PRESERVING ERROR:
Making Sure You Get Your Second Chance on Appeal

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Paper originally written by Tim Crooks
& updated and edited by Tim Crooks and Judy Madewell

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Introduction

As an attorney who now works exclusively on appeals, I am frustrated when good points of error have not been properly preserved below. Yet, having also been a trial attorney, I realize that, in the rush to judgment in criminal cases, it is all too easy to slip up!

Many times I have heard attorneys speak dismissively of seminars on preservation of error for appeal – for example: "All they're going to do is tell us that we need to object at trial, and I already know that." But the truth is that, in today's increasingly complex federal criminal practice, often much more than just a simple objection is needed. This paper is designed to give some basic information on preserving error to make sure that your clients get the full benefit of their "second chance" on appeal.

Pretrial Motions

Under Federal Rule of Criminal Procedure 12(b)(3), certain motions must be raised be raised before trial "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(1) Motions alleging defects in the institution of the prosecution;[1]

[1] See Fed. R. Crim. P. 12(b)(3)(A).

(2) Motions alleging a defect in the indictment or information;[2]

(3) Motions to suppress evidence;[3]

(4) Motions to sever charges or defendants under Fed. R. Crim. P. 14.[4]

(5) Motions for discovery under Fed. R. Crim. P. 16.[5]

Additionally, the district court "may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing."[6] However, a motion claiming that the court lacks jurisdiction "may be made at any time while the case is pending."[7]

What happens if the defendant fails to timely file a required pretrial motion? This question has been complicated by a 2014 amendment to Rule 12. Before the amendment, the rule stated that a party "waives" a defense not timely raised. Fed. R. Crim. P. 12(e) (2002). Based on this language, a number of courts had held that the

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[2]See Fed. R. Crim. P. 12(b)(3)(B).

[3]See Fed. R. Crim. P. 12(b)(3)(C).

[4]See Fed. R. Crim. P. 12(b)(3)(D).

[5]See Fed. R. Crim. P. 12(b)(3)(E).

[6]Fed. R. Crim. P. 12(c).

[7]Fed. R. Crim. P. (b)(2) (effective Dec. 1, 2014). The earlier version also allowed the court at any time while the case was pending to hear a claim that the indictment or information failed to state an offense. Fed. R. Crim. P. 12(b)(3)(B) (2002). That was removed in the 2014 amendment. See Fed. R. Crim. P. 12, Advisory Committee Notes to 2014 amendments.

failure to timely raise a pretrial motion barred appellate review.[8] Other courts, however, would review the claim for plain error.[9] The Eighth Circuit appeared to be more willing to review double-jeopardy issues for plain error than suppression issues.[10]

After the 2014 amendment, the failure to meet the deadline under Rule 12(b)(3), means that "the motion is untimely." Fed. R. Crim. P. 12(c)(3). "But a court may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3).

All the circuit courts appear to agree that the current Rule 12 allows appellate review of claims that were not timely raised.[11] The disagreement is over whether those claims are reviewed for plain error or for good cause.[12] The Sixth Circuit had previously held that these claims were waived; it now holds that these claims are

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[8]See, e.g., United States v. Chavez-Valencia, 116 F.3d 127, 129-33 (5th Cir. 1997) (suppression issue); United States v. Horton, 756 F.3d 569, 574 (8th Cir. 2014) (suppression issue).

[9]See, e.g., United States v. Robertson, 606 F.3d 943, 949-50 (8th Cir. 2010) (double-jeopardy claim); United States v. Johnson, 415 F.3d 728, 730 (7th Cir. 2005) (suppression issue).

[10]See Robertson, 606 F.3d at 949-50 (double-jeopardy claim reviewed for plain error); Horton, 756 F.3d 574 (suppression issue deemed waived). But see United States v. Moore, 98 F.3d 347, 350-51 (8th Cir. 1996) (stating suppression issues waived but also holding no plain error).

[11]See United States v. Edmond, 815 F.3d 1032, 1043-44 (6th Cir. 2016) (citing cases).

[12]See id. at 1044.

generally subject to plain-error review.[13] The Eighth Circuit had previously reviewed some of these claims for plain error; it now reviews these claims for good cause, and if it finds no good cause, then the substantive issue is not reviewed at all.[14] The Tenth Circuit likewise reviews only for good cause; and, in the absence of good cause, will find the issue waived.[15]

What constitutes "good cause" will, of course, vary from case to case. The Tenth Circuit, however, "'rarely [ ] grant[s] relief under the good-cause exception."[16] In the Tenth Circuit, the inadvertence, or ineffective assistance, or defense counsel in failing to make a timely assertion of the claim does not constitute "good cause."[17] The Tenth Circuit has also held that subsequent favorable Supreme Court law was not

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[13]See United States v. Soto, 794 F.3d 635, 647-56 (6th Cir. 2015).

[14]See United States v. Anderson, 783 F.3d 727, 740- 42 (8th Cir. 2015) (holding that prior to amendment would have reviewed double-jeopardy claim for plain error, but now review whether defendant showed good cause for failing to raise).

[15]See United States v. Burke, 633 F.3d 984, 987-91 (10th Cir. 2011). Although the Tenth Circuit's 2011 decision in Burke predates the 2014 amendment to Rule 12, the Tenth Circuit has continued to apply Burke's waiver rule post-amendment, albeit only in unpublished cases. See, e.g., United States v. Shrader, 665 Fed. Appx. 642, 649 (10th Cir. 2016) (unpublished); United States v. Franco, 632 Fed. Appx. 961, 963-64 (10th Cir. 2015) (unpublished); United States v. McCoy, 614 Fed. Appx. 964, 966-67 (10th Cir. 2015) (unpublished). The Tenth Circuit has expressly opined that the 2014 amendment to Rule 12 did not substantively alter pre-amendment law. See Franco, 632 Fed. Appx. at 963 n.1; McCoy, 614 Fed. Appx. at 966 n.2.

[16]United States v. Augustine, 742 F.3d 1258, 1266 (10th Cir. 2014) (quoting Burke, 633 F.3d at 988). This principle has been cited even after the 2014 amendment to Rule 12. See, e.g., Franco, 632 Fed. Appx. at 963.

[17]See, e.g., Augustine, 742 F.3d at 1266.

"good cause" for failing to file a motion to suppress, at least where the claim was not outright precluded by circuit precedent at the time the motion should have been filed.[18]

So what will constitute "good cause"? In one example, a district court in Iowa held that a change of counsel constituted good cause for failure to timely file pretrial motion.[19] See also United States v. Johnson, 668 F.3d 540, 542-43 (7th Cir. 2012) (holding good cause for failure to file motion to suppress based on belief that denial in earlier prosecution constituted law of the case); United States v. Cathey, 591 F.2d 268, 271 n.1 (5th Cir. 1979) (finding "cause shown," under previous version of rule, for failure to move to dismiss an indictment prior to trial where the defendant did not receive the critical grand jury transcript until after the trial started, and he filed his motion at the earliest possible time). If you file a pretrial motion late, it is very important to include facts and argument to support "good cause" for the late filing.

