DO AN ATTORNEY’S ACTIONS CONSTITUTE HIS CLIENT’S INTENT?: THE SEVENTH CIRCUIT’S BROADENING OF THE PRINCIPLES OF WAIVER

ALICE WARD*

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INTRODUCTION

When a defendant fails to object to an issue at sentencing, he may lose the right to make that challenge again later—but only if the court determines that he acted intentionally.¹ If a defendant disagrees with his lawyer’s decision not to object, should the lawyer’s failure to object constitute an intentional choice by the defendant?² Principles of waiver should be construed in favor of the defendant and the court has the discretion to infer a defendant’s intent based on the record.³ If there are ambiguities in the record, the court should resolve them in the light most favorable to the defendant, particularly when issues of sentencing are concerned.⁴


¹ United States v. Haddad, 462 F.3d 783, 793 (7th Cir. 2006) (citing United States v. Murry, 395 F.3d 712, 717 (7th Cir. 2005)).

² See United States v. Scott, 900 F.3d 972, 973 (7th Cir. 2018).

³ United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005) (citing United States v. Sumner, 265 F.3d 532, 539 (7th Cir. 2001)).

⁴ United States v. Anderson, 604 F.3d 997, 1002 (7th Cir. 2010) (citing United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001)).
Wayne Scott was on conditional release after serving a term of imprisonment for fraud, under 18 U.S.C. § 1341. Scott violated the conditions of his release, and on January 17, 2017, the district court held a revocation hearing to address his latest violation – opening a new line of credit without consulting his probation officer. After the court determined that Scott did violate the terms of his release, the government recommended five months in custody and an additional thirty-six months of supervised release based on a sentencing recommendation prepared for a previous probation violation. The court declined to place Scott into custody because of his compliance with his restitution payments. Defense counsel stated, “we have no objection to extending the period of mandatory supervised release.” The court then advised Scott to follow the terms of his conditional release to avoid future court involvement and Scott began to speak. Scott stated, “Your Honor, I just want to add for the record,” before his defense attorney interrupted, advising Scott to speak with him first. After speaking to Scott, defense counsel advised the judge that Scott had nothing to say and the hearing ended.

Scott retained new counsel for his next status hearing when the court discovered it had to impose a period of custody to extend Scott’s supervised release period. The new attorney requested a shorter period of supervised release but made no mention about the lack of sentencing guidelines calculation or the fact that Scott was not permitted to allocute at the revocation hearing. Scott later filed a motion to reconsider challenging the district court’s supervised release

\[5\] Scott, 900 F.3d at 973.
\[6\] Id.
\[7\] Id.
\[8\] Id.
\[9\] Id. at 974.
\[10\] Id.
\[11\] Id.
\[12\] Id.
\[13\] Id.
\[14\] Id.
violation finding, advocating for a shorter sentence of supervised release, and stating that he disagreed with his attorney’s decision to not object to the sentence of supervised release. The district court denied the motion and Scott timely appealed. The Seventh Circuit affirmed the district court’s ruling, finding that Scott waived both his challenge to the lack of sentencing guidelines calculation and his right to allocution.

The first part of this comment will discuss the principle of waiver and how its standard differs from that of forfeiture. The second section will summarize the Seventh Circuit’s decision in *United States v. Scott*. The third section will analyze the Seventh Circuit’s decision in *Scott* against precedent in the circuit and argue that the case should have been remanded to the district court for a new calculation under the sentencing guidelines.

**BACKGROUND**

When a defendant intentionally and voluntarily gives up a claim to a known right, it constitutes a waiver of that right, precludes appellate review, and extinguishes error. “Waiver principles should be construed liberally in favor of the defendant.” When a defendant does not make an objection at his sentencing hearing that may communicate that he does not wish to argue the sentence imposed. When a defendant decides not to make an argument for tactical reasons that constitutes an intentional decision - not mere oversight - and he has waived his ability to make that argument later. If a

