COA, the petitioner should seek a COA from a circuit judge. *See* FED. R. APP. P. 22(b)(1).

As of this writing, proposed amendments to Rule 11 governing §§ 2254 and 2255 cases (and conforming amendments to Appellate Rule 22) are on track to take effect on December 1, 2009, assuming that Congress takes no contrary action during the statutorily prescribed period. *See* Letter to Nancy Pelosi, Speaker of the House, United States House of Representatives, and Joe Biden, Vice President of the United States, from John Roberts, Chief Justice of the United States (March 26, 2009), http://www.supremecourtus.gov/orders/courtorders/frcr09.pdf (transmitting amendments to the Federal Rules of Criminal Procedure). If they take effect, those amendments will require the district judge to rule on the COA at the same time that the judge denies the habeas petition. *See* ADMIN. OFFICE OF THE U.S. COURTS, AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 33–34, 36–37 (2007), *available at* http://www.uscourts.gov/rules/Supreme%20Court%202008/2008-CR-Clean_Rules.pdf. At present, however, that approach is not universal, and thus under current practice the district court's ruling on the COA may occur after the filing of the petitioner's notice of appeal. *See, e.g.*, Awon v. United States, 308 F.3d 133, 139 (1st Cir. 2002).

28 *See* Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("[A] COA does not require a showing that the appeal will succeed.").

the merits, because the petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner . . . ."[29] A district judge's grant of a COA thus signals to the court of appeals that the district judge views the issues designated in the COA as at least debatable.

The standard for granting a litigant leave to proceed in forma pauperis on appeal is more lenient than the standard for granting a COA[30]: in addition to showing economic eligibility, the appellant must show that at least one of the issues to be presented on appeal is nonfrivolous.[31] Conversely, the relevant statute provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."[32] It is common for courts to apply an objective standard to both of these inquiries, treating one as the mirror image of the other.[33] The district court, when denying a request to proceed in forma pauperis on appeal or when certifying

29 Slack v. McDaniel, 529 U.S. 473, 484 (2000). The standard's application to cases involving procedural bars is slightly more complex:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id.

30 Thus, many cases can be found in which the court denies a COA but grants in forma pauperis status to the would-be appellant. *See, e.g.*, Yang v. Archuleta, 525 F.3d 925, 927 (10th Cir. 2008) ("We grant Yang's request to proceed *ifp*, but deny a COA.").

31 *See, e.g.*, Hooker v. Am. Airlines, 302 F.3d 1091, 1092 (9th Cir. 2002) ("If at least one issue or claim is found to be non-frivolous, leave to proceed in forma pauperis on appeal must be granted for the case as a whole.").

32 28 U.S.C. § 1915(a)(3) (2006). If the appellant was given in forma pauperis status in the district court (or if the appellant is a criminal defendant who was found to be unable to obtain an adequate defense), then the appellant may automatically proceed in forma pauperis on appeal unless a statute provides otherwise or unless the district court, stating its reasons, certifies that the appeal is not in good faith or that the appellant is "not otherwise entitled to proceed" in forma pauperis. FED. R. APP. P. 24(a)(3).

33 *See, e.g*, Wooten v. D.C. Metro. Police Dep't., 129 F.3d 206, 208 (D.C. Cir. 1997) ("'In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous.'" (quoting Ellis v. United States, 356 U.S. 674, 674 (1958) (per curiam))).

that the appeal is not taken in good faith, must state its reasons.[34] Those determinations by the district court are reviewable by the court of appeals,[35] and the district court's statement of reasons can help to inform the court of appeals' determination concerning in forma pauperis status.

Appellate Rule 7 entrusts to the district court the tasks of deciding whether to require a bond "to ensure payment of costs on appeal," and of setting the amount of any such bond.[36] Rule 7's purpose appears to be to insure the appellee against the possibility that the appellant will be unable to pay if costs on appeal are taxed against the appellant.[37] Courts have reached varying views concerning whether and how the district court may take into account the merits of the appeal when deciding a motion for a Rule 7 cost bond. For example, the First Circuit has approved a district court's inclusion in such a bond of an amount reflecting the district court's prediction that the court of appeals might impose sanctions on the appellant under Appellate Rule 38 for taking a frivolous appeal.[38] The Ninth Circuit has disagreed, reasoning that permitting the district court to include

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34 *See* FED. R. APP. P. 24(a)(2) (requiring a statement of reasons for any denial of leave to proceed in forma pauperis on appeal); *id.* 24(a)(3)(A) (requiring a statement of reasons for certification that an appeal is not taken in good faith).

35 Although § 1915(a)(3) does not explicitly provide for appellate review of the district court's determination that the appeal is not in good faith, Appellate Rule 24(a) has (ever since its adoption) permitted such review. A number of cases uphold the court of appeals' ability to review the district court's determination that the appeal is not in good faith. *See, e.g.*, Rolland v. Primesource Staffing, LLC, 497 F.3d 1077, 1078 (10th Cir. 2007) ("The palpable conflict between [§ 1915(a)(3) and Rule 24] is resolved in favor of the procedures dictated by Rule 24(a)(5), by virtue of the fact that its most recent reenactment postdates that of § 1915(a)(3).").

36 FED. R. APP. P. 7.

37 *See* Adsani v. Miller, 139 F.3d 67, 75 (2d Cir. 1998) ("The court has made a determination that this particular appellant poses a payment risk because she has no assets in the United States and has failed to post a supersedeas bond. The purpose of Rule 7 appears to be to protect the rights of appellees brought into appeals courts by such appellants . . . .").

38 In finding that the district court had not abused its discretion, the First Circuit reasoned as follows:

> [A]lthough the district court did not expressly make a finding that the appeal on the merits was frivolous, we note that defendants' motion below requesting a bond sought 'security for the costs, including attorneys' fees, which may be awarded by the [court of appeals] to [defendants] pursuant to Fed.R.App.P. 38 and 39.' Thus, the district court's decision to set the amount at $5,000 implied a view that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility.

Sckolnick v. Harlow, 820 F.2d 13, 15 (1st Cir. 1987) (third alteration in original) (quoting defendant's motion).

anticipated Rule 38 sanctions in a Rule 7 cost bond could unduly deter appeals and would usurp the appellate court's role in determining whether to impose a sanction under Rule 38.[39] But the Ninth Circuit, along with a majority of the circuits that have considered the question, does permit the district court to include in the Rule 7 cost bond an amount reflecting the attorney fee that a successful appellee could recover under an applicable fee-shifting statute.[40] Though it is not entirely clear what role the district court's view of the appeal's merits will play in its consideration of whether to include an amount attributable to such an attorney fee award, it seems likely that the merits will at least sometimes factor into that determination. The Second Circuit, for example, has reasoned that "prejudging the case's chances on appeal" is "part and parcel of Rule 7":

> The only way that an appellant would have to pay any "costs" would be if he or she lost on appeal: therefore, a district court's imposition of any sort of cost bond (whether or not including attorney's fees) can always be described as an implicit finding that the appellant's appeal lacks merit, or at least that the appellant poses a payment risk. A district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal.[41]

The Eleventh Circuit has held that a Rule 7 cost bond can include an amount reflecting the possibility of recovering attorney fees (attributable to the appeal) under the fee-shifting provision in 42 U.S.C. § 1988(b)—but that when the plaintiff is the appellant, the asymmetric nature of § 1988's fee-shifting scheme permits the inclusion of such an amount in the Rule 7 bond only if the district court "determines that the appeal is likely to be frivolous, unreasonable, or without foundation."[42] Interestingly, in reaching this conclusion, the Eleventh Circuit analogized the district court's task to that which the district judge performs when considering a habeas petitioner's request for a COA:

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39 *See* Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 961 (9th Cir. 2007) ("[T]he question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38.").

40 *See id.* at 958 ("We agree with the Second, Sixth, and Eleventh Circuits and hold that the term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute, including attorney's fees." (citing FED. R. APP. P. 7)).

41 *Adsani*, 139 F.3d at 79.

42 Young v. New Process Steel, LP, 419 F.3d 1201, 1208 (11th Cir. 2005).

> [COA] determinations, which district courts routinely make in order to decide whether the denial of § 2254 or § 2255 relief can be appealed, are not perfectly analogous to the determination they must make in order to decide whether a judgment denying relief in a civil rights case can be appealed without a bond. Deciding whether a "substantial showing" [of the denial of a constitutional right] has been made is not the same thing as determining whether an appeal will be frivolous, unreasonable, or without foundation. But both tasks essentially involve evaluating a plaintiff's possibility of success on appeal based on what the court has seen of his case at the trial level. That is enough of a similarity to convince us that district courts will be able to assess prospectively appeals from the denial of relief in a civil rights case under a scale heavily tilted in favor of the plaintiff who wants to appeal.[43]

In various situations, then, the district court's gatekeeping role requires it to apply a standard which implicates the merits of the appeal. The district court's close familiarity with the case will help to inform those rulings, and the district court's findings will, in turn, assist the court of appeals in reviewing the gatekeeping decision. And for appeals that proceed through the gate, the ruling may also enrich the court of appeals' understanding of the merits of the appeal itself.

2. Other Ancillary Rulings

The preceding section canvassed district court determinations that may determine whether the appeal proceeds at all. This section notes that the district court is also the first-line decisionmaker on a number of other important issues relating to the appeal, and that rulings on those issues may also inform the court of appeals' consideration of the appeal's merits.

Under Appellate Rule 8, in a civil case[44] a request to stay the district court's judgment or order pending appeal ordinarily must be made first to the district judge.[45] The appellant may obtain a stay of a damages judgment by providing a supersedeas bond. Such a bond—which is designed to protect the appellee's right to payment of the judgment—must be approved by the district court.[46] Whether to stay

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43 *Id.*

44 Stays in criminal cases are governed by Criminal Rule 38. *See* FED. R. CRIM. P. 38. Requests by convicted defendants for release pending appeal are discussed below. *See infra* notes 62–71 and accompanying text.

45 *See* FED. R. APP. P. 8(a)(1).

46 *See id.* 8(a)(1)(B) (stating that a request for approval of a supersedeas bond should ordinarily be made first to the district court); FED. R. CIV. P. 62(d) (stating that a stay of judgment may be obtained by supersedeas bond, and stay "takes effect

an injunction pending appeal is committed in the first instance to the district court's discretion,[47] and the district judge's analysis of that question will explicitly include a consideration of the merits of the appeal. Though the test varies in its details, courts ordinarily apply some variant of a four-part balancing test which considers (1) the likelihood that the appellant will succeed on appeal, (2) the risk of harm to the appellant if the injunction is not stayed pending appeal, (3) the risk of harm to the other parties if a stay is granted, and (4) the public interest.[48] As John Gotanda has noted, "there is . . . a wide difference of opinion as to the degree or level of probability of success on the merits that the movant must show."[49] Some of that variation might arise from the nature of the four-factor balancing test[50]: it is standard to require less of a showing on the first factor when the showing on the other factors is very strong.[51] Courts have recognized that the

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when the court approves the bond"). Rule 62(d) excludes from its scope actions "described in Rule 62(a)(1) or (2)," that is, "(1) an interlocutory or final judgment in an action for an injunction or a receivership; or (2) a judgment or order that directs an accounting in an action for patent infringement." *Id.* 62(a), (d).

47 Rule 62(c) provides in part: "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." *Id.* 62(c); *see also* FED. R. APP. P. 8(a)(1)(C) (providing that "[a] party must ordinarily move first in the district court" for an order "suspending" or "modifying" an injunction pending appeal).

48 The Supreme Court has stated:

> Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

49 John Y. Gotanda, *The Emerging Standards for Issuing Appellate Stays*, 45 BAYLOR L. REV. 809, 813 (1993).

50 *See, e.g.*, Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 244 (6th Cir. 2006) ("All four factors are not prerequisites but are interconnected considerations that must be balanced together.").

51 *See, e.g.*, Stormans Inc. v. Selecky, 526 F.3d 406, 408 (9th Cir. 2008) ("[T]o satisfy steps (1) and (2), we will accept proof either that the applicant has shown 'a *strong* likelihood of success on the merits [and] . . . a *possibility* of irreparable injury to the [applicant],' or 'that *serious* legal questions are raised and that the balance of hardships tips *sharply* in its favor.'" (alterations in original) (quoting Golden Gate Rest. Ass'n v. City of San Francisco, 512 F.3d 1112, 1115–16 (9th Cir. 2008))); Humane Soc'y v. Gutierrez, 523 F.3d 990, 991 (9th Cir. 2008) ("[T]he issues of likelihood of success and irreparable injury represent two points on a sliding scale in which

standard should not require a finding that the appellant will more likely than not succeed on appeal, since this would be an unlikely finding for a district court to make with respect to a challenge to its own ruling.[52] In any event, whether the first factor is formulated as "a substantial likelihood of success on the merits,"[53] "a reasonable likelihood of success on the merits,"[54] or a showing that the appellant "has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation,'"[55] the district judge's findings on this factor

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the required degree of irreparable harm increases as the probability of success decreases." (citing *Golden Gate Rest. Ass'n*, 512 F.3d at 1115)); *In re* World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007) ("[T]he degree to which a factor must be present varies with the strength of the other factors."); FTC v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 852 (10th Cir. 2003) ("[W]here the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed." (citing Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001))); McCammon v. United States, 584 F. Supp. 2d 193, 197 (D.D.C. 2008) ("A party does not necessarily have to make a strong showing with respect to the first factor (likelihood of success on the merits) if a strong showing is made as to the second factor (likelihood of irreparable harm).").