Also, you should make sure to include as many specific facts (or factual allegations) as possible in your pretrial motions because, if you do not, you cannot

[18]See Franco, 632 Fed. Appx. at 963-64. The Seventh Circuit has held likewise. See United States v. Daniels, 803 F.3d 335, 352 (7th Cir. 2015) (holding that defendant had available facts and nothing prevented him from making legal argument as one of first impression).

[19]United States v. Ngombwa, 2016 WL 4599917 (N.D. Iowa 2016).

count on getting an evidentiary hearing to flesh out your record.[20] An evidentiary hearing is required – and hence a district court perforce abuses its discretion in denying a hearing – ***only*** where "'the defendant alleges sufficient facts which, if proven, would justify relief.'"[21] The motion will allege sufficient facts to justify an evidentiary hearing only when it is "sufficiently definite, specific, detailed, and nonconjectural," to enable the court to conclude that a substantial claim is presented or to establish a contested issue of fact.[22] "General or conclusory assertions, founded upon mere suspicion or conjecture will not suffice."[23] Thus, if your motion is not sufficiently detailed, your motion may be summarily denied without ever having an evidentiary hearing, and, in the absence of a sufficiently detailed record, it will be

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[20]I recognize that trial attorneys will often want to file as "bare-bones" a motion as possible, to avoid tipping their hand in advance of the evidentiary hearing. There is certainly merit in this approach, because it can prevent adverse witnesses from tailoring their testimony to defeat the particular allegations in the motion. The problem is that, if you do not allege a claim with sufficient specificity, you may never get an evidentiary hearing. How much detail to put in suppression motions is thus a judgment call that depends in large measure on the predilections of the judge before whom you are appearing. If that judge is going to give you an evidentiary hearing regardless of the particularity of your motion, then you have little to lose and everything to gain by filing only a "bare-bones" motion.

[21]United States v. Mergist, 738 F.2d 645, 648 (5th Cir. 1984) (quoting United States v. Harrelson, 705 F.2d 733, 737 (5th Cir. 1983)); accord, e.g., United States v. Chavez-Marquez, 66 F.3d 259, 261 (10th Cir. 1995)..

[22]Harrelson, 705 F.3d at 733; accord, e.g., United States v. Barajas-Chavez, 358 F.3d 1263, 1266 (10th Cir. 2004); see also United States v. Mims, 812 F.2d 1068, 1073-74 (8th Cir. 1987) (motion to suppress); United States v. Stevenson, 727 F.3d 826, 830 (8th Cir. 2013).

[23]Harrelson, 705 F.3d at 733.

virtually impossible to get any appellate relief.[24] Additionally, especially with motions to suppress, you should be careful to allege ***all*** possible grounds for suppression: a motion to suppress evidence based on one theory or argument will not preserve for an appeal the claim that the same evidence should be suppressed on another theory or argument.[25]

Another pitfall for the unwary with respect to pretrial motions is the motion in limine. Motions in limine are excellent devices to try to get pretrial rulings on the admissibility vel non of certain evidence. Furthermore, the Federal Rules of Evidence provide that "[o]nce the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[26] However, a pretrial motion in limine as to which the judge has ***not*** made a definitive ruling will ***not***, by itself, preserve error for appeal: "to preserve

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[24]See, e.g., United States v. Smith-Bowman, 76 F.3d 634, 637-38 (5th Cir. 1996) (district court did not abuse its discretion in denying motion to transfer venue for excessive pretrial publicity without an evidentiary hearing, where, among other things, defendant did not allege with specificity that the community had been saturated with negative media coverage of the charges against her, nor did she include with her motion any copies of, or excerpts from, specific newspaper stories or television reports that focused on her, the charges against her, or the pending trial).

[25]See, e.g., United States v. Maldonado, 42 F.3d 906, 909-13 (5th Cir. 1995); United States v. Green, 691 F.3d 960, 965-66 (8th Cir. 2012); Augustine, 742 F.3d at 1258 (10th Cir.).

[26]Fed. R. Evid.103(b); see also, e.g., Abraham v. BP America Production Co., 685 F.3d 1196, 1204 (10th Cir. 2012) (definitive ruling on pretrial motion in limine preserved error, notwithstanding lack of objection at trial); but see United States v. Fonseca, 744 F.3d 674, 682-84 (10th Cir. 2014) (definitive ***granting*** of pretrial motion in limine did ***not*** preserve for review the separate error of the government's introduction of barred evidence, in violation of the court's in limine order.

error for appeal, an objection or offer of proof as to the subject presented by a motion in limine must be made at trial."[27] It is probably a good idea (although it is not necessary) to apply the same principle to unsuccessful motions to suppress: i.e., you should renew your objection to the allegedly suppressible evidence at trial.

Special considerations arise when the government proposes, under Federal Rule of Evidence 609, to use prior convictions to impeach your client if he or she testifies. Where the district court rules that these prior convictions will be admissible under Rule 609 to impeach your client, and your client decides not to testify in light of that ruling, any error in the Rule 609 ruling is extinguished; in other words, in order to preserve any Rule 609 error for appeal, your client must "run the gauntlet" by testifying and then being impeached by the prior convictions.[28] In a similar vein, if a defendant, faced with an unfavorable pretrial Rule 609 ruling from the district court, decides to try to "remove the sting" of the prior convictions by preemptively bringing them out herself during her direct testimony, she also loses the right to

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[27]United States v. Graves, 5 F.3d 1546, 1552 n.6 (5th Cir. 1993); see also id. at 1551-52; United States v. Frokjer, 415 F.3d 865, 872 (8th Cir. 2005) (because "district court never made a definitive ruling on Frokjer's motion in limine to exclude the composite videotape, her failure to object to the videotape when it was played during trial amounts to a forfeiture of any error."); United States v. Sinclair, 109 F.3d 1527, 1536 (10th Cir. 1997) (where defendant failed to establish that the pretrial denial of his motion in limine was a definitive ruling, error was forfeited by lack of objection at trial).

[28]See Luce v. United States, 469 U.S. 38, 43 (1984) ("We hold that to raise and preserve for review a claim of improper impeachment with a prior conviction, a defendant must testify.").

contest the propriety of the Rule 609 ruling on appeal.[29]

Proffer, Proffer, Proffer

"A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of a party ***and***: . . . if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context."[30] Some circuits require that, not only the substance of the evidence, but also the ***relevancy of the evidence to the defense*** and the ***ground(s) for admissibility of the evidence***, be made known to the court.[31] "Although a ***formal*** offer of proof is not required to preserve error, the party must at least inform the trial court 'what counsel intends to show by the evidence and why it should be

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[29]See Ohler v. United States, 529 U.S. 753, 760 (2000) ("a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error").

[30]Fed. R. Evid. 103(a) & (2) (emphasis added); see, e.g., United States v. Scott, 48 F.3d 1389, 1397 (5th Cir. 1995) (holding that defendant did not preserve for appeal the issue of improper restriction on cross-examination/impeachment of government witness, where defendant failed to make an offer of proof to the district court as to which portions of the criminal record of the government's witness should have entered into evidence).