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15 Id.
16 Id.
17 Id.
18 *United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006) (citing *United States v. Murry*, 395 F.3d 712, 717 (7th Cir. 2005)).
19 *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005) (citing *United States v. Sumner*, 265 F.3d 532, 539 (7th Cir. 2001)).
20 *United States v. Brodie*, 507 F.3d 527, 531 (7th Cir. 2007) (citing *Jaimes-Jaimes*, 406 F.3d at 848).
21 *Jaimes-Jaimes*, 406 F.3d at 848.
defendant does not make an argument due to oversight or negligence, however, that constitutes forfeiture and may be subject to plain error review at the appellate level, if the defendant can demonstrate good cause.22 “Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake.”23 When a legal rule was violated, there has been an error regardless of whether the defendant timely objected.24

The Seventh Circuit found that a defendant waived his rights at sentencing when he made arguments against certain findings in his presentence report and then stated that he had no further objections.25 Similarly, when a defense attorney stated he had reviewed the presentence report with his client and they had no objections to the guidelines calculation, the court of appeals found that the defendant knew of his right to object and intentionally decided not to do so.26

The major difference between waiver and forfeiture is that forfeiture does not extinguish error on appeal and instead permits review for plain error.27 However, the line between waiver and forfeiture is not always clear, and courts sometimes find it difficult to distinguish the two.28 Waiver is an intentional decision to not assert a right while forfeiture is an accidental or negligent “failure to make the timely assertion of a right.”29 To determine whether a right was waived or forfeited, the court must examine the defendant’s mental state at the

22 United States v. Brodie, 507 F.3d 527, 531 (7th Cir. 2007).
24 Olano, 507 U.S. at 733-34.
25 Brodie, 507 F.3d at 531.
26 United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000).
27 United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015) (citing Olano, 507 U.S. at 731).
28 Butler, 777 F.3d at 387 (citing United States v. Garcia, 580 F.3d 528, 541 (7th Cir. 2009)).
29 Olano, 507 U.S. at 733.
time he could have made the objection. When deciding whether a right was waived, the court analyzes each omission to determine whether it was a strategic decision to not object. It is the government’s burden to show a strategic justification for a defendant’s failure to object to prove waiver. Generally, when a defendant does not object to an issue at his sentencing hearing, the court finds that the defendant waived the issue; however, there is no rigid “rule that every objection not raised at a sentencing hearing is waived.” To determine a defendant’s intent in not arguing a point, the court makes inferences from the record as a whole and considers the particular circumstances.

“[A]n argument should be deemed forfeited rather than waived if finding waiver from an ambiguous record would compel the conclusion that counsel necessarily would have been deficient to advise the defendant not to object.” The Seventh Circuit found that the failure to object by defendant and his counsel at sentencing was merely forfeiture and not waiver when the defendant had made an objection to the restitution calculation prior to sentencing, even though both the defendant and his counsel stated at sentencing that they had no objections.

When a court finds that a defendant forfeited a right, then the “remarkably demanding” plain error tests applies. A defendant bears the burden to show: “(1) an error or defect that (2) is clear or obvious

30 *Butler*, 777 F.3d at 387 (citing United States v. Anderson, 604 F.3d 997, 1001 (7th Cir. 2010)).
31 *Butler*, 777 F.3d at 387 (citing *Anderson*, 604 F.3d at 1002).
32 *Anderson*, 604 F.3d at 1001-02.
33 *Butler*, 777 F.3d at 387 (quoting United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005)).
34 *Butler*, 777 F.3d at 387 (citing United States v. Garcia, 580 F.3d 528, 542 (7th Cir. 2009)).
35 *Jaimes-Jaimes*, 406 F.3d at 848 (citing United States v. Richardson, 238 F.3d 837, 841 (7th Cir. 2001)).
36 United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008).
37 *Butler*, 777 F.3d at 388 (citing *Anderson*, 604 F.3d at 1002).
and (3) affects the defendant’s substantial rights.”38 If a defendant meets this burden, the court has the discretion to correct the error – it is not required to do so.39 The court may correct the error when it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”40 The standard of plain error review “is permissive, not mandatory.”41 The Supreme Court has determined it should be exercised “in those circumstances in which a miscarriage of justice would otherwise result.”42 While “miscarriage of justice” applies to cases where the defendant is actually innocent, the doctrine is generally applied more broadly.43