The four-part test for stays of injunctions pending appeal is similar to the four-part test for preliminary injunctions. In the latter context, the Supreme Court recently rejected a variant of the sliding-scale approach under which "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." Winter v. Natural Res. Defense Council, Inc., 129 S. Ct. 365, 375 (2008). The Court explained that the "'possibility' standard is too lenient" because the preliminary-injunction test "requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* The Court's elimination of this particular approach in the context of preliminary injunctions need not be seen as casting doubt on all the cases that apply a flexible standard under Rule 8 for stays of injunctions pending appeal. The two tests are not identical. Moreover, even if the *Winter* reasoning can be read to imply that courts should require a minimum showing of likelihood of harm in the Rule 8 context, that would not foreclose the use of a sliding-scale approach which permitted the likelihood-of-success showing to vary inversely to the harm showing (so long as the harm showing always met the required minimum).

52 The D.C. Circuit has stated:

> [A] court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits.

Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

53 United States v. Philip Morris Inc., 314 F.3d 612, 617 (D.C. Cir. 2003).

54 Hinrichs v. Bosma, 440 F.3d 393, 396 (7th Cir. 2006).

55 *Mainstream Mktg. Servs*, 345 F.3d at 853 (quoting *Pierce*, 253 F.3d at 1246–47).

will by definition illuminate his or her views concerning the merits of the appeal. If the district court refuses to stay the injunction, Appellate Rule 8 permits the applicant to seek a stay from the court of appeals, and the Rule requires the applicant to "state any reasons given by the district court for its action"[56]—presumably contemplating that those reasons will inform the appellate court's consideration of the matter.[57]

Under Appellate Rule 23, determinations whether to release a habeas petitioner pending appeal can be made by the district judge in the first instance.[58] The court will apply the same four-factor balancing test that applies to other civil appeals[59] (though the factors may of course balance out differently due to the specifics of the habeas context). The starting point for the analysis concerning release will differ depending on whether the district court granted or denied the habeas

56 FED. R. APP. P. 8(a)(2)(A)(ii).

57 This does not mean that the court of appeals will necessarily defer to the district court's decision on the stay. *Compare* Lightfoot v. Walker, 797 F.2d 505, 507 (7th Cir. 1986) (reasoning, in a case involving a request to stay an attorney fee award, that "if the basis of the application for such a stay lay in events occurring after the district court had denied a similar application, we would make an independent judgment," but that where "the application is in effect an appeal from the district judge's denial of the stay, we shall treat it as such and give the district judge's action the appropriate deference"), *with* Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460 (6th Cir. 1991) ("[W]e are not reviewing the district judge's grant of the injunction, and are therefore not bound to defer to his judgment. We are, however, bound to accept the district court's factual findings unless we find them to be 'clearly erroneous.'" (quoting FED. R. CIV. P. 52(a)).

58 Under Appellate Rule 23(b) and (c), the question of release pending appeal from a habeas determination can be made by "the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court." FED. R. APP. P. 23(b),(c).

59 The Supreme Court has so held in the context of a determination concerning release under Rule 23(c): "[T]he general standards governing stays of civil judgments should also guide courts when they must decide whether to release a habeas petitioner pending the State's appeal." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Accordingly, the factors to be balanced are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. The *Braunskill* Court's reasoning seems equally applicable to the analysis of requests for release under Rule 23(b).

petition,[60] but in either event the factors to be analyzed will include the merits of the appeal.[61]

The merits are also relevant when assessing a defendant's request for release pending appeal from a judgment of conviction. Appellate Rule 9 contemplates that such requests will be made in the first instance to the district court.[62] In most cases,[63] the governing statute directs the judge to order a convicted defendant detained pending his or her appeal from the judgment of conviction unless the judge

60 If the district court ordered the release of the habeas petitioner, then Rule 23(c) directs that the prisoner be released in the absence of a contrary order; in such instances, "[t]here is [a] presumption in favor of enlargement of the petitioner with or without surety, but it may be overcome if the traditional stay factors tip the balance against it." *Id.* at 777. In contrast to Rule 23(c), Rule 23(b)—which governs the question of release pending appeal from a decision not to release the habeas petitioner—does not set a presumption in favor of release. *See* FED. R. APP. P. 23 (b), (c).

61 In the Rule 23(b) context, the Ninth Circuit denied bail pending review of the denial of federal prisoners' request for collateral relief on the ground that "appellants have not demonstrated their appeal is an extraordinary case involving 'special circumstances' or presents a 'high probability of success.'" United States v. Mett, 41 F.3d 1281, 1282 (9th Cir. 1994) (citing Land v. Deeds, 878 F.2d 318, 318 (9th Cir. 1989)).

In the Rule 23(c) context, the *Braunskill* Court stressed the likely importance of the assessment of the appeal's merits:

> The balance may depend to a large extent upon determination of the State's prospects of success in its appeal. Where the State establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits, continued custody is permissible if the second and fourth factors in the traditional stay analysis militate against release.

Braunskill, 481 U.S. at 778.

62 Prior to its amendment in 1994, Rule 9(b) stated explicitly that "[a]pplication for release after a judgment of conviction shall be made in the first instance in the district court." FED. R. APP. P. 9(b) (1988) (amended 1994 & 1998). Though Rule 9(b) no longer contains this explicit directive, its reference to "review of a district-court order regarding release after a judgment of conviction" seems to contemplate a continuation of this practice. FED. R. APP. P. 9(b). Section 3141(b) of title 18 states: "A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under this chapter." 18 U.S.C. § 3141(b) (2006).

63 The statute presumptively requires detention pending appeal for defendants convicted and sentenced to imprisonment for certain types of serious crime. *See* 28 U.S.C. § 3143(b)(2). *But see id.* § 3145(c) ("A person subject to detention pursuant to section 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.").

makes certain findings concerning flight risk and dangerousness and also finds

> that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—(i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.[64]

A number of circuits have concluded that the latter portion of the test requires "a two-part inquiry: (1) Does the appeal raise a substantial question? (2) If so, would the resolution of that question in the defendant's favor be likely to lead to reversal?"[65] On the first of these prongs, some circuits direct the court to ask whether the issue on appeal "is a close question or one that very well could be decided the other way."[66] Two circuits ask, instead, only whether the issue is "fairly debatable" among reasonable judges.[67] In any event, as with stays in civil cases, so too here there is no requirement that the district judge find that he or she is likely to be reversed.[68] Thus, the court of

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64 *Id.* § 3143(b)(1)(B).

65 United States v. Perholtz, 836 F.2d 554, 555 (D.C. Cir. 1987) (listing cases); *see also, e.g.*, United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991) ("In applying § 3143(b)(2) the court must make two inquiries after finding that the appeal is not taken for the purpose of delay. First, whether the question presented on appeal is a 'substantial' one. Second, if decided in favor of the accused, whether the substantial question is important enough to warrant reversal or a new trial on all counts for which the district court imprisoned the defendant.").

66 *Perholtz*, 836 F.2d at 556; *see also* United States v. Colon-Munoz, 292 F.3d 18, 20 (1st Cir. 2002) ("The 'likely to result' standard is applied flexibly—a question that can be regarded as 'close' will often suffice . . . ."); United States v. Marshall, 78 F.3d 365, 366 (8th Cir. 1996) ("We require a showing that the appeal presents 'a close question'—not 'simply that reasonable judges could differ'—on a question 'so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor.'" (quoting United States v. Powell 761 F.2d 1227, 1234 (8th Cir. 1985))); *Steinhorn*, 927 F.2d at 196 (adopting the *Giancola* test, which asks whether an issue presents "a 'close' question or one that very well could be decided the other way" (quoting United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985))); United States v. Clark, 917 F.2d 177, 180 (5th Cir. 1990) (agreeing that a substantial question is one that "'could very well be decided the other way'" (quoting United States v. Valera-Elizondo, 761 F.2d 1020, 1024 (5th Cir. 1985))); United States v. Shoffner, 791 F.2d 586, 589 (7th Cir. 1986) ("[W]e have adopted the formulation of the Eleventh Circuit in *United States v. Giancola* . . . .").

67 United States v. Smith, 793 F.2d 85, 89 (3d Cir. 1986); United States v. Handy, 761 F.2d 1279, 1282–83 (9th Cir. 1985).

68 *See, e.g.*, United States v. Eaken, 995 F.2d 740, 743 (7th Cir. 1993) (Easterbrook, J., dissenting) ("Even district judges who perceive a 'substantial question' lurk-

appeals should "not regard a decision to grant bail pending appeal as a concession by the trial judge that he lacked confidence in his decision, but rather as an acknowledgement that some legal questions are simply harder to resolve than others."[69] The district court must state the reasons for its ruling on the request for release,[70] and that reasoning will help to inform the court of appeals' analysis of the release issue if review of the order is sought.[71]

The other major category of ancillary rulings that warrants mention here concerns the record on appeal.[72] Under Appellate Rule 10(e), the district court will ordinarily be the first-line decisionmaker concerning disputes over the content of the district court record.[73]

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ing do not believe that the question is 'likely' to produce reversal—if they believed this, they would have acquitted the defendant."); United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985) (rejecting a "construction [of the statute] which would make bail contingent upon a finding by the district court that it is likely to be reversed"); United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985) ("[R]equiring district judges to determine the likelihood of their own error is repugnant, for in such a case the proper remedy would be to rectify the error on post-trial motions.").

69 *Shoffner*, 791 F.2d at 588 n.3.

70 Appellate Rule 9(b) (which governs requests for release after judgment of conviction) provides that the district court's order is "subject to Rule 9(a)." FED. R. APP. P. 9(b). Appellate Rule 9(a) requires the district judge to "state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case." *Id.* 9(a).

71 *See, e.g.*, United States v. DiSomma, 951 F.2d 494, 497 (2d Cir. 1991) (affirming an order granting release pending appeal, and stating that "[t]he trial judge reasonably concluded that an appellate court might find no basis from which to infer the necessary violence" and that "[g]iven the trial judge's close familiarity with the evidence presented in the case, her determination in regard to this matter should be upheld"); *In re* Smith, 823 F.2d 401, 401 (11th Cir. 1987) ("Rule 9(b) of the Federal Rules of Appellate Procedure commands that such reasons be specified in writing; moreover, of course, written explanations for denying release during appeal are helpful to this court in discharging our own responsibility under Rule 9(b).").

72 Under Appellate Rule 10(a), the record on appeal consists of "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." FED. R. APP. P. 10(a).

73 Appellate Rule 10 provides two additional mechanisms through which the district court can affect the contents of the record on appeal. *See id.* 10(c), (d). Though proceedings in open court generally must be recorded, *see* 28 U.S.C. § 753(b) (2006), the recording is sometimes lost through human or technical error. Rule 10(c) provides that if a hearing or trial transcript is thus unavailable, the appellant may prepare a statement of the proceedings, and the appellee may serve objections to the statement. FED. R. APP. P. 10(c). The district court then settles and approves the statement. *Id.* The court of appeals is likely to give considerable deference to the district judge's rulings on the statement of the record under Rule 10(c). *See, e.g.*, United States v. Keskey, 863 F.2d 474, 478 (7th Cir. 1988) ("We must accept the court's recon-

Rule 10(e)(1) provides that "[i]f any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly."[74] Rule 10(e)(2) provides that material omissions from or misstatements in the record can be corrected "(A) on stipulation of the parties; (B) by the district court before or after the record has been forwarded; or (C) by the court of appeals."[75] As a catchall, Rule 10(e)(3) directs that "[a]ll other questions as to the form and content of the record must be presented to the court of appeals."[76] A similar principle underlies Civil Rule 60(a) and Criminal Rule 36, each of which authorizes the district court to correct "clerical" errors or errors that arose from "oversight or omission."[77] One procedural complication concerns timing with respect to civil appeals: Appellate Rule 10(e)(2)(B), as noted above, authorizes the district court to make such corrections "before or after the record has been forwarded,"[78] whereas Civil Rule 60(a) provides that "after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave."[79] But leaving that question aside, the key point for the present purpose is that corrections under Appellate Rule 10(e), Civil Rule

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struction of the record under Federal Rule of Appellate Procedure 10(c) unless it was intentionally falsified or plainly unreasonable.").

Rule 10(d) permits the parties to prepare an agreed-upon statement—subject to the district court's approval—for use as the record on appeal. FED. R. APP. P. 10(d). This provision, however, seems rarely to be used.

74 FED. R. APP. P. 10(e)(1).

75 *Id.* 10(e)(2).

76 *Id.* 10(e)(3).

77 FED. R. CIV. P. 60(a); FED. R. CRIM. P. 36.

78 FED. R. APP. P. 10(e)(2)(B).

79 FED. R. CIV. P. 60(a). In holding that the district court had been entitled to correct the record to reflect an event at the final pretrial conference which pertained to a jurisdictional issue, the court of appeals noted the possible tension between the two provisions:

> We believe that the district court was entitled to take the corrective action that it did take. If characterized as a correction of the record under Rule 10(e) of the Federal Rules of Appellate Procedure, the action could be taken without leave of this court. . . . If, on the other hand, the district court's action was taken under Rule 60(a) of the Federal Rules of Civil Procedure, the permission of this court is a necessary prerequisite because the case is in the court of appeals.

Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1014 n.9 (7th Cir. 2000).