[31]See, e.g., United States v. Clements, 73 F.3d 1330, 1336 (5th Cir. 1996); see also, e.g., United States v. Harry, 816 F.3d 1268, 1281 (10th Cir. 2016) ("'[T]o qualify as an adequate offer of proof, the proponent must, first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence.'") (quoting United States v. Adams, 271 F.3d 1236, 1241 (10th Cir. 2001));; United States v. Moore, 425 F.3d 1061, 1068 (7th Cir. 2005) ("for admissibility, the proponent must inform the court and opposing counsel what he expects to prove by the excluded evidence, and he must demonstrate the significance of the excluded evidence").

admitted.'"[32] Thus, in making a proffer, the prudent practitioner is well-advised to give (1) a detailed summary of the substance of the excluded evidence; (2) ***all*** the things you expect to show or prove by that evidence; ***and*** (3) ***all*** the grounds on which the evidence should be admitted.

While a general description of the excluded evidence, or a global proffer of mass prior testimony or evidence, is generally not sufficient to preserve error, it may be sufficient where the trial court chills or restricts the party's ability to make a more detailed proffer.[33] Thus, in Ballis, the Fifth Circuit found that a global proffer of the entire record of a previous motion to dismiss hearing was adequate to preserve error where the trial judge warned that he did not need to be "spoon fed" about every possible nuance of the question, and where the judge expressed an intimate familiarity with the testimony offered and in fact accepted the global proffer as sufficient.[34]

The same principles apply where the error complained of is not one pertaining to the exclusion of evidence per se, but is one pertaining to the trial process leading

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[32]Clements, 73 F.3d at 1336 (emphasis in original) (quoting United States v. Ballis, 28 F.3d 1399, 1406 (5th Cir. 1994)). In Clements, the Fifth Circuit applied this rule to hold that the district court did not abuse its discretion in excluding evidence of defendant's poor CheckFax credit rating as hearsay, where "[d]efense counsel . . . made no attempt to inform the district court that [defendant's] testimony about his CheckFax rating was being sought to prove something other than the truth of his rating." Clements, 73 F.3d at 1336.

[33]See Ballis, 28 F.3d at 1406-07.

[34]See id.

to the discovery, production, and introduction of evidence.[35] For example, where a defendant moves for continuance on the basis of the unavailability of a witness, it is incumbent upon the defendant to show the court that "due diligence has been exercised to obtain the attendance of the witness, that substantial favorable evidence would be tendered by the witness, that the witness is available and willing to testify, and that the denial of the continuance would materially prejudice the defendant."[36] Likewise, if the district court denies you the opportunity to present surrebuttal at trial, you must proffer the substance of your surrebuttal; failure to do so will doom your chances on appeal.[37]

Courts of appeals have upheld a district court's denial of a defense request for

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[35]See, e.g., United States v. Stever, 603 F.3d 747, 752-53 (9th Cir. 2009) (denial of discovery materials required reversal because defendant demonstrated information was in the U.S. Attorney's possession and was relevant to defense).

[36]Scott, 48 F.3d at 1394 (internal quotation marks and citations omitted) (rejecting defendant's claim that continuance was necessary to secure the services of a voice expert for analysis of evidentiary tapes, on the basis that defendant had not demonstrated due diligence in obtaining such an expert, availability and willingness of such an expert to testify, or that the testimony would be favorable if secured); see also, e.g., United States v. West, 828 F.2d 1468, 1470 (10th Cir. 1987) (applying substantially similar test to find that district court abused its discretion in denying a continuance to secure the testimony of a subpoenaed defense witness); United States v. Little, 567 F.2d 346, 348-49 (8th Cir. 1977) (holding that district court did not abuse its discretion when it denied motion for continuance because defendant made no showing that witness would be available to testify or that the testimony was necessary; also defendant had made no effort to interview witness during four years case was pending).

[37]See, e.g., United States v. Wright, 86 F.3d 64, 65 (5th Cir. 1996) (denial of surrebuttal was not an abuse of discretion "because Wright 'failed to proffer to the district court the substance of his surrebuttal testimony'") (quoting and citing United States v. Alford, 999 F.2d 818, 821 (5th Cir. 1993).

appointment of an investigator under the Criminal Justice Act (18 U.S.C. § 3006A(e)(1)) when the request failed to provide an explanation specifying why an investigator was necessary and why defense counsel could not perform the investigation.[38] On the same principle, where the judge refuses to issue a subpoena, you should proffer, as specifically as you can, what you expect the witness's testimony will be in order to nail down your record on appeal. Requests for appointment of experts under the CJA should establish why the expert's services are necessary to the defense.[39]

The rule is simple: whenever the judge keeps out evidence that you need for your case, you should state on the record (or file a written submission into the record, if the judge will not let you make an oral proffer) (1) a detailed summary of the evidence; (2) why the evidence is necessary to your case; and (3) why it is admissible. Doing this in every case will ensure that the appellate court will review your claims of erroneous exclusion on the merits rather than "punting" by finding that there was an insufficient proffer to permit appellate review.

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[38] See, e.g., United States v. Gadison, 8 F.3d 186, 191 (5th Cir. 1993); United States v. Kasto, 584 F.2d 268, 273 (8th Cir. 1978); United States v. Goodwin, 770 F.2d 631, 634 (7th Cir. 1985).

[39] Cf., e.g., United States v. Nichols, 21 F.3d 1016, 1018 (10th Cir. 1994) (request for appointment of defense psychologist properly denied where defendant did not, and could not, establish the necessity for the expert).

The Contemporaneous-Objection Rule[40]

The contemporaneous-objection rule is codified at Federal Rule of Criminal Procedure 51(b)[41] and Federal Rule of Evidence 103(a)& (1).[42] You should be aware of one general, and two specific, exceptions to the contemporaneous-objection rule. First, "[i]f the party does not have an opportunity to object to a ruling or order, the

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[40]An excellent compendium of some of the most common trial objections is found in the following law review article: Craig Lee Montz, Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials, 29 Pepp. L. Rev. 243 (2002). The article is a "must-read," particularly if you have a trial coming up.

[41]This rule is entitled "Preserving a Claim of Error," and states as follows:

> A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

Fed. R. Crim. P. 51(b).

[42]Under this rule, "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

> (1) if the ruling admits evidence, a party, on the record:
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> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context;
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> . . . .

Fed. R. Evid. 103(a) & (1).

absence of an objection does not later prejudice that party."[43] Second, no objection is required where the judge presiding at the trial testifies in the trial as a witness.[44] Third, where the judge calls or examines witnesses, the objection may be deferred until "the next opportunity when the jury is not present."[45]

It bears repeating that, unless the judge renders a "definitive" pretrial ruling on the motion, as allowed under Fed. R. Evid. 103(b), a pretrial motion in limine will ***not*** obviate the need for a contemporaneous objection at trial. It is counsel's duty to determine whether the court's ruling was definitive.[46] If it was not, then "to preserve error for appeal, an objection or offer of proof as to the subject presented by a motion in limine must be made at trial."[47] But, even if the court's pretrial ruling is definitive, nothing in Rule 103(b) prohibits the court from revisiting its decision when the

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[43]Fed. R. Crim. P. 51(b).