Judges are required to calculate the guidelines range before sentencing a defendant to a term of supervised release.44 While judges are not required to sentence a defendant to a term within the range, the federal code requires them to consider the enumerated subsections in section 3553(a) when deciding the length of a sentence of imprisonment and conditions of supervised release.45 The record must indicate that the district court actually considered the guidelines range.46 Failure to do so constitutes reversible error.47

When a defendant argued that his criminal history score was improperly calculated and the calculation he advocated for led to a sentencing guidelines range that overlapped with the range calculated

38 Butler, 777 F.3d at 388 (citing United States v. Olano, 507 U.S. 725, 736 (1993)).
39 Id.
40 United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008) (quoting United States v. Kibler, 279 F.3d 511, 514 (7th Cir. 2002)).
41 Olano, 507 U.S. at 735.
43 Olano, 507 U.S. at 735.
44 United States v. Downs, 784 F.3d 1180, 1181 (7th Cir. 2015).
45 United States v. Griffin, 806 F.3d 890, 892 (7th Cir. 2015) (citing United States v. Thompson, 777 F.3d 368, 373 (7th Cir. 2015) (citing 18 U.S.C. §§ 3553(c), 3583(c))).
46 United States v. Oliver, 873 F.3d 601, 610 (7th Cir. 2017).
47 Downs, 784 F.3d at 1181.
by the district court, the Seventh Circuit found that was insufficient to constitute plain error because the defendant failed to show a substantial right was affected.\(^{48}\) However, when the district court failed to calculate the appropriate sentencing guidelines range before imposing a period of supervised release, the Seventh Circuit found that was not a harmless error because judges are required to consider the guidelines range before imposing any sentence— even though they are not required to actually impose a sentence within that resulting range.\(^{49}\)

**United States v. Scott**

Wayne Scott was on conditional release after completing a prison term for defrauding investors and potential investors.\(^{50}\) As part of his supervised release, Scott was not permitted to open new lines of credit without the approval of his probation officer.\(^{51}\) The government filed a motion alleging that Scott violated that provision of his release on January 17, 2017 and on July 6, 2017, the district court held a revocation hearing.\(^{52}\) The district court determined that Scott violated the terms of his release and, based off of a report created for a previous violation, the government recommended five months in custody and an additional thirty-six months of supervised release.\(^{53}\) Because Scott had been complying with his restitution payments, the court denied imposing a period of custody.\(^{54}\) The government renewed its request for an extended period of supervised release, and defense counsel advised that he had no objection.\(^{55}\) The court imposed the thirty-six months of supervised release and then addressed Scott to

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\(^{48}\) United States v. Butler, 777 F.3d 382, 389 (7th Cir. 2015).

\(^{49}\) *Downs*, 784 F.3d at 1181.

\(^{50}\) United States v. Scott, 900 F.3d 972, 973 (7th Cir. 2018).

\(^{51}\) *Id.*

\(^{52}\) *Id.*

\(^{53}\) *Id.*

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 974.
remind him to continue making restitution payments to avoid future court appearances.\textsuperscript{56} Scott began to address the court, saying, “Your Honor, I just want to add for the record,” before his defense attorney interrupted, saying “No, you’re going to talk to me first.”\textsuperscript{57} After speaking to Scott, defense counsel stated, “Pardon me, Judge. Thank you for the opportunity to talk. I don’t believe he has anything else he wants to tell the Court,” and the hearing ended.\textsuperscript{58}

Scott was represented by a different attorney at his next status hearing when the court determined that the extension of Scott’s supervised release required a period of custody.\textsuperscript{59} The court ordered a one day sentence with time considered served followed by the thirty-six months of supervised release and then asked whether there was any objection.\textsuperscript{60} Scott’s new counsel stated he was, “not looking to reopen Mr. Scott’s sentencing hearing,” but advocated for a shorter period of supervised release.\textsuperscript{61} Counsel did not argue that the sentencing guidelines calculation was not performed or that Scott had no opportunity to allocute\textsuperscript{62} at the revocation hearing.\textsuperscript{63}

After the status hearing, Scott filed a motion to reconsider, on the grounds that: he did not agree with his attorney’s decision to not object to the additional time of supervised release, no sentencing guidelines calculation was performed at the hearing, the penalties were not explained to him, and he was not permitted to present mitigating