In any event, the court of appeals concluded that its "sua sponte order . . . inquiring about jurisdiction is sufficient authority for the district court to enter an order explaining the circumstances that cause the jurisdictional ambiguity." *Id.*

60(a), and Criminal Rule 36 should only be used to ensure that the record reflects what actually occurred in the district court prior to the filing of the notice of appeal.

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The district judge, then, may make a number of ancillary rulings, after the notice of appeal is filed, that disclose something about the district judge's view of the merits. Sometimes the ruling will not be particularly revelatory—as, for instance, where the district judge tersely denies a habeas petitioner's request for a COA. But in other instances, the ruling may lead the district judge to revisit the challenged decision and provide a thoughtful analysis of whether the decision posed a close question.[80] Such rulings will obviously aid the court of appeals in any review of the ancillary ruling—but they also may inform the appellate court's understanding of the merits of the appeal itself.

Such rulings do not offend the *Griggs* Court's notion that only one court should control the case at one time, because these rulings do not alter the decision that is under review. Nor do they raise practical concerns. These rulings are ordinarily made at a party's request, so they do not place the district judge in the position of unilaterally volunteering additional information concerning the appeal. And since these rulings typically occur at the outset of the appellate process, to the extent that the district judge's ancillary ruling communicates a view on the merits, the parties can if necessary respond to the ruling when they brief the appeal. As we shall see in the next subpart, a different calculus may obtain when the district judge—outside the context of any ancillary ruling—augments the reasoning for the decision that is under appeal.

B. Intentional Communications

The district judge is the primary arbiter of disputes concerning the record. The standard view is that, in this role, the district judge is limited to ensuring that the record accurately reflects what took place in the district court prior to the filing of the notice of appeal. But in reality, that standard view sometimes blurs in practice, for instance when the district judge amplifies the reasoning in support of the judgment that is under appeal. Unlike the rulings discussed in the preced-

80 *Cf.* United States v. Eaken, 995 F.2d 740, 743 (7th Cir. 1993) (Easterbrook, J., dissenting) (noting that 18 U.S.C. § 3143(b)(1)(B)'s test for release pending appeal casts the district judge in a "self-critical role").

ing subpart—which shed light on the district judge's view of the merits only as a byproduct of a ruling on some other issue—these are instances where the district judge provides new findings or reasoning specifically in order to inform appellate review.

The extent of such practices is unclear. The First Circuit recently noted with concern "a relatively new phenomenon: the practice indulged in by some district courts of filing post-judgment, post-appeal sentencing memoranda."[81] Within the Third Circuit, the occurrence of post-judgment memoranda is sufficiently common that it is addressed by a local rule: Third Circuit Local Appellate Rule 3.1 provides that "[n]o later than 30 days after the docketing of a notice of appeal, the trial judge may file and transmit to the parties a written opinion or a written amplification of a prior written or oral recorded ruling or opinion."[82] Though the commentary notes that this rule "does not authorize a trial judge to change a prior ruling except as provided by F.R.C.P. 59(e),"[83] the local rule is intended to provide the trial court with the "flexibility" to "explain[] a decision after an appeal is taken."[84]

The courts of appeals vary in their willingness to consider belated writings by the district judge. Perhaps the least controversial variant occurs when the district judge puts oral findings in writing after an

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81 United States v. Martin, 520 F.3d 87, 88 (1st Cir. 2008).

82 3D CIR. LOCAL APP. R. 3.1.

83 Civil Rule 59(e) provides that "[a] motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment." FED. R. CIV. P. 59(e).

84 3D CIR. LOCAL APP. R. 3.1 committee comments. It is interesting to note that state courts in two of the states within the Third Circuit have rules that authorize the trial judge to provide an opinion after the filing of the notice of appeal. Pennsylvania Rule of Appellate Procedure 1925(a) provides in part:

> Upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or shall specify in writing the place in the record where such reasons may be found.

PENN. R. APP. P. 1925(a). New Jersey Rule 2:5-1(b) provides in part:

> In addition to the filing of the notice of appeal the appellant shall mail a copy thereof . . . to the trial judge . . . . Within 15 days thereafter, the trial judge . . . may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to R. 1:2-2. If there is no such prior statement, opinion or memorandum, the trial judge . . . shall within such time file with the Clerk of the Appellate Division and mail to the parties a written opinion stating findings of fact and conclusions of law.

N.J. R. 2:5-1(b), *available at* http://www.judiciary.state.nj.us/rules/r2-5.htm.

appeal is taken. So long as the written findings are consistent with the oral findings, they may be permitted on the theory that they aid the appellate court's review.[85] But the longer the delay, and the greater the difference between the later writing and the prior decision, the more likely that the court will look askance at the district court's belated submission.

One of the principal concerns, in this context, is that the belated filing will prejudice the appellant's rights by turning the challenged ruling into a moving target. If the initial decision is too barebones, it may limit the losing party's ability to make an informed assessment concerning whether to take an appeal.[86] And once an appeal is taken, a belated supplemental opinion from the district judge may come too late to be addressed in the appellant's main brief. Thus, for example, in deciding whether to consider an opinion filed by the district court outside the time limit set by Third Circuit Local Appellate Rule 3.1,[87] the Third Circuit has considered whether the appellant had the opportunity to respond in its appellate briefs to the additional points made in the supplemental opinion.[88] Perhaps ironically, if a supplemental written opinion contributes little to the existing record, that

85 *See, e.g., In re* Walker, 515 F.3d 1204, 1211 (11th Cir. 2008) ("[W]hen a trial court reduces its oral findings to writing and cites relevant case law, it does not lack jurisdiction to do so because the losing party filed a notice of appeal after the oral hearing but before the entry of the written order. Such a subsequent order aids appellate review." (citation omitted)); *In re* Mosley, 494 F.3d 1320, 1328 (11th Cir. 2007) ("[A] lower court has jurisdiction to reduce its oral findings to writing even if a party has filed a notice of appeal in the interim."); *In re* Silberkraus, 336 F.3d 864, 869 (9th Cir. 2003) ("[T]he bankruptcy court retained jurisdiction to publish its written findings of fact and conclusions of law because they were consistent with the court's oral findings and because they aid us in our review of the court's decision." (footnote omitted)).

86 As Judge Posner has observed: "The losing party cannot make an informed judgment whether to appeal until he has the complete statement of the district judge's reasons. The practice therefore encourages the filing of protective notices of appeal designed to get the judge to state his reasons fully." *In re* Jones, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring).

87 Prior to a December 2008 amendment, the time limit was fifteen days. *See* 3D CIR. LOCAL APP. R. 3.1 committee comments.

88 In *United States v. Scarfo*, 263 F.3d 80 (3d Cir. 2001), the court of appeals considered the district court's March 2001 written order which "supplement[ed] its reasons for entering the December 6, 2000, gag order, as well as defin[ed] the exact parameters of the gag order." *Id.* at 89. Though the March 2001 order was written after the appellant had filed his main brief, the appellant's reply brief addressed the order and the court of appeals found that the appellant was not prejudiced. *Id.*

Similarly, in *United States v. Bennett*, 161 F.3d 171 (3d Cir. 1998), the court of appeals considered a written sentencing memorandum—filed some eight months after the sentencing at a point in time when the briefing on appeal was complete—

may make the court of appeals more likely to find a lack of prejudice to the appellant.[89]

It may seem efficient, from the standpoint of the district judge, to defer writing a lengthy opinion when issuing a judgment that may never be appealed.[90] But some have suggested that the provision of a supplemental opinion after the filing of a notice of appeal might signal that the initial judgment was not fully considered, and also that the spirit in which the supplemental opinion would be written might depart from the ideal of the judicial role. Judge Posner, for example, has stated:

> [T]he practice of writing opinions only in cases that the judge knows have been appealed converts the opinion-writing process from exploration to rationalization. The judge is defending a deci-

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because the memorandum was a "helpful amplification" and the parties had been permitted to file supplemental briefs in response to the memorandum. *Id.* at 186–87.

89 An example is provided by *In re Jones*, 768 F.2d 923. The district judge had affirmed the bankruptcy court in an oral opinion. After the trustee filed a notice of appeal from the district court judgment, the district court issued a written opinion. *Id.* at 925. Though the court of appeals noted "a danger . . . that in these circumstances the appellant will not have before him all the arguments later relied on in the written opinion," it found "no prejudice to the trustee" in this instance, because "the oral opinion clearly incorporated the bankruptcy court's two written opinions," and because the bankruptcy judge's "opinions seem to us to express the appellees' position more cogently than the district court's later written opinion." *Id.* at 925 n.2. Accordingly, the court concluded, "if technically only the oral opinion and bankruptcy orders are before us because the district court lacked jurisdiction to enter its written opinion, we have an adequate basis for understanding the district court's reasoning and deciding this appeal." *Id.*

90 *See, e.g.*, United States v. Martin, 520 F.3d 87, 98 n.9 (1st Cir. 2008) ("Many of us have been trial judges and we recognize the immense pressures on district courts and the understandable desire of busy trial judges not to invest time and effort in extravagant explanations that may prove to be unnecessary. But as we have noted above, the disadvantages of the practice are substantial."); Aoude v. Mobil Oil Corp., 862 F.2d 890, 895 (1st Cir. 1988) ("We understand that overtaxed district courts, struggling with burgeoning case loads, are often unable to ignore their dockets and generate instant written opinions."). Judge Posner, criticizing a district judge's practice of deciding bankruptcy cases with an oral opinion (and not providing a written opinion unless an appeal was taken), conceded:

> [T]he practice has appeal as a time-saver—no mean consideration in an era of heavy judicial caseloads. Why bother to write an opinion if the case is not going to be appealed? The parties are entitled to a statement of the reasons for the judge's result, and they get it, but it is oral. Only if the case is appealed does the judge take the time necessary to prepare a written opinion.

In re Jones, 768 F.2d at 930 (Posner, J., concurring).

> sion that he has already reached and announced and that is being challenged in a higher court, rather than formulating a decision.[91]

Though recognizing that caseload pressures might explain the practice, Judge Posner has suggested that parties might resent the notion that they could only obtain a fuller explanation of the district judge's reasoning if they appealed:

> Maybe it is sentimental to question the rationing of our district judges' scarce time on the basis of which cases are most important to the development of the law, and no doubt those judges in deciding whether and how much to write consider anyway the probability that the case will be appealed. But I am disturbed by a practice that amounts to telling litigants, "The reasons I give you for my decision are not good enough for the appellate court, so if but only if you appeal I will give you a fuller statement." It is an admission of the oral opinion's inadequacy.[92]

As the preceding paragraph suggests, courts of appeals sometimes worry that a district court's belated, volunteered submission may cast the district judge in an inappropriate role. One court has noted, in the criminal sentencing context, that

> when the district court files a tardy sentencing memorandum after an appeal has been taken, it runs a risk of creating an unwelcome appearance of partisanship. Its writing understandably may be viewed by the appealing party as a quasi-brief, filed as a way of defending the sentence against the appeal.[93]

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91 *In re Jones*, 768 F.2d at 932. Judge Posner conceded that the court of appeals sometimes employs a similar practice, but he stressed that such instances are rare: "It is true that this court sometimes announces its decision before handing down its opinion. But we reserve the practice for cases that either are emergencies or are frivolous." *Id.*

92 *Id.* It is interesting to observe that similar questions surfaced in the debate over appellate courts' use of unpublished opinions. So, for example, Judge Posner has summarized and countered one of the arguments against unpublished appellate opinions:

> It has been argued that streamlining has produced a bifurcated system of federal appellate justice in which "interesting" cases receive the traditional kind of appellate review—involving oral argument, careful analysis of the issues by the judges themselves, and a published opinion—while "hopeless" or "routine" appeals are fobbed off on staff, and that this sort of case "tracking" is inconsistent with the ideals of equal justice. Descriptively this argument is pretty accurate, but normatively it is unconvincing. Equality in adjudication means treating like cases alike, not all cases alike.

RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 172 (1999) (footnotes omitted).

93 *Martin*, 520 F.3d at 97.

Along the same lines, in determining whether to consider a belatedly filed opinion, the Third Circuit has considered whether the district court "alter[ed] or clarif[ied] its rulings to address the arguments raised in [the appellant's] appellate brief or cater[ed] to the identity of the panel."[94] In a case where the district judge filed a thirty-page opinion three months after final judgment (at a point when the parties had already filed their principal briefs on appeal), the court of appeals denied a request to reassign the case on remand, but observed "that the preferred practice is for the district court to file any memorandum opinions before or concurrent with its final judgment. Exigent circumstances may justify a late memorandum, but delayed filing may raise suspicions of partiality. Unquestionably, the better and preferred practice is prompt filing."[95]

The practice of providing an augmented opinion after the filing of a notice of appeal might seem to serve the goal of efficiency by lightening the trial judge's load in cases which do not generate an appeal. But such a benefit should be weighed against the possibility of unfairness to the litigants and the possibility of questionable effects on the judge's role. Appellate courts are likely, therefore, to discourage the routine use of such a practice. On the other hand, a belated supplemental opinion may sometimes prove useful to the court of appeals without raising undue problems for the parties and without placing the district judge in an inappropriate position. Thus we see that the appellate courts have retained for themselves the discretion to accept and consider such supplementations if the circumstances warrant.