[44]See Fed. R. Evid. 605. Rule 605 provides that "[t]he presiding judge may not testify as a witness at that the trial. A party need not object to preserve the issue." Fed. R. Evid. 605.

[45]Fed. R. Evid. 614(c). Note, however, that an objection is required in order to preserve this type of error on appeal, as opposed to the "automatic objection" rule contained in Rule 605. See Advisory Committee Notes to Rule 614(c). Failure to object either contemporaneously or at the first opportunity when the jury is not present will subject your claims of excessive questioning by the court to review only for plain error. See, e.g., United States v. Wright, 86 F.3d 64, 65 (5th Cir. 1996).

[46]See Fed. R. Evid. 103, Committee Notes to 2000 Amendments.

[47] Graves, 5 F.3d at 1552 n.6; see also id. at 1551-52; United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987); Sinclair, 109 F.3d at 1536 (10th Cir.) (where denial of motion in limine was not shown to be definitive, failure to object to introduction of evidence at trial forfeited claim).

evidence is actually offered at trial[48].

This does not mean, however, that pretrial motions in limine are utterly useless. First of all, you may actually win them, get what you asked for, and never need to appeal. But second, even if you do not prevail on the merits of your motions in limine before trial, they often provide a convenient shorthand for making an objection during trial: for example, "Objection, Your Honor, for all the reasons, and on all the grounds, stated in defendant's motion in limine." An objection of this type is quickly made and quickly disposed of, preserving error and preserving the good will of the judge at the same time.

The key to any type of objection is ***specificity***. You must be specific about what you are objecting to and the basis for your objection, or you run the risk of forfeiting your objection and subjecting it only to plain-error review on appeal.[49] However, an objection that does not cite "chapter and verse" may still be sufficient,

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[48]See Fed. R. Evid. 103, Committee Notes to 2000 Amendments.

[49]See, e.g., United States v. Burton, 126 F.3d 666, 671-73 (5th Cir. 1997) (given that Fed. R. Evid. 801(d)(2)(E) contains at least four possible bases for an objection to proffered co-conspirators' testimony, defendant's objection to evidence "under 801.d2e" did not preserve for appeal the contention that the statements objected to were not "in furtherance of the conspiracy"); United States v. Eagle, 515 F.3d 794, 803-04 (8th Cir. 2008) (holding that defendant's general objection to "relevance" was not sufficient to preserve objection under Federal Rule of Evidence 403 that the probative value was outweighed by the danger of unfair prejudice); United States v. McVeigh, 153 F.3d 1166, 1201 (10th Cir. 1998) (continuing objection on one evidentiary ground did not preserve for appeal defendant's argument respecting a different ground).

provided that it got the gist of your complaint across to the district court.[50] That is because one of the purposes of the contemporaneous-objection rule is to allow the district court the opportunity to rule on the objection in the first instance, thus conserving judicial resources.[51]

Jury Instructions

Any objections to the jury instructions the district court proposes to give, as well as any objections to the district court's failure to give requested instructions, "must inform the court of the specific objection and the grounds for the objection ***before the jury retires to deliberate***."[52] Failure to comply with this requirement will mean that instructional errors will be reviewed for plain error.[53] Fed. R. Crim. P. 30(d). A party "may [and is well advised to] request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party."[54] But caution

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[50]See, e.g., United States v. Neal, 578 F.3d 270, 272-73 (5th Cir. 2009); United States v. Ocana, 204 F.3d 585, 589 (5th Cir. 2000).

[51]See, e.g., United States v. Stewart, 256 F.3d 231, 239 (4th Cir. 2001).

[52]Fed. R. Crim. P. 30(d) (emphasis added).

[53]Id.; see also Jones v. United States, 527 U.S. 373, 388 (1999) (failure to object to jury instructions before jury retired rendered objection untimely and subject to plain-error review).

[54]Fed. R. Crim. P. 30(a).

– the mere submission of the requested instruction does not, by itself, suffice to preserve error; rather, you must also object, in a timely fashion, to the failure to give that instruction.[55]

However, a defendant need not necessarily submit a requested jury instruction in order to preserve instructional error for appeal; rather, under Rule 30, all that is required is a timely (i.e., before the jury retires to deliberate) and sufficiently specific objection to the charge actually given by the trial court.[56] Oral requests have been held to be sufficient if the record indicates that the district court was adequately informed of the point involved.[57]

The defendant is entitled to a specific instruction on his theory of the case.[58] However, the request must be timely, the instruction must correctly state the law, and

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[55]See, e.g., Jones, 527 U.S. at 388; see also United States v. Faust 795 F.3d 1243, 1251-52 (10th Cir. 2015) (suggesting that defendant forfeited objection to instruction by failing to object to the refusal to give proposed instruction, but ultimately deciding the case against defendant under the abuse-of-discretion standard).

[56]See, e.g., United States v. Eiland, 741 F.2d 738, 741 (5th Cir. 1984) ("[Defendant's] objection to the omission of this charge had the same effect as a valid request for the instruction.") (footnote omitted); United States v. English, 409 F.2d 200, 201 (3d Cir. 1969) ("counsel's exception to the charge, although no requests for charge were submitted, was sufficient to preserve the error for assignment on appeal").

[57]See, e.g., United States v. Mallen, 843 F.2d 1096, 1101-02 (8th Cir. 1988); United States v. Jones, 403 F.3d 817, 821 (6th Cir. 2005).

[58]See, e.g., United States v. Bradshaw, 580 F.3d 1129, 1135 (10th Cir. 2009) ("It is axiomatic (and important) that a defendant is entitled to an instruction stating the law on his theory of the case . . . ."); United States v. Hatcher, 323 F.3d 666, 672 (8th Cir. 2003).

the evidence must support the instruction.[59] In determining whether the evidence supports the instruction, it is construed in the light most favorable to the requesting party.[60] In making this determination, the district court "is forbidden from weighing the evidence, making credibility determinations, or resolving evidentiary conflicts."[61]

Other Trial Problems

In 2000, the United States Supreme Court held that any error in a district court's refusal to strike a juror for cause is extinguished if the defendant uses a peremptory challenge to remove the objectionable juror.[62] (The Court "reject[ed] the Government's contention that under federal law, a defendant is obliged to use a peremptory challenge to cure the judge's error."[63]) After Martinez-Salazar, therefore, it appears that a defendant may have to elect between letting an objectionable juror sit, thereby preserving the ruling for appeal, or using a peremptory to remove that juror from the jury.[64]

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[59]See, e.g., Hatcher, 323 F.3d at 672.

[60]See, e.g., United States v. Powers, 702 F.3d 1, 8-9 (1st Cir. 2012).

[61]Id.

[62]See United States v. Martinez-Salazar, 528 U.S. 304, 307 & 315-17 (2000).

[63]Id. at 307; see also id. at 314-15.