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 974.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Allocution is a defendant’s opportunity to address the court at sentencing. The three major theories in support of allocution posit that it allows the defendant the opportunity to accept responsibility for his actions, mitigate his sentence, and humanize himself to the court. Mark W. Bennett and Ira P. Robbins, \textit{Last Words: A Survey and Analysis of Federal Judges’ Views of Allocution in Sentencing}, 65 ALA. L. REV. 735, 739 (2013) (citing Kimberly A. Thomas, \textit{Beyond Mitigation: Towards a Theory of Allocution}, 75 FORDHAM L. REV. 2641, 2655-67 (2007)).
\textsuperscript{63} Scott, 900 F.3d at 974.
The district court denied Scott’s motion and he filed a timely appeal.\textsuperscript{65}

The Seventh Circuit found that Scott waived his right to challenge both the thirty-six months of supervised release imposed and that the district court did not allow him to allocute.\textsuperscript{66} The court noted that revocation hearings do not provide the same constitutional rights to a defendant that a sentencing hearing does.\textsuperscript{67} However, the dissent addresses this somewhat cryptic statement by pointing out that in a revocation hearing, the district court is still required to consider the appropriate sentencing guidelines range by at least referencing a report prepared by the probation office advising what the guidelines range is.\textsuperscript{68} The court then cited to the fact that Scott’s counsel had no objection to the additional thirty-six months of supervised release and that while Scott began to speak to the judge, after conferring with his counsel, his attorney advised the court Scott had nothing to say.\textsuperscript{69} The majority opined that it did not want to interfere with the attorney-client relationship.\textsuperscript{70}

However, the dissent characterized the revocation hearing and the interaction between Scott and his attorney differently.\textsuperscript{71} Chief Judge Wood noted first that the district court did not properly calculate a guidelines sentence and instead relied on a report prepared for Scott’s previous probation violation.\textsuperscript{72} Then, Scott’s counsel spoke for him, stating that they did not have any objection to the imposition of an additional thirty-six months of supervised release.\textsuperscript{73} Next, defense counsel interrupted Scott when he attempted to assert his right to

\begin{footnotesize}
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\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id. (citing United States v. Lee, 795 F.3d 682, 685 (7th Cir. 2015)).
\item \textsuperscript{68} Scott, 900 F.3d at 979 (Wood, J., dissenting).
\item \textsuperscript{69} Scott, 900 F.3d at 974.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id. at 975 (Wood, J., dissenting).
\item \textsuperscript{72} Id. at 976 (Wood, J., dissenting).
\item \textsuperscript{73} Id. (Wood, J., dissenting).
\end{itemize}
\end{footnotesize}
allocute. Finally, defense counsel spoke for Scott, advising the court that Scott had nothing to say. Scott retained a new lawyer and attempted to address the lack of sentencing guidelines calculation and allocution, but the district court ruled that it was too late. The dissent performed a thorough analysis of the record, and went line-by-line to determine what occurred at the sentencing hearing between the government, the court, and the defense. The dissent noted that Scott’s attorney agreed to extend the period of mandatory supervised release before the government or court made a recommendation of how many months to extend the supervised release. “The government recommended a 36-month term only after Scott’s counsel had agreed to some extension.” The dissent then summarized the end of the hearing as follows: Scott attempted to address to court, he was interrupted by his attorney, then conferred with his attorney, Scott’s attorney then addressed the court to advise the judge that Scott had nothing further to say, and the judge did not confirm with Scott instead just said, “All right. That’s fine.” The dissent concluded, based on its reading of the record, that Scott did not waive his arguments regarding his right to a sentencing guidelines calculation and allocution and would have remanded to the district court for a new revocation hearing where the district court would actually calculate the sentencing guidelines for Scott’s violation.