C. Invited Communications

With respect to the communications discussed in the preceding subpart, a number of the qualms expressed by the courts of appeals connect to the unsolicited nature of the communication: the fact that the district judge volunteers additional views on the merits of the issues on appeal might raise concerns about the nature of the district judge's role. In this vein, a useful point of comparison can be derived from the instances in which the court of appeals invites or directs a response from the district judge while a matter is on review in the court of appeals. This may occur when a party seeks an extraordinary writ directed to the district judge. It also occasionally arises when the

94 United States v. Bennett, 161 F.3d 171, 186 (3d Cir. 1998).

95 United States v. Pelullo, 14 F.3d 881, 906–07 (3d Cir. 1994).

court of appeals employs a "limited remand" to secure the district judge's input on a matter relevant to the appeal.[96]

1. Extraordinary Writs

Modern practice concerning extraordinary writs tends to discourage active participation by the district judge in most proceedings on a petition for a writ directed to the district judge. However, the court of appeals retains the authority to request or invite the district judge to respond to the petition, and such invited responses can sometimes play a key role in the court of appeals' decision concerning the petition.

A stated goal of the 1996 amendments to Appellate Rule 21 was to remove the district judge from the nominal role of party in an extraordinary writ proceeding, and to emphasize that such proceedings typically function instead as a form of appellate review in which the true adversaries are the contending parties below.[97] As the Committee Note put it, "[i]n order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent."[98] Instead, Rule 21(a)(1) states that "[a]ll parties to the proceeding in the trial court other than the petitioner are respondents."[99] The district judge is not *served* with the

96 *See infra* Part I.C.2 for a discussion of limited remands.

97 *See* FED. R. APP. P. 21 committee note ("In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties.").

98 *See id.*

99 FED R. APP. P. 21(a)(1). Of course, that arrangement may work best when at least one party to the proceeding below wishes to support the district court determination. An unusual sequence of events was presented in the death penalty case of Len Davis, a former New Orleans police officer convicted of capital crimes in connection with "the execution-style murder" of a woman who had filed a police brutality complaint against him. *See* United States v. Causey, 185 F.3d 407, 411 (5th Cir. 1999) (providing facts and procedural history and, inter alia, remanding for resentencing of Davis). After Davis asserted the right to represent himself in the penalty phase on remand and indicated his intent not to present traditional mitigation evidence (focusing instead on the strength of the evidence as to guilt), the district judge ordered "that the Constitution calls for Davis to be represented by counsel and that counsel shall determine how the penalty phase should be conducted." United States v. Davis, 150 F. Supp. 2d 918, 920–21 (E.D. La. 2001). Davis appealed this order and, alternatively, sought a writ of mandamus, arguing that he should be permitted to proceed pro se in the penalty phase; the government supported the mandamus request. *See* United States v. Davis, No. 01-30656, 2001 WL 34712238, at *1 (5th Cir. July 17, 2001). The Fifth Circuit panel majority, noting that the district judge "relies on its extensive

Order and Reasons, filing nothing further in this court," granted the writ on the ground that under *Faretta v. California*, 422 U.S. 806 (1975), "[i]f Davis made a knowing and intelligent waiver of his right to counsel, he is entitled to represent himself." *Davis*, 2001 WL 34712238, at *1, *3. The panel majority concluded by directing that

> the writ is issued to remand this action for a sentencing hearing wherein Davis will be allowed to proceed *pro se* if he wishes to do so and knowingly and intelligently waives his right to counsel. The district court may of course appoint stand-by counsel for Davis if such is appropriate.

Id. at *3. Judge Dennis dissented on the merits and also objected that the panel majority should not have granted the writ "summarily without oral argument and without inviting an amicus curiae to advocate the interest of the people of the United States in the fair and efficient administration of justice in the imposition of federal capital punishment." *Id.* at *4 (Dennis, J., dissenting).

The Fifth Circuit docket reflects that the district judge then submitted a letter "requesting . . . reconsideration of [the] Court's opinion/order." Docket Entry, United States v. Davis, No. 01-30656 (5th Cir. July 31, 2001). The judge's letter, reproduced as an appendix to a later ruling, indicates that she submitted the letter "in response to an invitation from the panel in the above case to request the Court to reconsider its recent ruling." United States v. Davis, 180 F. Supp. 2d 797, 808 (E.D. La. 2001) (reproducing the letter). The letter invoked "the reasons given in my original Order and Reasons and also the reasons given in the dissent by Judge Dennis," and offered some additional arguments as well. *Id.* at 808–11. Shortly thereafter, the docket indicates, the court of appeals entered an order which, inter alia, "den[ied] motion of the district judge for reconsideration of the prior order." (The docket reflects that Judge Dennis dissented from at least some aspects of that order.) Docket Entry, United States v. Davis, No. 01-30656 (5th Cir. Aug. 3, 2001).

Later that month, in an opinion which referenced the earlier opinion and letter, the district court "appoint[ed] independent counsel to investigate and present mitigation evidence at the penalty phase." *Davis*, 180 F. Supp. 2d at 798 & n.1. Davis then moved in the court of appeals for clarification of the prior writ, or alternatively for a new writ. The Fifth Circuit docket indicates that the court of appeals ordered the government to respond to Davis's motion, and that the court of appeals order also stated:

> The panel invites Judge Helen G Berrigan to address the motion, but certainly does not require her to do so. The panel leaves the matter of a response entirely to her discretion and notes that it has the benefit of her thorough Order of August 30, 2001. . . . The appointed independent counsel, Laurie White, as amicus curiae is invited, but not required to file a response to the motion.

Docket Entry, United States v. Davis, No. 01-30656 (5th Cir. Oct. 10, 2001).

The Fifth Circuit docket indicates that Judge Berrigan did not submit a further response, but that the independent counsel filed a response and that the National Association of Criminal Defense Lawyers filed an amicus brief (with the court's permission). *Id.* Once again, a divided panel granted the writ, with the panel majority reasoning that "the district court's decision to appoint an independent counsel violates Davis's Sixth Amendment right to self-representation." United States v. Davis, 285 F.3d 378, 381 (5th Cir. 2002). The independent counsel continued to press a challenge, but her requests for panel rehearing and rehearing en banc were denied,

petition, though the Rule directs that he or she be provided with a copy.[100]

The court of appeals can deny the petition without requiring a response, but otherwise Rule 21(b)(1) directs it to order an answer from the respondents.[101] By contrast, the 1996 Committee Note voices an expectation that a response from the district judge will usually be unnecessary: "The court of appeals ordinarily will be adequately informed not only by the opinions or statements made by the trial court judge contemporaneously with the entry of the challenged order but also by the arguments made on behalf of the party opposing the relief."[102] But the Committee Note also acknowledges that "[i]n some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue."[103] Accordingly, Rule 21(b)(4) permits, but does not require, the court of appeals to request or direct a response from the district judge.[104] And as an alternative to requesting such a response, Rule 21(b)(4) authorizes the court of appeals to invite an amicus curiae to respond in the district judge's stead.[105] The 1996 Committee Note explains that the Rule proffers this alternative out of concerns about the proper role of the district judge:

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as was her petition for certiorari. White v. United States, 537 U.S. 1066 (2002) (mem.)(denying certiorari).

It is unusual—indeed, it is not entirely clear that it is permissible—for a district judge to request rehearing after the court of appeals issues an extraordinary writ directed to the judge. *See In re* Boston's Children First, 244 F.3d 164, 171–72 (1st Cir. 2001) (stating that "the court received a petition for rehearing en banc from the district judge" and noting that "the basis for filing such a petition may be open to dispute, *cf.*, Fed. R. App. P. 21(b)(4)"). But in the *Davis* proceedings, the district judge's request for reconsideration of the first mandamus writ might have been justified by the fact that the actual parties to the case were united in support of the issuance of the writ, which meant that at that stage of the proceedings only the district judge was in a position to request reconsideration. (The Fifth Circuit docket indicates that a codefendant asked leave to intervene for the purpose of requesting rehearing but that the request was denied. *See* Docket Entry, United States v. Davis, No. 01-30656 (5th Cir. July 30, 2001). The district judge's letter also suggests that the judge's request for reconsideration might have resulted from an invitation by the court of appeals. *Davis*, 180 F. Supp. 2d at 808.

100 *See* FED. R. APP. P. 21(a)(1). The rule also requires the circuit clerk to send a copy of the petition's disposition to the district judge. *See id.* 21(b)(7).

101 *Id.* 21(b)(1).

102 *Id.* 21 committee note.

103 *Id.*

104 *Id.* 21(b)(4).

105 *Id.*

> Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an *amicus curiae* to provide a response to the petition. In those instances in which the respondent does not oppose issuance of the writ or does not have sufficient perspective on the issue to provide an adequate response, participation of an *amicus* may avoid the need for the trial judge to participate.[106]

The same concerns presumably underpin Rule 21(b)(4)'s restriction on unsolicited input by the district judge. The Rule provides that "[t]he trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."[107]

Indeed, unsolicited interventions by the district judge in the mandamus proceeding appear particularly likely to generate concern about the judge's role. In extreme instances, such interventions can become a factor in the appellate court's decision to reassign the case to another district judge.[108] The dynamic may be quite different, by contrast, when the court of appeals solicits a response from the district judge. In such a case, the invitation for a response from the judge may signal to the judge that the court of appeals views the petition as raising a colorable issue, and the district judge's response might qualify the district judge's earlier opinion in ways that remove the need for mandamus relief.[109]

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106 *Id.* committee note.

107 *Id.* 21(b)(4).

108 For example, in *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993), the plaintiff class representatives sought a writ of mandamus requiring the district judge to disqualify himself from hearing the case. *Id.* at 157. The district judge responded by sending a seven-page letter to the plaintiffs' counsel (with a copy to opposing counsel) listing asserted errors in the mandamus brief. *See id.* at 162. The court of appeals directed the reassignment of the case to another district judge, reasoning that the judge's "observations . . . throughout the conduct of these proceedings could well give rise to the questioning of his impartiality." *Id.* at 164. The court of appeals' discussion makes clear that the judge's letter in response to the mandamus petition formed part of the basis for this conclusion:

> In the present case where Judge Lechner has authored six opinions, and where counsel for [the defendant] has responded eloquently and vigorously to the allegations of the petition, we are fearful that Judge Lechner's letter response to the petition could be misinterpreted by a reasonable person, to say nothing of a disappointed litigant, as an attempt by Judge Lechner to align himself with [the defendant].

Id. at 165 (footnote omitted).

109 Of course, the response does not always steer the court of appeals away from issuing the writ. An interesting recent example was provided in connection with the

For example, in *In re Braxton*,[110] the district court had issued a nine-page opinion granting a capital habeas petitioner's request that the State make prosecution evidence available for DNA retesting.[111] The State promptly sought an emergency stay from the court of appeals (the district court had denied the request for a stay), sought a writ of mandamus and/or prohibition from the court of appeals, and filed a notice of appeal.[112] The court of appeals granted the stay and invited the district judge to respond to the mandamus petition.[113] Less than three weeks later, the district judge issued a supplemental opinion "to clarify and reaffirm its January 9, 2001 Order."[114] In con-

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massive tax fraud prosecution involving former employees and partners of KPMG. KPMG attempted to appeal the district court's rulings asserting ancillary jurisdiction over contract claims by defendants (seeking to compel KPMG to pay their legal fees) and denying KPMG's request to send those claims to arbitration. At oral argument, the court of appeals solicited the parties' input on whether it should treat KPMG's attempted appeal as a request for a writ of mandamus. *See* Stein v. KPMG, LLP, 486 F.3d 753, 758 (2d Cir. 2007). KPMG responded in the affirmative, and the court of appeals invited the district judge to respond to KPMG's submission. *See* Docket Entry, Stein v. KPMG, LLP, No. 06-4358 (2d Cir. Dec. 13, 2006). Judge Kaplan's resulting "Response to Rule 21(b)(4) Invitation," which was some 45 pages long, addressed in detail both the merits of the challenged decisions and also whether the case was an appropriate one for mandamus. *See* Response to Rule 21(b)(4) Invitation, *Stein*, 486 F.3d 753 (No. 06-4358), 2007 WL 1593793. At a number of points the Response addressed arguments made by KPMG in its submission to the court of appeals. *See, e.g.*, *id.* at Part I.C.1–.3. Though Judge Kaplan concluded that the court of appeals should refuse to issue the writ—"either on the ground that (1) this is not an appropriate case in which to use mandamus to review the merits of the challenged order or, (2) on the merits"—he also stated that the district-court proceedings "would be facilitated by prompt review of the merits of the challenged order." Quoting the latter statement, the court of appeals issued a writ of mandamus and "vacate[d] the order of the district court asserting ancillary jurisdiction over the contract claim as beyond the district court's power." *Stein*, 486 F.3d at 756.

Sometimes the situation that prompts a mandamus petition involves not a challenged ruling by the district court but rather a district court's failure to act. So, for example, in some instances a petitioner might seek a writ because the petitioner asserts that the district court has unduly delayed in issuing a ruling. In such instances, if the court of appeals agrees with the petitioner that the district court has delayed too long and the court of appeals therefore requests a response from the district court, the court of appeals' request is likely to prompt the district court to issue the requested ruling (thus mooting the need for any other response).

110 258 F.3d 250 (4th Cir. 2001).

111 *Id.* at 252, 255.