[64]The Court in Martinez-Salazar left open the possibility that reversal might be required where "the trial court deliberately misapplied the law in order to force the defendants to use a peremptory challenge to correct the court's error." Id. at 316 (citation omitted). The Court also

Another possible problem is a party's use of peremptory challenges on the impermissible basis of race or gender, in violation of Batson v. Kentucky[65] and its progeny.[66] First of all, in order to be timely, a Batson challenge ***must*** be made before the venire is dismissed and before the trial commences; it is not sufficient that challenge be made prior to the jury's being sworn.[67] Second, in order even to require the opposing party to explain its strikes, the challenging party must make out a prima facie case that the strikes were exercised for an impermissible reason.[68] At this point,

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noted that reversal would be required if a juror who should have been dismissed for cause actually sat on the jury. See id.

In a concurring opinion, Justice Souter also suggested that reversible error might be shown when a defendant "use[s] a peremptory challenge to cure an erroneous denial of a challenge for cause and when he shows that he would otherwise use his full complement of peremptory challenges for the noncurative purposes that are the focus of the peremptory right," i.e., by showing that he would have used the peremptory used for the for-cause juror on another juror, and requesting another, "make-up" peremptory. See id. at 317-18 (Souter, J., concurring). Justice Souter's concurrence notwithstanding, however, it seems doubtful whether this type of claim has survived Martinez-Salazar. In fact, the Fifth, Seventh, and Eighth Circuits have explicitly so held. See United States v. Sanchez-Hernandez, 507 F.3d 826, 829-30 (5th Cir. 2007); United States v. Johnson, 495 F.3d 951, 964-65 (8th Cir. 2007); United States v. Polichemi, 219 F.3d 698, 705-06 (7th Cir. 2000).

[65]476 U.S. 79 (1986).

[66]The Supreme Court has held that, under the reasoning of Batson, it likewise violates the Equal Protection Clause to exclude potential jurors solely on the basis of their gender. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 146 (1994).

[67]See United States v. Maseratti, 1 F.3d 330, 335 (5th Cir. 1993) (Batson claim waived because not made prior to dismissal of the venire); United States v. Parham, 16 F.3d 844, 847 (8th Cir. 1994) (same); United States v. Brown, 634 F.3d 435, 440 (8th Cir. 2011).

[68]See Batson, 476 U.S. at 93-97.

the burden shifts to the striking party to explain its strikes.[69] Then, however, in order to preserve the Batson issue for appeal, the challenging party must object to/dispute the explanations, explain why those explanations are a pretext for impermissible discrimination on the basis of race or gender, and request the court to make a ruling; otherwise the claim is waived.[70]

Defense counsel should move for judgment of acquittal (1) at the close of the government's evidence; and (2) at the close of all the evidence.[71] One benefit of a pre-verdict motion for judgment of acquittal is that if the district court grants it, then double jeopardy bars a government appeal and a retrial,[72] whereas, if the jury convicts the defendant, and the district court grants a post-verdict judgment of acquittal, there is no double-jeopardy bar to a government appeal because it will merely result in restatement of the jury's guilty verdict.[73]

Failure to move for judgment of acquittal will forfeit the usual standard of

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[69]See id. at 97-98.

[70]See United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (where defense did not dispute or contest the prosecutor's explanation for exercise of peremptory challenge against Hispanic venireman, Batson challenge to peremptory challenge was waived); United States v. Rudas, 905 F.2d 38, 41 (2d Cir. 1990) (same); United States v. Whitfield, 314 Fed. Appx. 554 (4th Cir. 2008) (unpublished).

[71]See Fed. R. Crim. P. 29(a).

[72]See, e.g., United States v. Ogles, 440 F.3d 1095, 1099-1104 (9th Cir. 2006).

[73]See, e.g., id.

review for claims of insufficiency of the evidence, and any such claims will be reviewed only for a "manifest miscarriage of justice."[74] Some circuits hold that such a miscarriage exists only if the record lacks any "evidence of the defendant's guilt or the evidence on a key element of the offense was so tenuous that a conviction would be shocking."[75] A narrow exception to this forfeiture rule exists where the defendant moves for judgment of acquittal after the government's case, and then immediately rests without putting on any evidence; in such a case, the sufficiency of the evidence is reviewed under the usual standard of review.[76] Likewise, the failure to move for judgment of acquittal does not constitute waiver where the trial court's action renders the motion for acquittal "an empty ritual."[77]

But even if you have forgotten to move for judgment of acquittal at the close

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[74]See, e.g., United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir. 1991) (reviewing for manifest miscarriage of justice); United States v. Walden, 625 F.3d 961, 967-68 (6th Cir. 2010) (same); United States v. Fries, 725 F.3d 1286, 1291 n.5 (11th Cir. 2013) (same). But see United States v. Borders, 829 F.3d 558, 564 (8th Cir. 2016) (reviewing for plain error); United States v. Calhoun, 721 F.3d 596, 599-600 (8th Cir. 2013) (reviewing for plain error, which requires manifest miscarriage of justice); United States v. King, 735 F.3d 1098, 1106-07 (9th Cir. 2013) (reviewing for plain error); United States v. Bowie, 892 F.2d 1494, 1496-97 (10th Cir. 1990) (stating that the Tenth Circuit reviews for plain error, which has been expressed in a number of different ways, but also stating that "the standard of review actually applied is essentially the same as if there had been a timely motion for acquittal").

[75]Calhoun, 721 F.3d at 600; United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988).

[76]See, e.g., United States v. Jaras, 86 F.3d 383, 388 n.5 (5th Cir. 1996) (citing United States v. Resio-Trejo, 45 F.3d 907, 910 n.6 (5th Cir. 1995)).

[77]E.g., United States v. Pennington, 20 F.3d 593, 597 n.2 (5th Cir. 1994) (citing United States v. Gonzalez, 700 F.2d 196, 204 n.6 (5th Cir. 1983)).

of the government's case-in-chief and/or at the close of all the evidence, you may still preserve a claim of insufficient evidence by filing a post-verdict motion under Federal Rule of Criminal Procedure 29(c).[78] Under this rule, "[a] defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later."[79]

A general motion for judgment of acquittal (i.e., a general assertion that the evidence was insufficient to sustain a conviction) is sufficient to preserve a claim of insufficient evidence, and it is not necessary that the grounds of such a motion be more specifically stated.[80] However, some circuits hold that if the defendant asserts specific grounds for a Rule 29 motion, then all grounds not specified are forfeited.[81]

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[78]See, e.g., United States v. Villarreal, 324 F.3d 319, 322 (5th Cir. 2003) (where defendant moved for judgment of acquittal at close of government's case-in-chief, but did not renew motion at the close of all the evidence, question of the sufficiency of the evidence was nevertheless preserved by defendant's timely post-verdict motion for judgment of acquittal); United States v. Sanchez, 789 F.3d 827, 834 (8th Cir. 2015) (post-trial motion for judgment of acquittal preserved sufficiency of the evidence); see also Fed. R. Crim. P. 29(c)(3).

[79]Fed. R. Crim. P. 29(c)(1).

[80]See, e.g., United States v. McCall, 553 F.3d 821, 830 (5th Cir. 2008); Huff v. United States, 273 F.2d 56, 60 (5th Cir. 1959); United States v. Hammoude, 51 F.3d 288, 291 (D.C. Cir. 1995); United States v. Marston, 694 F.3d 131, 134 (1st Cir. 2012); United States v. Kelly, 535 F.3d 1229, 1234 (10th Cir. 2008). But see United States v. Clarke, 564 F.3d 949, 953-54 (8th Cir. 2009) (held general motion for judgment of acquittal as to methamphetamine conviction did not preserve specific argument on appeal that only "usable" amount of methamphetamine in biphase liquid could be counted toward weight).