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74 Id. (Wood, J., dissenting).
75 Id. (Wood, J., dissenting).
76 Id. (Wood, J., dissenting).
77 Id. (Wood, J., dissenting).
78 Id. (Wood, J., dissenting).
79 Id. (Wood, J., dissenting).
80 Id. (Wood, J., dissenting).
81 Id. (Wood, J., dissenting).
Neither Scott nor his counsel objected at his revocation hearing to the imposition of thirty-six months of supervised release.\(^{82}\) A failure to object may communicate his intention to relinquish an argument, but it does not automatically constitute a waiver.\(^{83}\) The court should also consider whether there was a strategic reason to not object to a provision at sentencing and whether it was deficient for defense counsel to not object.\(^{84}\) The *Scott* majority did not consider whether there was any strategic reason to not object to the period of supervised release suggested by the government.\(^{85}\) Scott retained a new attorney after his revocation hearing, and while it is not in the record, the court could have inferred it was because Scott was unhappy with his previous counsel’s performance at sentencing.\(^{86}\) As the record stands, it is at the very least ambiguous as to whether Scott’s previous counsel was acting strategically or negligently.\(^{87}\) Principles of waiver are meant to be construed in the defendant’s favor.\(^{88}\) When a court determines whether a defendant intentionally made the choice to not object, it relies on inferences from the record and the circumstances particular to the defendant.\(^{89}\)

The facts in *Scott* are similar to those in *United States v. Jaimes-Jaimes*, where the Seventh Circuit found that counsel’s failure to object to a sentence enhancement constituted forfeiture – not waiver.\(^{90}\)

\(^{82}\) United States v. Scott, 900 F.3d 972, 974 (7th Cir. 2018).

\(^{83}\) United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008) (citing United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005)).

\(^{84}\) *Allen*, 529 F.3d at 395 (citing United States v. Brodie, 507 F.3d 527, 531-32 (7th Cir. 2007); *Jaimes-Jaimes*, 406 F.3d at 848).

\(^{85}\) See *Scott*, 900 F.3d at 974.

\(^{86}\) See *Scott*, 900 F.3d at 974.

\(^{87}\) See id.

\(^{88}\) *Jaimes-Jaimes*, 406 F.3d at 848 (citing United States v. Sumner, 265 F.3d 532, 539 (7th Cir. 2001)).

\(^{89}\) United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015) (citing United States v. Garcia, 580 F.3d 528, 542 (7th Cir. 2009)).

\(^{90}\) See *Jaimes-Jaimes*, 406 F.3d at 848.
Scott’s counsel did not allow him to address the court and Scott later stated that he disagreed with his lawyer’s decision to not challenge the sentencing guidelines calculation.\(^\text{91}\) In \textit{Jaimes-Jaimes}, the Seventh Circuit found that while the statement from defense counsel that his client did not have an objection to the content of the presentence report was significant, it did not automatically constitute a waiver of the right of the defendant to later appeal any guidelines calculation in the report.\(^\text{92}\) Despite the court ruling under similar circumstances that a defendant had waived his right to appeal the guidelines sentence in his presentence report, the court ruled that it was not “an inflexible rule that every objection not raised at a sentencing hearing is waived.”\(^\text{93}\) When the Seventh Circuit could not think of any strategic reason for a defendant to choose not to object to multiple level increases in his offense level and the government also offered no reasonable justification, the court of appeals found that the most probable explanation was that the defendant’s counsel made an oversight in not challenging the increase.\(^\text{94}\) That oversight by defense counsel was accidental and not an intentional choice made by defendant and therefore constituted forfeiture and was subject to plain error review.\(^\text{95}\)

The Seventh Circuit in \textit{Scott} was aware of its decision in \textit{Jaimes-Jaimes}, the majority opinion even cites the case while discussing the concept of waiver.\(^\text{96}\) However, the Seventh Circuit did not discuss the facts of \textit{Jaimes-Jaimes} or distinguish it from \textit{Scott}.\(^\text{97}\) Rene Jaimes-Jaimes (“Jaimes”) pleaded guilty to unlawfully remaining in the United States after being deported.\(^\text{98}\) The presentence report prepared by probation and the written plea agreement prepared by the parties

\(^{91}\) See \textit{Scott}, 900 F.3d at 974.

\(^{92}\) \textit{Jaimes-Jaimes}, 406 F.3d at 848.

\(^{93}\) \textit{Id}.

\(^{94}\) \textit{Id}.

\(^{95}\) \textit{Id}. at 849.

\(^{96}\) \textit{Scott}, 900 F.3d at 973 (quoting \textit{Jaimes-Jaimes}, 406 F.3d at 848 (“The touchstone of waiver is a knowing and intentional decision.”)).

\(^{97}\) See \textit{Scott}, 900 F.3d at 973.