112 *See id.* at 255. The notice of appeal was filed on the theory that the district judge's order counted as an injunction from which an appeal could be taken under 28 U.S.C. § 1292(a)(1). *Id.*

113 *See id.*

114 Cherrix v. Braxton, 131 F. Supp. 2d 756, 759 (E.D. Va. 2000).

trast to the brief January order,[115] the supplemental opinion occupies some thirty pages in the official reporter and includes a table of contents with fifteen headings or subheadings. The court of appeals denied the request for an extraordinary writ and dismissed the appeal. In rejecting the State's contention that a threat of irreparable harm rendered the order immediately appealable, the panel majority reasoned that the State's concerns about evidence contamination and chain of custody problems were "at best, premature."[116] To support this conclusion, the majority relied upon the district judge's supplemental opinion, which "made clear" that the district court's initial order "did not provide for the final testing of the evidence, only for its preservation and for testing funds."[117] The panel majority rejected the State's objection to its consideration of the supplemental opinion, reasoning that the opinion aided the panel in its consideration of the appeal, and that "though the Supplemental Opinion is certainly more detailed than the January 9, 2001 Order, these documents do not . . . conflict with each other."[118] Judge Traxler concurred in the result but made clear that he would not have done so were it not for the district judge's supplemental opinion.[119] In rejecting the State's objection to consideration of the supplemental opinion, Judge Traxler stressed that it was provided at the invitation of the court of appeals: "Considering the fact that this panel specifically invited the district court to address the Commonwealth's petition for a writ of mandamus, it would be strange indeed if the district court overstepped its bounds by doing just that."[120] And since the supplemental opinion was clearly before the panel with respect to the mandamus petition, Judge Traxler considered it sensible to consider it, as well,

115 *See* Cherrix v. Taylor, No. Civ.A. 00-CV-1377, 2001 WL 1797177 (E.D. Va. Jan. 09, 2001).

116 *In re Braxton*, 258 F.3d at 258.

117 *Id.* (quoting *Cherrix*, 131 F. Supp. 2d at 771).

118 *See id.* at 255 n.4.

119 Judge Traxler reasoned as follows:

> Were it not for the information in the Supplemental Order, however, I would hold that the January 9, 2001 Order, standing alone, was immediately appealable. Without clarification from the Supplemental Opinion, the January 9, 2001 Order, literally interpreted, required the Commonwealth to turn over the samples directly to the defendant for testing. This would have broken the chain of custody and created a situation, if only in testing, in which Cherrix could have contaminated and even destroyed the evidence. In my judgment, the dangers attendant to an apparently uncontrolled release of the evidence would have fully warranted an interlocutory appeal . . . .

Id. at 263 (Traxler, J., concurring in the result).

120 *Id.*

with respect to the attempted interlocutory appeal. Judge Traxler's concurrence in the result, then, presents the supplemental opinion as part of a dialogue between the two courts, and one which in his view determined the outcome. As he put it, due to the supplemental opinion, "[w]e now understand the district judge has considered a number of safeguards that he intends to implement in order to protect the evidence."[121]

2. Limited Remands

In contrast to the procedure for extraordinary writs, the Appellate Rules do not provide a mechanism by which the court of appeals can seek the district judge's input with respect to the merits of an ordinary appeal. However, some courts have fashioned the "limited remand" as a means for doing so.

The remand is limited because it only seeks a district court response on a stated issue; such a limited remand does not authorize the district court to address the merits of the matter under appeal, other than as directed by the court of appeals.[122] Sometimes (but not always) the appeal remains pending in the court of appeals while the limited remand occurs. Where the original appeal remains pending, proceedings in the court of appeals after remand will ordinarily take place before the same panel; this is true, as well, in some instances even when the original appeal does not remain pending and a new appeal must be taken.[123]

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121 *Id.*

122 *See, e.g.*, United States v. Wooden, 230 F. App'x 243, 244 (4th Cir. 2007) (per curiam) ("[T]he only issue before the district court by reason of our limited remand was a determination of the date on which Wooden gave his notice of appeal to prison officials so that we could determine whether Wooden's appeal in No. 04-6793 was timely noted. . . . [T]he district court was without authority to act on Wooden's motions which involved aspects of the case involved in the appeal.").

123 For example, the Ninth Circuit has held as follows:

> [W]hen we are faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory.

United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc). Unlike some other circuits, the Ninth Circuit does not maintain the original appeal during the limited remand. Rather, if the district court adheres to the original sentence, the appellant must file a new notice of appeal:

> If the district court judge determines that the sentence imposed would not have differed materially had he been aware that the Guidelines were

The limited remand mechanism may be employed where the district court failed to supply required findings in support of a ruling for which review is sought. Thus, for example, courts have employed a limited remand where the district court omitted the findings required by Appellate Rule 9 with respect to an order concerning release in a criminal case,[124] or where the district court failed to make required findings concerning an evidentiary determination.[125] Even where the district court did make findings, the court of appeals might employ a limited remand to ask the district court to consider certain facts or issues that it did not account for when entering the challenged

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> advisory, the district court judge should place on the record a decision not to resentence, with an appropriate explanation. A party wishing to appeal the order may file a notice of appeal as provided in [Fed. R. App. P.] 4(b).

Id. at 1085. However, the new appeal "will be subject to the usual procedure pertaining to comeback cases, as provided in General Order 3.7." *Id.* at 1085 n.9. General Order 3.7 provides that in such instances the new appeal will ordinarily go to the original panel. *See* U.S. Court of Appeals for the Ninth Circuit, General Orders 3.7 (2008).

124 *See, e.g.*, *In re* Smith, 823 F.2d 401, 401–02 (11th Cir. 1987) ("Where the district court has not specified in writing its reasons for denying release in accordance with [Fed. R. App. P.] 9(b), a limited remand of the matter for an entry of an order in compliance with Rule 9(b) is appropriate. . . . If release is still denied, the order and the government's response, if any, shall be filed with this court as a supplemental record; and the matter will then be ripe for decision."); United States v. Wong-Alvarez, 779 F.2d 583, 585 (11th Cir. 1985) ("[N]either magistrate nor district court has stated in writing the reasons for requiring a bond with the types and amounts of surety described above, as commanded by [Fed. R. App. P.] 9 . . . . We must remand the case for entry of such an order, which should be entered promptly. The order may be filed as a supplemental record, and this case will then be ripe for review." (footnote omitted)); United States v. Hart, 779 F.2d 575, 577 (10th Cir. 1985) ("[W]e partially remand this case to the district court for prompt consideration of appellant's application for release pending appeal. We imply no view on the merits of the application."). *See generally supra* note 70 (discussing the fact that Rule 9 requires a statement of reasons from the district court).

125 *See, e.g.*, Seeley v. Chase, 443 F.3d 1290, 1297 (10th Cir. 2006) ("Because we cannot review a district court's decision to admit Rule 415 evidence unless it makes a reasoned, recorded statement of its 403 decision, the case is REMANDED to the district court for an articulated analysis of its ruling under Rule 403. This court will retain jurisdiction of the appeal pending the district court's further rulings, which shall be certified to this court as a supplemental record. In the interim, the case is abated."); United States v. Castro, 908 F.2d 85, 91 (6th Cir. 1990) ("This court must order a limited remand to the district court for the district court to make a finding on the admissibility of co-conspirator statements. . . . [The court] retains jurisdiction over this case pending the district court's finding.").

order.[126] Where a privilege ruling is challenged on appeal, the limited remand device has been used to ask the district court to conduct an in camera review for the purpose of responding to specific questions, posed by the court of appeals, bearing on the privilege issue.[127] Limited remand might also be used to ask the district judge to supply

126 For example, in *United States v. Samet*, 11 F. App'x 21 (2d Cir. 2001), the defendant sought appellate review of the district court's pretrial detention order. *Id.* at 22. The United States, for its part, asked the court of appeals:

> for a limited remand to allow the district court: (1) to consider the effect of Israel's statute permitting extradition of Israeli residents on its finding that Samet is a flight risk and that no reasonable conditions can be set to assure his presence at trial; and (2) to clarify its findings regarding the telephone service at Samet's residence.

Id. The court of appeals granted the limited remand, directing the district court to "consider the two issues raised by the Government and . . . clarify its bases for ordering Samet's pretrial detention." *Id.* The Second Circuit docket indicates that the district court subsequently entered an order stating: "The transcript of the hearing held on 6/13/01, at 10:00 AM, constitutes the decision of the Court responding to the two questions by the U.S. Court of Appeals for the Second Circuit on limited remand of the appeal by defendant of the court's order denying bail." Docket Entry, United States v. Samet, No. 01-1224 (2d Cir. Apr. 17, 2001). The docket indicates that briefing then resumed in the court of appeals, and that the district court's detention order was affirmed. *See* Docket Entry, United States v. Samet, No. 01-1224 (2d Cir. Apr. 25, 2001); *see also, e.g.*, Mun. Leasing Corp. v. Fulton County, 835 F.2d 786, 791 (11th Cir. 1988) ("We AFFIRM this case as specified in this opinion, except on the question of pre-bid improprieties we return this case on a LIMITED REMAND for supplemental findings and conclusions."), *further decision after remand*, 849 F.2d 516, 517 (11th Cir. 1988) (holding the district court's additional findings not clearly erroneous and affirming the judgment).

127 So, for example, in *United States v. BDO Seidman, LLP*, Nos. 02-3914, 02-3915, 2002 WL 32080709 (7th Cir. Dec. 18, 2002), the court of appeals remanded "for the limited purpose of permitting the district court to enter more extensive findings regarding those documents to which the proposed intervenor-appellants claim a privilege under 26 U.S.C. § 7525." *Id.* at *1. The court of appeals directed the district court to inspect the relevant documents in camera and to "enter specific findings" concerning the circumstances surrounding each document, "including but not limited to" four questions listed in the remand order. *Id.* This assignment was probably a heavy one. The Seventh Circuit docket reflects the receipt of a letter from the district judge concerning the court of appeals' order. *See* Docket Entry, United States v. BDO Seidman, LLP, No. 02-3914 (7th Cir. Jan. 17, 2003). The Northern District of Illinois docket reflects the reassignment of the case to another district judge pursuant to 28 U.S.C. § 294(b). Docket Entry, United States v. BDO Seidman, LLP, No. 1:02-cu-04822 (N.D. Ill. Jan. 9, 2003); *see also* 28 U.S.C. § 294(b) (2006) (providing that a senior status judge "may continue to perform such judicial duties as he is willing and able to undertake"). The newly assigned district judge, on the limited remand, issued a memorandum opinion containing detailed findings based on a review of a subset of the relevant documents. *See* United States v. BDO Seidman, LLP, No. 02 C 4822, 2003 WL 932365, at *1–*4 (N.D. Ill. Feb. 5 2003). Having reviewed those supplemental

information that is necessary to clarify whether the appellate court has jurisdiction,[128] or to clarify the proper scope of appellate review.[129]

Limited remands have also been employed as a way of managing doctrinal change. A case in point is provided by the metamorphosis—under *United States v. Booker*[130]—of the federal Sentencing Guidelines from mandatory to advisory authority.[131] For cases pending in the court of appeals post-*Booker* but in which the sentencing occurred pre-*Booker*, the problem for the appellate court was frequently[132] that unless the judge "said in sentencing a defendant pre-*Booker* that he would have given the same sentence even if the guidelines were merely advisory . . . it is impossible for a reviewing court to determine—*without consulting the sentencing judge* . . . —whether the judge would have done that."[133] The Seventh Circuit has adopted a limited-remand procedure to address this difficulty:

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findings, the court of appeals affirmed. *See* United States v. BDO Seidman, LLP, 337 F.3d 802, 813 (7th Cir. 2003).

128 *See, e.g.*, United States v. D.L. Kaufman, Inc., 175 F.3d 970, 973 (Fed. Cir. 1999) ("An appellate court should not be required to search the record in an attempt to ascertain the bases for the district court's action. We therefore conclude that the appropriate procedure in this case is partially to remand to the district court to clarify the bases for its decision. We shall retain jurisdiction of the appeal and dispose of it in light of what the district court states.").

129 *See, e.g.*, United States v. Fox, 930 F.2d 820, 824 (10th Cir. 1991) ("The ambiguity in the judge's ruling is important because the question determines the scope of our review. . . . Accordingly, the cause is partially remanded to the district court, and the district judge shall clarify whether, in sentencing the defendant, he declined to depart from the guidelines because he felt he had no authority to do so or whether it was because he simply exercised his discretion not to do so. . . . This court retains jurisdiction of the appeal.").

130 543 U.S. 220 (2005).

131 *See id.* at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

In crafting a procedure for dealing with *Booker* issues, not all circuits have adopted the response discussed in the text. *See, e.g.*, United States v. Milan, 398 F.3d 445, 454 (6th Cir. 2005) ("[W]e think it proper that the court of appeals itself review a claimed error for whether it is plain, or whether it is harmless, and remand for resentencing in appropriate cases.").

132 Frequently does not mean always. *See, e.g.*, United States v. Pittman, 411 F.3d 813, 818 (7th Cir. 2005) ("We can skip the limited remand if we are highly confident that the judge would have imposed a different sentence . . . .").