[81]See, e.g., United States v. Herrera, 313 F.3d 882, 884 (5th Cir. 2002) (en banc); United States v. Foley, 783 F.3d 7, 12 (1st Cir. 2015); Kelly, 535 F.3d at 1243-35 (10th Cir.).

This means that, whenever you assert specific grounds for acquittal, you may be forfeiting the right to assert on appeal any other grounds for finding the evidence insufficient. If you are going to assert specific grounds for acquittal, therefore, you should make sure to include ***all*** the possible grounds for acquittal. If you fear that you may miss some of these grounds, you may be able to avoid this forfeiture rule by first making a general motion for judgment of acquittal, and then adding your particular arguments.[82] If you have little or no hope that the judge will grant the motion, it may be best just to stick with a general motion for judgment of acquittal.

Challenging venue issues can present special considerations. Some circuits have held that a defendant waives appellate review of venue defects not raised pretrial if the indictment lacks sufficient venue allegations or the defendant was on notice of a defect in venue.[83] However, if the indictment contains a proper allegation of venue so that the defendant has no notice of a defect until the government rests its case, the

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[82]You might, for example, say, "Mr. Defendant hereby moves for judgment of acquittal on each and every count, on the ground that the government has failed to carry its burden of proving each and every element of those counts. Furthermore, without waiving our general claim of insufficiency, we would particularly point out that the government has failed to prove that the banks allegedly robbed had their deposits insured by the FDIC."

[83]See, e.g., United States v. Carreon-Palacio, 267 F.3d 381, 392-93 (5th Cir. 2001); United States v. Delgado-Nunez, 295 F.3d 494, 496-97 (5th Cir. 2002); United States v. Haley, 500 F.2d 302, 305 (8th Cir. 1974); United States v. Grenoble, 413 F.3d 569, 573 (6th Cir. 2005); Kelly, 535 F.3d at 1234 (10th Cir.).

objection is timely if made at the close of evidence.[84]

In light of these authorities, it seems that the safest course is to attack improper venue in a pretrial motion either when (1) the indictment on its face establishes that venue is lacking or (2) the defense is on notice of a possible defect in venue.[85] Also, even where venue is a trial (as opposed to a pretrial) issue, it is an exception to the rule that a general motion for judgment of acquittal preserves all grounds for claiming insufficiency of the evidence. In other words, a general motion for judgment of acquittal will ***not*** preserve for appeal defects in venue; you must specifically point out to the court in a timely fashion why venue is improper.[86]

Guilty Pleas

A claim that a district court failed to comply with Federal Rule of Criminal Procedure 11 (dealing with the conduct of guilty-plea proceedings in federal court) will be subject to plain-error review if the Rule 11 error was not objected to in the

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[84]United States v. Black Cloud, 590 F.2d 270, 272 (8th Cir. 1979); see also United States v. Daniels, 5 F.3d 495, 496 (11th Cir. 1993); Grenoble, 413 F.3d at 573; Kelly, 535 F.3d at 1234 (10th Cir.).

[85]Cf. Fed. R. Crim. P. 12(b)(1) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits").

[86]See, e.g., United States v. Knox, 540 F.3d 708, 714-16 (7th Cir. 2008); United States v. Rommy, 506 F.3d 108, 119 (2d Cir. 2007). But see United States v. Zidell, 323 F.3d 412, 421 (6th Cir. 2003) (general Rule 29 motion preserved challenge to venue); Kelly, 535 F.3d at 1234-35 (10th Cir.) (same).

district court.[87] Furthermore, "a reviewing court may consult the whole record when considering the effect of any error on substantial rights,"[88] and is not limited merely to the transcript of the plea colloquy.[89] In order to prevail on an unpreserved Rule 11 claim on appeal, a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea."[90]

If your client decides to plead guilty, be sure that he is not waiving issues he wants raised on appeal. An unconditional guilty plea generally waives all nonjurisdictional defects and defenses,[91] subject to a few limited exceptions.[92] To

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[87]See United States v. Vonn, 535 U.S. 55, 59 (2002). Note, however, that even where there is not a contemporaneous objection to the Rule 11 error at the plea colloquy, error may be preserved by a subsequent motion to withdraw the guilty plea on the basis of the Rule 11 error. See, e.g., United States v. Powell, 354 F.3d 362, 367 (5th Cir. 2003) (reviewing defendant's claim of Rule 11 error for harmful error, not plain error, where, although defendant made no contemporaneous objection to the district court's noncompliance with Rule 11 at the guilty-plea proceeding, defendant raised the issue in a timely presentencing motion to withdraw her guilty plea).

[88]Vonn, 535 U.S. at 59.

[89]See id. at 74-75.

[90]United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004).

[91]See, e.g., United States v. Frook, 616 F.3d 773, 774-75 (8th Cir. 2010) (a valid guilty plea – knowing and voluntary – waives all non-jurisdictional defects).

[92]See, e.g., United States v. DeVaughn, 694 F.3d 1141, 1145-46 (10th Cir. 2012). (Interestingly, in DeVaughn, although the Tenth Circuit found the defendant's claim to be subject to the general rule, the court nevertheless reached the merits of the claim, finding that the government had waived reliance on the preclusive effect of the defendant's unconditional guilty plea. See De Vaughn, 694 F.3d at 1158.)

This Term, the United States Supreme Court will consider whether an unconditional guilty plea waives an appellate challenge to the constitutionality of the statute of conviction. See Class v.

preserve the right to appeal a ruling on a pretrial motion, the defendant must enter into a conditional guilty plea.[93] Conditional pleas must be in writing and approved by the court and the government. A conditional guilty plea reserves only "the right to have an appellate court review an adverse determination of a specified pretrial motion."[94]

A guilty plea pursuant to a plea agreement with an appeal waiver will waive all issues covered by the terms of the waiver,[95] although some circuits recognize a narrow "miscarriage of justice" exception to the enforceability of appeal waivers.[96] Be aware that a broad appeal waiver can encompass unanticipated issues with respect to conditions of supervised release, fines, and restitution.[97]

United States, U.S. Sup. Ct. No. 16-424, cert. granted, 137 S. Ct. 1065 (Feb. 21, 2017). In DeVaughn, the Tenth Circuit answered this question in the affirmative. See DeVaughn, 694 F.3d at 1153-54. Class thus has the possibility of changing Tenth Circuit law on this point.

[93]See Fed. R. Crim. P. 11(a)(2).

[94]United States v. Freeman, 625 F.3d 1049, 1052-53 (8th Cir. 2010).

[95]See, e.g., United States v. Arrellano, 213 F.3d 427, 430 (8th Cir. 2000) (defendant waived the right to appeal the denial of his suppression motion when he pleaded guilty pursuant to a plea agreement with an appeal waiver that did not reserve his right to appeal the denial).