\(^{98}\) \textit{Jaimes-Jaimes}, 406 F.3d at 846.
both calculated that Jaimes’ offense level should be increased by sixteen points. The district court accepted the calculation and sentenced Jaimes to seventy-eight months of imprisonment, which was within the calculated guidelines range of seventy to seventy-eight months. On appeal, Jaimes argued that his offense level was improperly increased by sixteen and should have only been increased by eight, and that miscalculation constituted plain error. The Seventh Circuit agreed, vacated, and remanded for resentencing. The government argued that when defense counsel advised the court that he had no objection to the guidelines calculation Jaimes waived his right to challenge the calculation on appeal. The court agreed that in previous rulings it had found that defendants waived their right to a sentencing guidelines argument under similar circumstances; however, in those previous cases the court found the defendant was acting strategically. In Jaimes-Jaimes, the court found that the only plausible explanation for defendant’s failure to object to the sentence enhancement was oversight by his attorney. Similarly, in Scott, no strategic explanation is provided to explain why Scott’s counsel did not object to the period of supervised release offered by the government at sentencing. The court had already advised the parties that it would not impose a period of custody based on Scott’s compliance with restitution payments. The dissent in Scott pointed

99 Id.
100 Id.
101 Id.
102 Id.
103 Id. at 847-48 (citing United States v. Staples, 202 F.3d 992, 995 (7th Cir. 2000) (finding that defendant had waived right to challenge guidelines calculation when his attorney advised the court that he had reviewed the presentence report with his client and they had no objection)).
104 Jaimes-Jaimes, 406 F.3d at 848 (citing United States v. Martinez-Jimenez, 294 F.3d 921, 923 (7th Cir. 2002); United States v. Cooper, 243 F.3d 411, 416 (7th Cir. 2001)).
105 Jaimes-Jaimes, 406 F.3d at 848.
106 See Scott, 900 F.3d at 973.
107 Id.
out that the record showed that Scott’s attorney stated he had no objection to a period of supervised release before the court even advised how long that period might be.\textsuperscript{108} If counsel did not even know what sentence the court was going to impose, how could his decision to not object to it reflect an intentional, strategic decision?

The “touchstone of waiver” is when a defendant makes objections to certain conditions of supervised release and then intentionally decides to not make objections to others.\textsuperscript{109} By purposefully choosing to not object, the defendant has waived any challenges he may have had to the provision.\textsuperscript{110} Scott’s counsel did not make any objection to either the failure of the court to perform a sentencing calculation or the imposition of thirty-six months of supervised release.\textsuperscript{111} As remarked above, Scott’s counsel blindly asserted there was no objection to a period of supervised release before even learning what period of time the court would impose.\textsuperscript{112}

When an attorney argued for a shorter sentence for his client instead of making a direct challenge to the sentencing guidelines calculation, the court found forfeiture of a right instead of waiver.\textsuperscript{113} In \textit{United States v. Butler}, the defendant did not challenge the calculation of his sentencing guidelines and the Seventh Circuit found that it was due to oversight by defendant’s counsel rather than an intentional decision and therefore constitute forfeiture and not waiver.\textsuperscript{114} Upon examining the record, the circuit court concluded that counsel objected to the inclusion of a state forgery offense that increased the defendant’s guidelines calculation by two points, but did not make the

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\item[\textsuperscript{108}] Id. at 977 (Wood, J., dissenting).
\item[\textsuperscript{109}] United States v. Raney, 842 F.3d 1041, 1044 (7th Cir. 2016) (quoting United States v. Armour, 804 F.3d 859, 865 (7th Cir. 2015)).
\item[\textsuperscript{110}] Raney, 842 F.3d 1044 (citing United States v. Gabriel, 831 F.3d 811, 814 (7th Cir. 2016)).
\item[\textsuperscript{111}] See Scott, 900 F.3d at 973.
\item[\textsuperscript{112}] See id. at 977 (Wood, J., dissenting).
\item[\textsuperscript{113}] See United States v. Butler, 777 F.3d 382, 387 (7th Cir. 2015).
\item[\textsuperscript{114}] Id.
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challenge to the guidelines calculation directly. The government could not articulate a strategic reason for defense counsel to not make the challenge and therefore the Seventh Circuit found that the defendant forfeited his right to challenge the guidelines calculation. Similarly, Scott retained new counsel for his first status hearing after sentencing who argued for a shorter period of supervised release instead of making an outright challenge to the lack of sentencing guidelines calculation. The court in Scott did not consider whether there was a strategic reason for Scott’s counsel to not make that challenge. The court could have made an inference that the failure to challenge the sentencing guidelines calculation was an oversight based on the fact that Scott filed a motion to reconsider after that hearing where he argued that he disagreed with his previous counsel’s decision to not object and reasserted his new counsel’s arguments for a shorter period of supervised release. Instead, the court concluded that if Scott wanted to challenge the lack of sentencing guidelines calculation, the time to do so was at his first hearing after sentencing. 