133 United States v. Paladino, 401 F.3d 471, 482 (7th Cir. 2005); *see also, e.g.*, United States v. Ngo, 406 F.3d 839, 844 (7th Cir. 2005) ("In some cases the record will provide assurances that the sentencing judge did not impose a longer sentence because of the guidelines. This is not such a case. Here, the district court sentenced

> The only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge. . . . [W]hat an appellate court should do in *Booker* cases in which it is difficult for us to determine whether the error was prejudicial is, while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence. If so, we will affirm the original sentence against a plain-error challenge provided that the sentence is reasonable . . . .
>
> If, on the other hand, the judge states on limited remand that he would have imposed a different sentence had he known the guidelines were merely advisory, we will vacate the original sentence and remand for resentencing.[134]

Under the Seventh Circuit procedure, the original appeal remains pending during the limited remand, and the court of appeals vacates and remands for resentencing if the district court indicates that it would have imposed a different sentence had it known the guidelines were advisory.[135] The Second Circuit follows a similar but distinct procedure which it terms a "*Crosby* remand." Under *United States v. Crosby*, the court of appeals issues a mandate remanding the case to the district court for that court to consider whether to resentence the defendant; the district court may then either leave the original sentence standing or vacate it and resentence the defendant. A party may then seek review (by the original panel) of the district court's determination, without the need for a new notice of appeal, by

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Ngo to the lowest term available under the applicable guideline range and noted that his career offender status had 'greatly increased' his sentence." (citations omitted)); United States v. Henningsen, 402 F.3d 748, 751 (7th Cir. 2005) (following *Paladino*).

134 *Paladino*, 401 F.3d at 483–84 (citations omitted). Judges Ripple and Kanne dissented from the denial of rehearing en banc in *Paladino*, arguing, inter alia, that the limited remand procedure would not ensure that the district court appropriately reconsidered each sentence. *See id.* at 486 (Ripple, J., dissenting from denial of reh'g en banc) ("In all too many instances, the process scripted by the panel will serve as an invitation for the district court to give only a superficial look at the earlier unconstitutionally-imposed sentence."); *id.* at 488 (Kanne, J., dissenting from denial of reh'g en banc) ("It is hard to see how, without a hearing and briefing tantamount to resentencing by normal vacatur and remand procedures, a district court could ever give 'an appropriate explanation' for its decision not to resentence.").

135 *See id.* at 484 (majority opinion) ("[S]ince we retain jurisdiction throughout the limited remand, we shall vacate the sentence upon being notified by the judge that he would not have imposed it had he known that the guidelines were merely advisory.").

notifying the circuit clerk.[136] The Ninth Circuit employs something resembling the *Crosby* technique, except that a new notice of appeal is required in order to challenge the district court's determination on remand (though the new appeal will ordinarily go to the same panel).[137]

D. Assessing Communicative Rulings

As the preceding subparts have shown, communications from the district judge concerning the merits of an appeal can occur in a range of situations, and the context of the communication is likely to affect its reception in the court of appeals. This subpart reviews factors that influence the way in which the communication is likely to be viewed, as well as best practices that might be followed in order to avoid complications.

At the most basic level, mechanisms that permit both the district judge and the court of appeals to act with respect to the same matter raise questions of power. It is useful, however, to distinguish the notion of "power" at issue here from some other types of questions that proceed under a similar heading. We do not speak here of questions concerning Article III power. The situations discussed in this Article do not ordinarily raise questions, for example, about whether a justiciable dispute exists or whether the dispute falls within the subject matter jurisdiction of the federal courts. The case will be one that falls within federal court subject matter jurisdiction, the litigants will ordinarily be adverse to one another, and there will exist relief that could remedy one litigant's grievance; the only question will be whether the litigants should be seeking action from the trial court or the appellate court.

It is certainly true that the *Griggs* formulation quoted in the Introduction to this Article frames the question treated here as one of power. And cases citing the *Griggs* formulation are legion.[138] But as

136 *See* United States v. Crosby, 397 F.3d 103, 120 (2d Cir. 2005) ("From whatever final decision the District Court makes, the jurisdiction of this Court to consider a subsequent appeal may be invoked by any party by notification to the Clerk within ten days of the District Court's decision, in which event the renewed appeal will be assigned to this panel." (citation omitted)), *modification on other grounds recognized*, United States v. Lake, 419 F.3d 111, 113 n.2 (2d Cir. 2005) ("*Fagans* thus abrogated the dictum in *Crosby* that had indicated that a *Crosby* remand would be appropriate for application of the harmless error doctrine as well as the plain error doctrine."). The Second Circuit's technique is discussed further in Part I.D, *infra*.

137 *See supra* note 123 (discussing United States v. Ameline, 409 F.3d 1073, 1074 (9th Cir. 2005) (en banc)).

138 So, for example, a majority of the en banc Fourth Circuit has stated:

the prior subparts illustrate, this notion of a division of power is not to be applied mechanically, without regard to its nature and rationale.[139] The *Griggs* rule is judge-made, and it serves practical purposes[140]: Restraining the district court from acting with respect to matters encompassed within the appeal "serves to avoid the confusion and waste of time that would result from dual jurisdiction."[141] The division of authority between the two levels of courts helps to promote comity within the court system.[142] The rule also protects the litigants from having to litigate the same matters in two fora simultaneously.[143]

> Broadly speaking, district courts have subject-matter jurisdiction over the first round of litigation proceedings, and the courts of appeal have jurisdiction over the second round. In that sense, then, in the language of *Kontrick*, different "classes of cases" fall within the "adjudicatory authority" of district courts and appellate courts—district courts have authority over trials and appellate courts have authority over appeals. Appellate Rule 4 is thus jurisdictional in that it establishes the point of time at which the subject-matter jurisdiction of the district court ends and that of the court of appeals begins.

Brickwood Contractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 393 (4th Cir. 2004) (en banc) (citations omitted).

139 *See, e.g.*, United States v. Powell, 24 F.3d 28, 31 (9th Cir. 1994) ("[T]he divestiture rule was created to prevent two courts from simultaneously considering the same issues in, or aspects of, a case. However, given the rule's purposes to avoid confusion or waste of time, 'the rule should not be employed to defeat its purpose or to induce needless paper shuffling.'" (quoting United States v. Claiborne, 727 F.2d 842, 850 (9th Cir. 1984))).

140 United States v. Rodgers, 101 F.3d 247, 251 (2d Cir. 1996) ("The divestiture of jurisdiction rule is, however, not a per se rule. It is a judicially crafted rule rooted in the interest of judicial economy . . . . Hence, its application is guided by concerns of efficiency and is not automatic.").

141 United States v. Tovar-Rico, 61 F.3d 1529, 1532 (11th Cir. 1995). A corollary of this principle is that if the court of appeals has not acquired jurisdiction—because the notice of appeal is ineffective—then the district court has not lost jurisdiction. *See, e.g.*, Estate of Conners v. O'Connor, 6 F.3d 656, 658 (9th Cir. 1993) ("This transfer of jurisdiction from the district court to the court of appeals is not effected . . . if a litigant files a notice of appeal from an unappealable order.").

142 *See, e.g.*, United States v. Brooks, 145 F.3d 446, 456 (1st Cir. 1998) ("The black-letter rule that the filing of a notice of appeal transfers authority over the case from the trial court to the court of appeals derives from a desire to prevent clashes between institutions that occupy different tiers within the federal judicial system.").

143 *See, e.g.*, United States v. Ledbetter, 882 F.2d 1345, 1347 (8th Cir. 1989) ("The [*Griggs*] rule serves two important interests. First, it promotes judicial economy for it spares a trial court from considering and ruling on questions that possibly will be mooted by the decision of the court of appeals. Second, it promotes fairness to the parties who might otherwise have to fight a confusing 'two front war' for no good reason, *Shewchun v. United States*, 797 F.2d 941, 943 (11th Cir. 1986), avoiding possible duplication and confusion by allocating control between forums.").

Where the rule's practical rationales do not apply, exceptions may arise:

> The purpose of the rule is to keep the district court and the court of appeals out of each other's hair, and when simultaneous proceedings would be productive and expediting rather than duplicative and delaying—as where the court of appeals asks the district court to clarify a jurisdictional uncertainty—the rule is not applied.[144]

District judges, of course, should be attentive to questions of power when an appeal is pending. Actions that exceed the district court's authority (due to the pending appeal) will be void. But the preceding subparts have shown that there are a number of steps the district court can take during the appeal,[145] even though in taking such steps the district court may communicate a view on the merits. Indeed, many of the questions discussed in Part I.A are explicitly committed to the district court, in the sense that litigants are ordinarily expected to seek the relevant relief from the district court in the first instance; the district court's power to issue such rulings is therefore not in doubt. Nor, from a practical perspective, need the district court worry about its power to respond to the court of appeals' requests for information in the circumstances discussed in Part I.C; when the court of appeals invites the district court to communicate its views on an issue involved in the appeal, it is most unlikely that the court of appeals would fault the district court for responding to the invitation. Thus, from the district court's perspective, the question of power will be most salient in the situations discussed in Part I.B, where the district judge addresses the merits of the appeal itself, but not in the course of issuing an ancillary ruling that the district judge is empowered to make, and not in response to a request from the court of appeals. As Part I.B discusses, such unsolicited communications may sometimes be considered by the court of appeals, but that will depend on the circumstances of the communication. At the extreme end of the spectrum, it can be said with a fair amount of confidence that if the district court attempts (through such a communication) to alter the contours of the judgment from which the appeal is pending,

144 *In re* Jones, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring).

145 *See, e.g.*, Sheet Metal Workers' Int'l. Ass'n Local 19 v. Herre Bros., 198 F.3d 391, 394 (3d Cir. 1999) ("Exceptions to the rule in *Griggs* allow the district court to retain jurisdiction to issue orders staying, modifying, or granting injunctive relief, to review applications for attorney's fees, to direct the filing of supersedeas bonds, to correct clerical mistakes, and to issue orders affecting the record on appeal and the granting or vacating of bail.").

the court of appeals will almost always regard that attempt as ultra vires.[146]

When employing the limited remand mechanism discussed in Part I.C.2, the court of appeals should also be attentive to questions of power. In particular, the court of appeals should consider how the parties are to invoke appellate jurisdiction after the district court makes the determination on remand. The court of appeals should ensure that the appellant can continue with the original appeal (after the remand) unless it is clear that the original appellant can secure all necessary relief by means of an appeal from the disposition reached by the district court on remand. And in the latter instances, the court of appeals should make clear to the appellant the necessity for a new notice of appeal if the appellant wishes to seek review after the determination on remand.

A number of courts that use the limited remand mechanism do so on the theory that the limited nature of the remand means that the appeal remains pending in the court of appeals and can proceed once the district court has made the requisite determination.[147] Though the Second Circuit has sometimes taken such an approach,[148] more recently it has used the technique of issuing a mandate which specifies "the conditions that will restore jurisdiction to this court" without the

146 This statement, of course, refers only to situations in which the notice of appeal has become effective. Where a timely tolling motion has suspended the effectiveness of a notice of appeal, the *Griggs* rule does not prevent the district court from ruling on the motion, because the appeal has not yet become effective.

Apart from the caveat about tolling motions, the statement in the text is guarded because in rare instances the court of appeals may permit the district court to modify the judgment after the filing of the notice of appeal. For example, in *Dixon v. Edwards*, 290 F.3d 699 (4th Cir. 2002), the court of appeals reviewed a permanent injunction entered by the district court. *Id.* at 704. The defendants had filed a notice of appeal and they also had moved in the district court for a stay of the injunction pending appeal. Rather than grant a stay of the injunction, the district court made what the court of appeals termed a "limited modification of its injunction." *Id.* at 709. The court of appeals noted the existence of the *Griggs* rule but held it inapplicable to the modification of the injunction because, it reasoned, the district court's action "'aided in this appeal by relieving us from considering the substance of an issue begotten merely from imprecise wording in the injunction.'" *Id.* at 709 n.14 (quoting Lytle v. Griffith, 240 F.3d 404, 407 n.2 (4th Cir. 2001)).

Cases such as *Dixon*, however, constitute a rare exception. The general and well-established rule is that "a district court may not interfere with [the court of appeals'] jurisdiction by amending a decision that is under appellate review." United States v. McHugh, 528 F.3d 538, 540 (7th Cir. 2008).

147 *See supra* Part I.C.2 (discussing how courts have used limited remands).

148 United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994) ("Precedent thus allows us to seek supplementation of the record while retaining jurisdiction, without a mandate issuing or the need for a new notice of appeal.").

need for a new notice of appeal, after the district court performs the tasks set by the remand.[149] As the court explained in *United States v. Jacobson*, there can be practical advantages in issuing such a mandate:

> [T]he issuance of a mandate ensures that the district court will have the power to do what we order and allows us flexibility in ordering actions by the district court that are clearly inconsistent with a retention of jurisdiction in this court. For example, enforcement of compulsory process and entry of a new judgment by the district court are not acts that are normally within the power of a district court when the court of appeals has "retained" jurisdiction.[150]

When the litigants reappear before the court of appeals after a limited remand, it might be asked on what theory they have appropriately invoked the court's jurisdiction under the statutes governing appellate review, which require that a notice of appeal be filed in order to trigger appellate jurisdiction to review a judgment.[151] The answer may vary with the type of mechanism employed by the court of appeals. Where the court of appeals has retained jurisdiction over the appeal and has simply directed the district court to provide additional findings or reasoning in support of the judgment that was initially appealed, there would seem to be no great conceptual difficulty when the court of appeals proceeds after the district court has provided the supplemental reasoning: the statutory requirement of a notice of appeal was already satisfied by the original notice, and it is still the original judgment that is under review.