[96]See, e.g., United States v. Griffin, 668 F.3d 987, 990 (8th Cir. 2012); United States v. Hahn, 359 F.3d 1315, 1324-25, 1327 (10th Cir. 2004) (en banc).

[97]See, e.g., United States v. Cohen, 459 F.3d 490, 495-96 (4th Cir. 2006) (defendant who knowingly agrees to waive his right to appeal his sentence has generally waived his right to appeal restitution). But see United States v. Sistrunk, 432 F.3d 917, 918-19 (8th Cir. 2006) (holding that restitution order was beyond scope of generic sentence-appeal waiver).

Sentencing

The key to preserving error at sentencing is to make comprehensive ***written*** objections to the presentence report (PSR) and any addenda thereto, and to renew those objections ***orally*** at the sentencing hearing (assuming, of course, that they are not resolved in your favor prior to sentencing). This is especially true with respect to the factual determinations underlying the selection of the Guidelines offense level, such as drug quantity, amount of loss, and role in the offense. Some courts have held that questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.[98]

A written objection is particularly important because "once a party raises an objection in writing, if he subsequently fails to lodge an oral on-the-record objection, the error is nevertheless preserved for appeal."[99] The objection must raise ***all*** the

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[98] See, e.g., United States v. Lopez, 923 F.2d 47, 50 (5th Cir. 1991) ("Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error."); contra United States v. Saro, 24 F.3d 283, 291 (D.C. Cir. 1994) (holding that "at least when [factual] findings are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial, factual errors can indeed be obvious"). Recently, Justice Sotomayor, joined by Justice Breyer, has opined that "precedent holding that factual errors are never cognizable on plain-error review" is misguided. Carlton v. United States, 135 S. Ct. 2399 (2015) (Sotomayor, J., statement respecting denial of certiorari). In Carlton, Justice Sotomayor characterized the Tenth Circuit as having a rule resembling that of the Fifth Circuit, but with an important exception. See id. at 2400 n.*.

[99] United States v. Medina-Anicacio, 325 F.3d 638, 642 (5th Cir. 2003) (citing Bender v. Brumley, 1 F.3d 271, 277 (5th Cir. 1993)); see also United States v. Baker, 116 F.3d 870, 872 n.4 (11th Cir. 1997); cf, United States v. Payseno, 104 F.3d 191, 192 (8th Cir. 1997) (issue preserved for appeal although not raised in defendant's written objections but orally presented at sentencing).

grounds for challenging a particular Sentencing Guidelines application or other proposed aspect of sentencing; new grounds will be subject only to plain-error review on appeal.[100] An objection to the presentence report must be made "with specificity and clarity."[101] A specific objection will allow the district court to correct its error and avoid the need for appellate review.[102] The Eighth Circuit requires specific objections "to put the Government on notice of challenged facts to which the government will need to prove at the sentencing hearing."[103] An imprecise, unexplained, or pro forma objection will not pass muster.[104]

It is important to remember that the defense carries the burden of proving

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[100]See, e.g., Medina-Anicacio, 325 F.3d at 642 ("When a defendant objects to his sentence on grounds different from those raised on appeal, we review the new argument raised on appeal for plain error only."); United States v. Ramirez-Flores, 743 F.3d 816, 821 (11th Cir. 2014) (defendant's ground for challenging sentencing enhancement was different on appeal than argument in the district court so reviewed for plain error); United States v. McClellan, 165 F.3d 535, 551-52 (7th Cir. 1999) (to preserve an issue, the defendant must make a proper, timely objection at sentencing on the same specific ground he is appealing).

[101]United States v. Davis, 583 F.3d 1081, 1095 (8th Cir. 2009) (quoting United States v. Razo-Guerra, 534 F.3d 970, 976 (8th Cir. 2008)).

[102]See, e.g., United States v. Krout, 66 F.3d 1420, 1434 (5th Cir. 1995).

[103]Davis, 583 F.3d at 1095.

[104]See, e.g., Krout, 66 F.3d at 1433-34. Note that appellate courts may sometimes find less-than-perfect sentencing objections sufficient under the circumstances of those cases to preserve error for appeal. See, e.g., United States v. Neal, 578 F.3d 270, 272-73 (5th Cir. 2009); United States v. Ocana, 204 F.3d 585, 589 (5th Cir. 2000). It is best not to count on such appellate forgiveness, however.

mitigating factors by a preponderance of relevant and sufficiently reliable evidence.[105] Moreover, a party does not carry its burden at sentencing merely by the unsworn assertions of counsel, as these do not constitute a sufficiently reliable basis for sentencing.[106]

In the Eighth Circuit, "it is well-established that 'when a defendant disputes material facts in his PSR, the sentencing court must either refuse to take those facts into account or hold an evidentiary hearing."[107] Moreover, if the defendant objects to any of the factual allegations in the report on "an issue on which the government has the burden of proof, such as the base offense level or any enhancing factors, the government must present evidence at the sentencing hearing to prove the existence of the disputed facts."[108] If the defendant objects to the factual basis for a sentencing enhancement and the government fails to present evidence to prove the enhancement by a preponderance of the evidence, it is error to apply the enhancement.[109]

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[105]See, e.g., United States v. Alfaro, 919 F.2d 962, 965 & n.10 (5th Cir. 1990).

[106]See, e.g., United States v. Patterson, 962 F.2d 409, 415 (5th Cir. 1992); United States v. Johnson, 823 F.2d 840, 842 (5th Cir. 1987).

[107]United States v. Cochrane, 608 F.3d 382, 383 (8th Cir. 2010).

[108]United States v. Poor Bear, 359 F.3d 1038, 1041 (8th Cir. 2004); accord, e.g., United States v. Wilkens, 498 F.3d 1160, 1169 (10th Cir. 2002) ("'When a defendant objects to a fact in a presentence report, the government must prove that fact at a sentencing hearing by a preponderance of the evidence.'") (quoting United States v. Kelly, 198 F.3d 798, 800 (10th Cir. 1999)).

[109]See, e.g., United States v. Mitchell, 825 F.3d 422, 425 (8th Cir. 2016).

The courts of appeals are not in agreement on this sentencing procedure.[110] The rule in the Fifth Circuit is that "[i]f the defendant does not submit affidavits or other evidence to rebut the information in the PSR, the district court may adopt its findings without further inquiry or explanation,"[111] and "[m]ere objections do not suffice as competent rebuttal evidence."[112] Regardless of where you practice, however, it is often best, if you intend to controvert a Guidelines application or fact in the PSR, to present some rebuttal evidence.

Other procedural errors – such as, for example, a district court's failure to adequately explain its sentence – are, if not objected to below, reviewed only for plain

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[110]Compare, e.g., United States v. Khawaja, 118 F.3d 1454, 1460 (11th Cir. 1997) ("The mere adoption of the PSR however cannot suffice for the district court's obligation to rule on unresolved objections specifically brought to the attention of the court at sentencing."); United States v. Farnsworth, 92 F.3d 1001, 1011 (10th Cir. 1996) ("We have repeatedly held that a district court may not satisfy its obligation [to resolve disputed sentencing facts] by simply adopting the presentence report as its finding.") (collecting cases). See also United States v. Van, 87 F.3d 1, 3 (1st Cir. 1996) ("Fed. R. Crim. P. 32 allows the court to adopt the facts set forth in the presentence report '[e]xcept for any unresolved objection' noted in the addendum submitted by the probation officer as required by the rule.") (citations omitted); United States v. Yusufu, 63 F.3d 505, 515 n.2 (7th Cir. 1995) ("The Federal Rules of Criminal Procedure allow the court to accept the PSR as its findings of fact, except for unresolved objections.") (citation omitted).