The court’s analysis in Butler did not stop at the conclusion of forfeiture. The defendant still had to show the following under the plain error test: “(1) an error or defect that (2) is clear or obvious and (3) affects the defendant’s substantial rights.” The court found that Butler did not meet the plain error standard when he argued that the state forgery conviction should have been considered relevant conduct under the sentencing guidelines. Butler argued that the actions underlying the state forgery conviction were part of the same course of conduct that he was being sentenced for and, therefore, should not

115 Id.
116 Id. at 388.
117 United States v. Scott, 900 F.3d 972, 974 (7th Cir. 2018).
118 See id.
119 Id.
120 United States v. Butler, 777 F.3d 382, 388 (7th Cir. 2015).
121 Id. (citing United States v. Olano, 507 U.S. 725, 736 (1993)).
122 Butler, 777 F.3d at 388.
have increased his criminal history score by two points.\textsuperscript{123} However, the court found that the conduct was not related to the specific course of conduct, and even if the two points had not been added to Butler’s criminal history score, the corresponding guidelines range would have been eighteen to twenty-four months.\textsuperscript{124} Because Butler was sentenced to twenty-four months with the two point increase to his criminal history score, he could not show that the district court would have imposed a lower sentence and therefore Butler did not show that the error affected his substantial rights.\textsuperscript{125} In \textit{Scott}, no sentencing guidelines calculation was ever done for this particular supervised release.\textsuperscript{126} For that reason, when considering whether the lack of sentencing guidelines calculation constituted plain error, the facts in \textit{Scott} more closely resemble those in \textit{United States v. Allen}, where the district court failed to make a proper calculation of restitution owed.\textsuperscript{127}

When a defendant and his defense counsel independently told the court they had no objections at sentencing, the Seventh Circuit still found evidence in the record that indicated the defendant merely forfeited his right to challenge the district court’s restitution calculation.\textsuperscript{128} The court of appeals found that the defendant had objected to the calculation before the sentencing and then determined there was no strategic reason to forego that challenge at the hearing.\textsuperscript{129} Therefore, the failure of defense counsel to object constituted forfeiture and the defendant was entitled to plain error review.\textsuperscript{130} The circuit court vacated the restitution and remanded the case to the district court for a new calculation, finding that it was plain error when the district court did not calculate the actual loss suffered by the defen

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} United States v. Scott, 900 F.3d 972, 980 (7th Cir. 2018) (Wood, J., dissenting).
\textsuperscript{127} See United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008).
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.}
defendant’s victim. The Scott dissent notes that when revoking a defendant’s supervised release, the district court must calculate and consider the recommended guidelines range. The government relied on a 2015 report created by the probation office regarding an unrelated violation of Scott’s supervised release when it suggested a period of thirty-six months of supervised release for the 2017 violation. The Probation Office never prepared a report for the violation that was the subject of the hearing in 2017; there was no sentencing guidelines calculation done by the probation office or the district court for that particular violation of supervised release.

“Judges are required to calculate the applicable guidelines range before imposing sentence, though not bound to sentence within that range.” The district court is the one responsible for calculating the guidelines sentence and the Supreme Court has noted that a miscalculation of the guidelines leads to a “risk of unnecessary deprivation of liberty [that] particularly undermines the fairness, integrity, or public reputation of judicial proceedings.” Before a judge can decide the length of a defendant’s term of supervised release, he must calculate the guidelines range according to the factors in 18 U.S.C. § 3553(a), and use the resulting range as an anchor in determining an appropriate sentence. Because the guidelines are so essential to sentencing, there is a presumption that failing to even calculate the guidelines sentence would affect a defendant’s sentence and therefore would constitute plain error by the district court.