The Second Circuit's *Jacobson* procedure might require further explanation, because under that procedure the remand may sometimes result in an entirely new judgment, from which it might be thought that a new notice of appeal must be filed. However, the *Jacobson* court asserted that there is statutory authority for mandates that "contain conditions upon the occurrence of which jurisdiction will be

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149 *Id.*

150 *Id.*

151 28 U.S.C. § 2107(a) states that:

> Except as otherwise specified in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

28 U.S.C. § 2107(a) (2006). In criminal cases, some government appeals are governed by 18 U.S.C. § 3731, which provides that the appeal "shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted." 18 U.S.C. § 3731 (2006). Section 3742 of title 18, which (as modified by *Booker*) governs review of criminal sentences, contemplates that the party seeking review "file a notice of appeal in the district court for review of [the] sentence." 18 U.S.C. § 3742 (2006).

automatically restored to the appellate panel without a new notice of appeal"[152]: 28 U.S.C. § 2106 provides that

> [t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[153]

In any event, whichever mechanism it employs, the court of appeals should provide clear guidance to the parties concerning the acts to be taken in order to restore the matter to the appellate docket.

Apart from the question of power, there are also prudential considerations. For example, some would argue that certain types of post-judgment communications by the district court—though permissible at the discretion of the court of appeals—are not ideal (for the reasons noted above in Part I.B). In this view, it may be desirable for the district court to attempt to avoid the necessity for post-judgment clarifications or amplifications. Thus, for example, Judge Posner has suggested that the best course of action for the district judge is to avoid the issue by deferring the entry of judgment until the judge is satisfied with his or her opinion:

> When a judge decides a case by an oral opinion he should make that opinion tentative, should reserve judgment, and should ask the court reporter to transcribe the opinion. When the judge gets the transcript he should edit it, polish it, add the necessary citations, amplify it if necessary, and then issue it together with the judgment order. Both the delay caused by this procedure and the added work for the judge should be slight, and outweighed by the benefits to the parties and counsel of getting a finished judicial product on which they can base an informed judgment on whether to appeal and how to brief and argue the appeal, and by the fact that the judge will not be open to the accusation that he gives more consideration to litigants whose cases are appealed than to other litigants.[154]

Likewise, a Federal Circuit panel has stated "that a district court should refrain from entering an appealable order until the findings of facts and conclusions of law *upon which the district court intends the losing party to base any appeal* also are entered."[155]

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152 *Jacobson*, 15 F.3d at 22.

153 28 U.S.C. § 2106 (2006).

154 *In re* Jones, 768 F.2d 923, 932 (7th Cir. 1985) (Posner, J., concurring).

155 Hybritech Inc. v. Abbott Labs., 849 F.2d 1446, 1450–51 (Fed. Cir. 1988); *see also id.* at 1451 ("Where a district court wishes to delay entering its findings and conclu-

Even if district courts incorporate such measures into their routine practice (as many judges already do), Parts I.B and I.C illustrate that there will sometimes be instances when the district court wishes to provide, and/or the court of appeals wishes to receive, additional information concerning the matters on appeal. In such cases, courts should craft the process so as to protect the litigants' ability to provide input where appropriate. Thus, for instance, if the district court supplements its opinion after appellate briefing has begun and the court of appeals is inclined to consider the supplemental opinion, the court of appeals should permit supplemental briefing if it is necessary in order to permit the litigants to respond to the supplemental opinion. And where the court of appeals uses a limited remand to seek input from the district court, the district court should provide an appropriate opportunity for the parties to be heard.[156]

II. INDICATIVE RULINGS

Part I's survey of communicative rulings has shown the utility, under a range of circumstances, of communications from the district judge concerning the merits of the appeal. Part I.A discussed instances when those communications may arise in the course of a ruling on an ancillary matter connected with the appeal; Part I.B discussed times when the district judge may proffer a view on the merits of the appeal, independent of such ancillary matters; and Part I.C considered instances when the court of appeals may invite the district court to opine on a matter relevant to the appeal. The district court communications discussed in each of those subparts are generally subject to a basic limitation on district court power—namely, that the district court cannot alter the judgment that is under appellate review. That limitation makes sense, but it creates a dilemma in instances where a persuasive request is made for relief that the district judge lacks authority to grant due to the pending appeal. This Part discusses the "indicative ruling" practice which courts have developed in order to address that dilemma. Part II.A describes the indicative ruling mechanism and summarizes current circuit practices for its use. Part II.B notes the pending amendments to the Civil and Appellate

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sions upon which it intends any appeal to be based, the district court may exercise its authority under Rule 58 of the Federal Rules of Civil Procedure to hold up entry of judgment until after the formal findings and conclusions are prepared.").

156 *See, e.g.*, United States v. Paladino, 401 F.3d 471, 484 (7th Cir. 2005) (contemplating that the district court will obtain input from counsel before deciding whether it would have imposed the same sentence with the knowledge that the Sentencing Guidelines are advisory).

Rules which would formalize the existing practice. And Part II.C assesses the practice, noting that it fits comfortably within the conceptual framework derived in Part I concerning communicative rulings generally.

A. Current Practice

As noted in Part I, the division of power between the appellate and district courts—in the course of a properly noticed appeal—is one that is demarcated through case law. That being so, the courts have applied the division flexibly in the light of its purposes. But one core principle is that the district court may not alter the judgment that is under review, because such an alteration would directly interfere with the court of appeals' exercise of authority over that judgment.

Sometimes, however, it will be desirable for the district court to have an opportunity to modify the judgment. One way in which the rules take account of that fact is by providing a limited period for making post-judgment motions which—if timely made—suspend the effectiveness of the notice of appeal. Because such a motion suspends the appeal's effectiveness, the appeal does not prevent the district court from modifying the judgment in response to the motion. After that brief window has closed, however, a motion asking the district court to alter its judgment seeks relief that the district court does not have the power to grant. A typical example, in civil cases, is a motion for relief from the judgment, under Civil Rule 60(b),[157] that is made after the time for tolling motions has elapsed. There are other possible examples, but for simplicity's sake the discussion that follows will use the Rule 60(b) motion as illustrative.[158]

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157 FED. R. CIV. P. 60(b).

158 The indicative ruling mechanism in criminal cases is similar to that described in the text for civil cases. Criminal Rule 33(b)(1) provides that "[i]f an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case." FED. R. CRIM. P. 33(b)(1); *see also* United States v. Cronic, 466 U.S. 648, 667 n.42 (1984) (approving the indicative ruling mechanism for Rule 33 motions). For an example of a case concerning sentence reductions under Criminal Rule 35(b), see *United States v. Bingham*, 10 F.3d 404, 405 (7th Cir. 1993) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order."). A sentence may be corrected under Criminal Rule 35(a) despite a pending appeal. *See* FED. R. APP. P. 4(b)(5).

The district court lacks the power to grant a Rule 60(b) motion while the appeal is pending. It can delay deciding the motion until the appeal has been resolved.[159] In most circuits,[160] it can deny the motion during the pendency of the appeal.[161] Or it can indicate that it would grant the motion if the court of appeals were to remand for that purpose.[162] In most circuits, the indicative ruling mechanism is a

159 *See, e.g.*, LSJ Inv. Co. v. O.L.D., Inc., 167 F.3d 320, 324 (6th Cir. 1999) ("Though [case law] allow[s] the court to entertain a motion for relief even while an appeal is pending, [it does] not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course."). *But see* Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 (1st Cir. 1979) ("The district court is directed to review [Rule 60(b)] motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit, bearing in mind that any delay in ruling could delay the pending appeal.").

160 For the Ninth Circuit's contrary view, see *infra* note 172.

161 *See, e.g.*, Mahone v. Ray, 326 F.3d 1176, 1180 (11th Cir. 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion."); Hyle v. Doctor's Assocs., 198 F.3d 368, 372 n.2 (2d Cir. 1999) ("Like most circuits, we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified."); Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1407 n.3 (5th Cir. 1994) ("Our court recognizes, however, 'the power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeal, because the district court's action is in furtherance of the appeal.'" (quoting Willie v. Cont'l Oil Co., 746 F.2d 1041, 1046 (5th Cir. 1984))); Venen v. Sweet, 758 F.2d 117, 123 (3d Cir. 1985) (noting with approval that "[m]ost Courts of Appeals hold that while an appeal is pending, a district court, without permission of the appellate court, has the power both to entertain and to deny a Rule 60(b) motion"); *SS Zoe Colocotroni*, 601 F.2d at 42 ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit."); Pioneer Ins. Co. v. Gelt, 558 F.2d 1303, 1312 (8th Cir. 1977) ("[T]he better rule, and the one that we approve, is that in such a situation the district court has jurisdiction to consider the motion and if it finds the motion to be without merit to enter an order denying the motion, from which order an appeal may be taken."); *see also* Kusay v. United States, 62 F.3d 192, 195 (7th Cir. 1995) ("Many cases, including *United States v. Cronic*, say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under [Fed. R. Crim. P.] 33, but the principle is general." (citation omitted)).

162 *See, e.g.*, Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004) ("To seek Rule 60(b) relief during the pendency of an appeal, 'the proper procedure is to ask the district court whether it wishes to entertain the motion, or to grant it, and then move this court, if appropriate, for remand of the case.'" (quoting Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984))); *Mahone*, 326 F.3d at 1180 ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter

creature of case law,[163] though a few circuits also have a local rule on point.[164] The next subpart notes proposed Rule amendments that would formalize the practice.

B. The Proposed New Rules

As of this writing, proposed new Civil Rule 62.1 and proposed new Appellate Rule 12.1 are on track to take effect, having been voted forward by the relevant Advisory Committees, by the Standing Committee, and by the Judicial Conference, and having been approved by

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course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara, No. 02-20042, 2003 WL 21027134, at *4 (5th Cir. Mar. 5, 2003) (per curiam) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief."); Bovee v. Coopers & Lybrand C.P.A., 272 F.3d 356, 359 n.1 (6th Cir. 2001) ("If the district judge believes there should be relief from the judgment, the district court is to indicate that it would grant the motion. The appellant should then make a motion in this court for a remand of the case so that the district court can grant relief."); Fobian v. Storage Tech. Corp., 164 F.3d 887, 891 (4th Cir. 1999) ("The competing concerns arising when a district court is inclined to grant a Rule 60(b) motion during the pendency of an appeal can be reconciled by requiring the district court to indicate its inclination to grant the motion in writing; a litigant, armed with this positive signal from the district court, can then seek limited remand from the appellate court to permit the district court to grant the Rule 60(b) motion."); Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) ("[B]efore the district court may grant a rule 60(b) motion, this court must first give its consent so it can remand the case, thereby returning jurisdiction over the case to the district court."); Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1073 (8th Cir. 1991) ("If the district court wishes to grant the Rule 60(b) motion, movant's counsel should request the court of appeals to remand the case so that a proper order may be entered."); Smith v. Pollin, 194 F.2d 349, 350 (D.C. Cir. 1952) ("[W]hen an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in this court for a remand of the case in order that the District Court may grant the motion for new trial.").

163 The Supreme Court has explicitly approved the indicative-ruling procedure in the context of motions under Criminal Rule 33. *See Cronic*, 466 U.S. at 667 n.42 ("The District Court had jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which could then entertain a motion to remand the case.").

164 *See, e.g.*, U.S. COURT OF APPEALS FOR THE D.C. CIR., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 31 (2005), *available at* http://www.cadc.uscourts.gov/internet/home.nsf/Content/Court+Rules+and+Operating+Procedures (follow "Handbook" hyperlink).

the Supreme Court.[165] If Congress takes no contrary action, these new rules will take effect December 1, 2009.

The proposals originated with the Department of Justice, which in 2000 suggested that an appellate rule be adopted to formalize the indicative ruling practice.[166] The Appellate Rules Committee referred the proposal to the Civil Rules Committee,[167] which prepared a draft of proposed Civil Rule 62.1.[168] The Appellate Rules Committee then decided that it would be useful to add a provision in the Appellate Rules that would dovetail with the proposed new Civil Rule, and it produced a draft of proposed Appellate Rule 12.1.[169] The proposed rules were published for comment in August 2007. Revised versions of the proposals received final approval by the two relevant Advisory Committees and by the Standing Committee in spring 2008.

Proposed Civil Rule 62.1, as approved by the Supreme Court in spring 2009,[170] reads as follows:

> Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal
>
> (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion; or
>
> (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

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165 *See* Advisory Committee on Civil Rules, Civil Rules Suggestion Docket (Historical), http://www.uscourts.gov/rules/Civil_Docket.pdf [hereinafter *Civil Rules Suggestion Docket*]; Advisory Committee on Appellate Rules, Table of Agenda Items (May 2008), *available at* http://www.uscourts.gov/rules/apdocket.pdf.

166 *See* U.S. Courts, Minutes of Spring 2000 Meeting of Advisory Committee on Appellate Rules 30–31 (Apr. 13, 2000), http://www.uscourts.gov/rules/Minutes/app0400.pdf.

167 *See* U.S. Courts, Minutes of Spring 2001 Meeting of Advisory Committee on Appellate Rules 59 (Apr. 11, 2001), http://www.uscourts.gov/rules/Minutes0401.pdf.

168 *See* U.S. Courts, Minutes of Standing Committee on Rules of Practice and Procedure 14–18 (Jan. 11–12, 2007), http://www.uscourts.gov/rules/Minutes/ST01-2007-min.pdf.

169 *See* U.S. Courts, Minutes of Spring 2007 Meeting of Advisory Committee Appellate Rules 18–23 (Apr. 26–27, 2007), http://www.uscourts.gov/rules/Minutes/AP04-2007-min.pdf. The proposal of an Appellate Rules provision enabled the Civil Rules Committee to remove from the proposed Civil Rules provision language directed to the proceedings in the court of appeals.

170 FED. R. CIV. P. 62.1 (proposed 2007), *available at* http://www.supremecourtus.gov/orders/courtorders/frcv09.pdf.

> (b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.
>
> (c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Proposed Appellate Rule 12.1 states:

> Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That is Barred by a Pending Appeal
>
> (a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.
>
> (b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.[171]

C. Assessing Indicative Rulings

The indicative ruling mechanism, by definition, implicates the division of power set by *Griggs*: it is precisely because the district court lacks the power to alter the judgment during the appeal that the mechanism came into being. But the mechanism exemplifies not only that division of power, but also the practical considerations that shape the contours of the *Griggs* doctrine. The practice of indicative rulings permits the district court to take actions that aid the appellate process without overstepping the bounds of the lower court's role.

Because the district court lacks the authority to grant a Rule 60(b) motion while the appeal is pending, one response to such a motion might be for the district court simply to defer ruling on the motion at all until the appeal is resolved. After all, the disposition of the appeal might remove any need for a ruling on the Rule 60(b) motion. Deferring consideration, however, is not the only possible

171 FED. R. APP. P. 12.1 (proposed 2007), *available at* http://www.supremecourtus.gov/orders/courtorders/frap09.pdf.

response. As noted in Part II.A, in all circuits other than the Ninth,[172] the district court can deny the motion on its merits. A skeptic might ask why it is permissible to deny the motion when it would be impermissible to grant it: why, in other words, should the district court's power to resolve the motion depend on the district court's choice of resolution? The answer lies in the purpose of the *Griggs* rule: the rule only bars the district court from taking actions that would interfere with the court of appeals' exercise of authority over the judgment that is under appeal.[173] Granting a Rule 60(b) motion by definition would interfere with that exercise of authority, whereas denying such a motion would not.[174] Such a denial fits the notion of actions "in aid of the appeal," because the consideration and denial of the motion serve the interests of judicial efficiency[175]: if the district court denies a

172 The Ninth Circuit has held that the district court lacks authority to deny a Rule 60(b) motion during the pendency of an appeal. *See* Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979), *superseded on other grounds as recognized in*, Miller v. Marriott Int'l, Inc., 300 F.3d 1061, 1064 n.1 (9th Cir. 2002).

173 If one is assessing the question of the district court's authority by analogy to some other types of jurisdictional questions, one might consider it odd that the scope of the district court's authority extends only to one possible resolution of the motion (denial) and not to another (grant). When one thinks, for example, of federal court subject-matter jurisdiction, the presence of jurisdiction does not ordinarily turn on the court's chosen disposition. However, analogies to federal court subject-matter jurisdiction are not entirely apt when the question concerns the division of authority between the appellate and trial court. Here, a better analogy would be to the "mandate rule," which requires the district court to comply, on remand, with the mandate of the court of appeals. On such a remand, it may well be that the district court's choice among various dispositions is circumscribed by the mandate of the higher court. Seen in that light, the constraints set by the *Griggs* rule do not appear surprising.

174 *See, e.g.*, Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara, No. 02-20042, 2003 WL 21027134, at *5 (5th Cir. Mar. 5, 2003) (per curiam) ("If the district court decides that the Rule 60(b) motion should be denied, the district court can do so without disturbing appellate jurisdiction over the underlying judgment . . . ."); Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir. 1976) ("[T]his circuit, along with other circuits and the commentators, has expressly recognized power in the district court to consider on the merits, and deny, a 60(b) motion filed after a notice of appeal, because the court's action is in furtherance of the appeal.").

175 As the Fourth Circuit has observed:

> If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal. Such a procedure preserves judicial resources and eliminates unnecessary expense and delay, and therefore is surely in "aid of the appeal."

Fobian v. Storage Tech. Corp., 164 F.3d 887, 890 (4th Cir. 1999) (citations omitted).

Civil Rule 60(b) motion made during the pendency of the appeal and the movant wishes to challenge that ruling, the movant should file a notice of appeal from it. In such event, the court of appeals may, if it wishes, hear the second appeal together with the first, ensuring that only one panel need familiarize itself with the case. Some courts have also suggested that it can be advantageous for the panel which hears the appeal from the original judgment to hear the appeal from the denial of the Rule 60(b) motion because that panel will thus have before it any additional record that was made in the district court in the course of litigating the Rule 60(b) motion.[176]

Admittedly, if deferral and denial were the only options open to the district court, some might question the point of the exercise—and, indeed, were it not for time limits on making such motions,[177] it might be unlikely that litigants would make a Rule 60(b) motion during an appeal if those were the only possible outcomes. But the indicative ruling practice gives the district court a third option: the district court can communicate to the court of appeals its view that the Rule 60(b) motion has merit—thus giving the court of appeals the opportunity to consider whether to remand the case to give the district court the power to grant relief from the judgment. Such an indicative ruling by the district court can be seen as one in aid of the appeal, in the sense that it assists the court of appeals in determining how best to resolve the appeal. If the district court indicates that it would grant relief from the judgment were the court of appeals to remand for that purpose, the court of appeals may view a remand as the most efficient way to proceed.[178]

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176 *See, e.g.*, Winter v. Cerro Gordo County Conservation Bd., 925 F.2d 1069, 1073 (8th Cir. 1991) ("[T]he district court [may] consider a Rule 60(b) motion, filed after a notice of appeal, on the merits and . . . deny it. A separate appeal can thereafter be taken . . . ."); *id.* at 1073 n.7 ("When this occurs the appealing party should file a new appeal and notify this court of the ruling on the Rule 60(b) motion so that any new evidence can be considered along with the appeal on the merits.").

177 Civil Rule 60(c)(1) provides that "[a] motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." FED. R. CIV. P. 60(c)(1). A Rule 60(b) motion brought after the disposition of an appeal might in appropriate circumstances be viewed as brought within a reasonable time; the fact that the appeal was pending during the time before the motion was made could help to establish reasonableness. But such an argument would not affect the one-year time limit for motions under Civil Rule 60(b)(1), (2), or (3).

178 *See, e.g.*, *Fobian*, 164 F.3d at 890 ("[I]t would be both inefficient and unfortunate to require the district court to wait until the underlying appeal is completed before giving any indication of its desire to grant a pending Rule 60(b) motion. Such a prohibition would likely render the initial appeal pointless in cases where the district court ultimately grants the motion following appeal.").

Evaluating the indicative ruling mechanism in the light of the concerns discussed in Part I.C, we find that indicative rulings fit well with the principles that define the roles of the trial and appellate courts. Unlike some instances—discussed in Part I.B—where the district court acts unilaterally to supplement the decision that is under appeal, an indicative ruling arises where a party has sought relief from the district court. Thus, the concerns that might sometimes arise with respect to a district judge's volunteered post-judgment statements do not obtain with respect to indicative rulings. Nor should the conditional nature of the indicative ruling—"I would grant this motion if the court of appeals were to remand for that purpose"—be seen as an advisory opinion. As one court has explained:

> [W]hen a district court indicates that it is inclined to grant a Rule 60(b) motion, it does not issue an opinion on hypothetical facts. Rather, it bases its decision on the actual facts. Similarly, a trial court's decision to issue a memorandum stating its inclination to grant the Rule 60(b) motion does affect the rights of the litigants. It allows a party to do that which it could not otherwise do—request leave from the appellate court for a limited remand to secure Rule 60(b) relief.[179]

The indicative ruling procedure requires coordination between the district court and the court of appeals.[180] Proposed Civil Rule 62.1 requires the moving party to notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue;[181] Proposed Appellate Rule 12.1 then permits the court of appeals, in its discretion, to determine whether to remand for the purpose of permitting the district court to grant (or consider) the motion.[182] The proposed Rules take the practicalities of trial-level litigation into account, by permitting the district court to state either that it *would* grant the motion or merely that the motion presents a substantial issue—thus permitting the district court to avoid a full decision on a challenging motion unless the court of appeals indicates

179 *Id.* at 891.

180 Courts have noted that the district judge may sometimes need portions of the record in order to inform his or her consideration of the motion. *See, e.g.*, Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 n.3 (1st Cir. 1979) ("If the district court needs portions of the record to review the motion adequately which, because of the pending appeal, are here, it may request those portions . . . ."). It seems likely that such logistical questions will eventually become simplified by the use of electronic records.

181 FED. R. CIV. P. 62.1 (proposed 2007), *available at* http://www.uscourts.gov/rules/Supreme%20Court%202008/2008-CV-Clean_Rules.pdf.

182 Fed. R. App. P. 12.1 (proposed 2007), *available at* http://www.uscourts.gov/rules/Supreme%20Court%202008/2008-AP-Clean_Rules.pdf.

its receptivity by remanding for consideration of the motion. At the same time, the proposed Rules observe the protocol of indicative rulings by leaving the decision whether to remand within the discretion of the court of appeals; and in exercising that discretion, the court of appeals can take into account, inter alia, whether the district court has stated positively that it would grant the motion, or has merely stated that the issue presented by the motion is substantial.[183]

As we noted in Part I.C with respect to limited remands, here too the court of appeals should give attention to the terms of the remand. The concern is that if the court of appeals were to remand unconditionally, and the district court were ultimately to decide not to grant relief from the judgment, the appellant would lack the ability to revive the original appeal and a further notice of appeal from the original judgment would be untimely. The litigant could, of course, appeal the denial of the motion itself, but that appeal would likely not provide the litigant with the same opportunities as the appeal from the original judgment.[184] In light of this risk, proposed Appellate Rule 12.1 sets as the default principle that when the court of appeals employs a Rule 12.1 remand, it retains jurisdiction unless it explicitly states otherwise.[185]

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183 *See id.*; FED. R. CIV. P. 62.1 (proposed 2007).

184 It is ordinarily the case that an appeal from denial of a Rule 60(b) motion does not permit a full challenge to the underlying judgment. *See* Browder v. Dir., Dept. of Corr., 434 U.S. 257, 263 n.7 (1978) ("The Court of Appeals may review the [Rule 60(b)] ruling only for abuse of discretion . . . and an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Seventh Circuit has suggested, however, that the ordinary approach might not apply where an unconditional remand leads to injustice:

> Suppose that the district court, on remand, thinks better of its inclination to grant the Rule 60(b) motion, and denies it; is the plaintiff remitted to the limited appellate review conventionally accorded rulings on such motions? And what about the defendant in a case in which the Rule 60(b) motion is granted before he has had a chance to argue to the appellate court that the original judgment was correct—is he, too, remitted to the limited appellate review of such grants? Probably the answer to both questions is "no," the scope of review of Rule 60(b) orders is flexible and can be expanded where necessary to give each party a full review of the district court's original judgment.

Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999). A different way to address such an injustice might be to conclude that such a situation—i.e., a situation in which a district judge indicates the intention to grant a Rule 60(b) motion if the court of appeals remands, and then (upon remand) changes course and denies the motion—constitutes one of the rare instances in which recall of the mandate might be justified. *See generally* 16 WRIGHT ET AL., *supra* note 7, § 3938, at 725–26 (discussing recall of mandate)

185 FED. R. APP. P. 12.1 (proposed 2007).

The indicative ruling mechanism incorporates safeguards that can help to serve the goals of fairness as well as efficiency. It is to be expected that the district court will permit briefing on the motion for an indicative ruling, and that the appellate court will ordinarily permit submissions on the advisability and scope of any remand. The possible advantage noted above—that combining an appeal from the denial of an indicative ruling motion with the appeal from the original judgment provides the appellate court with the record on the indicative ruling motion when it considers the original appeal—might suggest to some the possibility of misuse. Such skeptics might fear that an unscrupulous litigant would use the mechanism as a means for smuggling into the appellate record items that do not belong there. But such a misuse of the indicative ruling mechanism would face hurdles in both courts. In the district court, such a tactic would risk sanctions if the indicative ruling request failed to meet the requirements set by Civil Rule 11(b).[186] And if the appellate judges were to form the impression that the indicative ruling request was merely a cover for an attempt by the appellant to insert extraneous material into the appellate record, the attempt would be unlikely to assist the prospects of the appeal.[187]

CONCLUSION

This Article has surveyed the ways in which the district court may communicate with the court of appeals concerning a pending appeal. The transfer of power over the judgment that is being appealed does not remove all opportunity for the district court to discuss that judgment further. Indeed, in some instances such discussion can further the goals of fairness and efficiency without disadvantaging the parties or casting the trial judge in an inappropriate role. When a jurisdictional line divides a lower from a higher court, it is appropriate that the concept of jurisdiction be a nuanced one.

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186 FED. R. CIV. P. 11.

187 Appeals from denials of Rule 60(b) motions are conceptually distinct from appeals from the underlying judgment. Because appellate judges are accustomed to this distinction, it seems likely that they usually would avoid considering, in connection with the underlying-judgment appeal, matter that is properly only a part of the record on the Rule 60(b) appeal. But there may be instances when an appellate judge sees in the record on the Rule 60(b) appeal information that—though not justifying a conclusion that the denial of Rule 60(b) relief was an abuse of discretion—might lead the judge to conclude that the result below was unjust. In such an instance, if the two appeals are consolidated the judge's consideration of the Rule 60(b) appeal might lead him or her to take a particularly close look at the possible grounds for reversal on the appeal from the underlying judgment.