131 Id.
132 United States v. Scott, 900 F.3d 972, 979 (7th Cir. 2018) (Wood, J., dissenting) (citing United States v. Downs, 784 F.3d 1180, 1181 (7th Cir. 2015); United States v. Snyder, 635 F.3d 956, 959 (7th Cir. 2011)).
133 Scott, 900 F.3d at 980 (7th Cir. 2018) (Wood, J., dissenting).
134 Id.
135 United States v. Downs, 784 F.3d 1180, 1182 (7th Cir. 2015).
136 Scott, 900 F.3d at 980 (Wood, J., dissenting) (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1908 (2018)).
137 Downs, 784 F.3d at 1182.
138 Scott, 900 F.3d at 980 (Wood, J., dissenting) (citing Downs, 784 F.3d at 1182).
CONCLUSION

The Seventh Circuit’s precedent concerning principles of waiver and forfeiture demonstrate that there is a presumption that a defendant’s failure to object was not a waiver absent express, strategic intent by the defendant and his defense counsel to do so.\textsuperscript{139} Even in circumstances where a defendant appears to have intentionally waived a right, the court retains discretion to examine the record for evidence that failure to object at sentencing was an oversight.\textsuperscript{140} This follows the Seventh Circuit’s declaration that “[w]aiver principles should be construed liberally in favor of the defendant.”\textsuperscript{141} In light of its precedent, the court in \textit{Scott} should have inferred from the record that Scott’s former counsel did not strategically and intentionally decide not to object to the imposition of thirty-six months of supervised release. When Scott retained new counsel, his attorney advocated for a shorter sentence at the first status hearing after sentencing; Scott filed a motion to reconsider shortly after that hearing arguing that he did not agree with his previous counsel’s decision to not object; and in that same motion Scott addressed the issue that no sentencing guidelines calculation was completed.\textsuperscript{142} At one point, the dissent characterized this case, after considering the record, as “not a good candidate for a finding of forfeiture, much less waiver.”\textsuperscript{143}

The majority in \textit{Scott} argued that if Scott wished to challenge the lack of sentencing guidelines calculation and his inability to allocute, he should have done so when he retained new counsel at the status hearing.\textsuperscript{144} But, as the dissent points out, that is the language of

\begin{itemize}
  \item \textsuperscript{139} \textit{See} United States v. Allen, 529 F.3d 390, 395 (7th Cir. 2008).
  \item \textsuperscript{140} \textit{Id}.
  \item \textsuperscript{141} United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005) (citing United States v. Sumner, 265 F.3d 532, 539 (7th Cir. 2001)).
  \item \textsuperscript{142} \textit{See} \textit{Scott}, 900 F.3d at 974.
  \item \textsuperscript{143} \textit{Id.} at 979 (Wood, J., dissenting).
  \item \textsuperscript{144} \textit{Id.} at 973.
\end{itemize}

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forfeiture.\textsuperscript{145} Clearly, the majority did not perceive any strategic advantage by Scott’s lawyer to not objecting at that time; therefore, to not do so was an oversight and would entitle Scott to plain error review.\textsuperscript{146} While district court judges are no longer required to sentence within the guidelines,\textsuperscript{147} they are required to calculate the appropriate guidelines range and consider it when imposing a sentence.\textsuperscript{148} To not even calculate a guidelines sentence before imposing a period of supervised release was plain error that clearly had a substantial effect on Scott’s rights. The Seventh Circuit should have remanded to the district court to hold a new sentencing hearing, calculate the guidelines range for the violation at issue, consider that range prior to sentencing Scott, and then allow Scott the opportunity to allocute.

\textsuperscript{145} \textit{Id.} at 980 (Wood, J., dissenting).
\textsuperscript{146} \textit{See} United States v. Brodie, 507 F.3d 527, 531 (7th Cir. 2007).
\textsuperscript{147} United States v. Booker, 543 U.S. 220 (2005).
\textsuperscript{148} United States v. Downs, 784 F.3d 1180, 1182 (7th Cir. 2015).