[111]United States v. Mitchell, 166 F.3d 748, 754 (5th Cir. 1999) (footnote with citation omitted). But see United States v. Dabeit, 231 F.3d 979, 983 (5th Cir. 2000) (although a PSR is generally considered to have sufficient indicia of reliability for it to serve as the evidentiary basis for sentencing determinations, "[t]he PSR, however, cannot just include statements in the hope of converting such statements into reliable evidence, without providing any information for the basis of the statements") (citing United States v. Elwood, 999 F.2d 814, 817-18 (5th Cir. 1993)).

[112]United States v. Parker, 133 F.3d 322, 329 (5th Cir. 1998).

error.[113] In the particular context of a district court's reasons (or lack thereof) for the sentence imposed, this means that you ***must*** object to the inadequacy of the explanation after sentence is pronounced; and, if the district court provides further (though still inadequate) explanation, you must say something like, "The objection stands."[114]

The courts disagree on whether an objection is necessary to preserve an appellate challenge to the substantive reasonableness of the sentence. The Eighth Circuit's position is that "a defendant need not object to preserve an attack on the length of the sentence imposed if he alleges [on appeal] only that the district court erred in weighing the § 3553(a) factors."[115] The Fifth Circuit holds that, absent an objection to the length of the sentence after the sentence is imposed, post-Booker[116] appellate review for substantive reasonableness is subject only to plain-error

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[113]See, e.g., United States v. Lopez-Velasquez, 526 F.3d 804, 806 (5th Cir. 2008); United States v. Buesing, 615 F.3d 971, 975 (8th Cir. 2010); United States v. Martinez, 557 F.3d 597, 600 (8th Cir. 2009); United States v. Romero, 491 F.3d 1173, 1175-78 (10th Cir. 2007).

[114]Note that in other circuits, this sort of objection is not required in order to preserve for appellate review a claim that the district court did not adequately explain its sentence. See, e.g., United States v. Lynn, 592 F.3d 572, 577-79 (4th Cir. 2010) (claim preserved by making arguments for a lower sentence; no need for objection after imposition of sentence); United States v. Sevilla, 541 F.3d 226, 230-31 (3d Cir. 2008) (same).

[115]United States v. Bolivar-Diaz, 594 F.3d 1003, 1005 (8th Cir. 2010) (internal quotation marks omitted).

[116]United States v. Booker, 543 U.S. 220 (2005).

review.[117] This means that, after sentence is imposed, you must object that the sentence is greater than necessary to effectuate the purposes of sentencing set out in 18 U.S.C. § 3553, and, probably, you should explain why that is so.[118]

Rejected requests for downward departures and variances may be the subject of appellate review. However, unless you are very careful to lay the record correctly, the district court's denial of a downward departure will not be reviewable on appeal. Generally speaking, an appellate court has no jurisdiction under 18 U.S.C. § 3742 to hear an appeal of a lawful Guidelines sentence where the district court has exercised its discretion not to depart downward; in such cases, the appeal must be dismissed for lack of jurisdiction.[119] However, where a district court's refusal to depart downward is not discretionary, but rather is based upon the court's mistaken belief that it legally does not possess the authority to depart, the resulting sentencing is "in violation of

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[117]See United States v. Peltier, 505 F.3d 389, 391-92 (5th Cir. 2007). The circuits are divided on the question whether such an objection is necessary to preserve a claim of substantive unreasonableness. See, e.g., United States v. Autery, 555 F.3d 864, 870-71 (9th Cir. 2009) (disagreeing with Peltier and detailing circuit split on the question). The Tenth Circuit appears to hold that such an objection is not necessary. See Romero, 491 F.3d at 1177.

[118]Technically, you should not object in the district court that the sentence is "unreasonable," as "reasonableness" is the standard of review on appeal, not the standard by which the district court should determine its sentence. That said, objecting that the sentence is "unreasonable" is better than nothing.

[119]See, e.g., United States v. DiMarco, 46 F.3d 476, 477-78 (5th Cir. 1995); United States v. Heath, 624 F.3d 884, 888 (8th Cir. 2010); United States v. Wooten, 377 F.3d 1134, 1146-47 (10th Cir. 2006).

law," and appellate jurisdiction does therefore lie, under 18 U.S.C. § 3742(a)(1).[120] If possible, you should get the sentencing judge to expressly articulate on the record that she would depart if she thought she had the authority to do so.

One strategy is to argue a downward-departure ground as a basis for a downward variance as well. That way, if the district court denies it, the issue is still reviewable on appeal, because the appellate court may "still review to determine whether the district court's imposition of a [G]uideline sentence instead of a non-[G]uideline sentence was reasonable."[121]

You should be especially careful to object to any objectionable noncustodial aspects of the sentence – e.g., punitive fines, costs of incarceration, restitution, and conditions of supervised release. In these cases, there is, of course, the usual consequence that your failure to do so will invoke the plain-error standard on appeal. However, there is also the risk that, at least as to financial exactions, your failure to make these claims will not later be cognizable as ineffective assistance of counsel in a subsequent motion to vacate or set aside under 28 U.S.C. § 2255. The Fifth Circuit has held, (1) a challenge to a fine or restitution order does not meet the "in custody"

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[120] See, e.g., United States v. Burleson, 22 F.3d 93, 95 (5th Cir. 1994); Wooten, 377 F.3d at 1147 (10th Cir.); see also, DiMarco, 46 F.3d at 478 (5th Cir.).

[121] United States v. Nikonova, 480 F.3d 371, 375 (5th Cir. 2007) (footnote omitted); see also United States v. Chavez-Diaz, 444 F.3d 1223, 1228-29 (10th Cir. 2006).

requirement of § 2255 because (2) Congress intended to limit the types of claims cognizable under § 2255 to claims relating to unlawful custody,[122] and other circuits agree.[123]

In the cited Gaudet case, for example, defense counsel raised, for the first time on appeal, a substantial sentencing question with respect to a question relating to a restitution order, but the Fifth Circuit declined to give it plenary review on the defendant's direct appeal because it had not been raised in the district court. Then, when the defendant tried to assert on § 2255 that counsel had been ineffective for failing to raise it, the Fifth Circuit declined to reach it because defendant was not "in custody" as to that portion of the sentence! The Gaudet case illustrates the enhanced importance of making proper objections to, and preserving plenary appellate review of, the objectionable ***noncustodial*** portions of a defendant's sentence.

Finally, make sure you object to illegal/improper conditions of probation and supervised release so that they can be appealed at the time the original judgment is entered. If you do not, it will be extremely difficult, if not impossible, to challenge them later when the defendant's probation/supervised release is being revoked for

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[122]See, e.g., United States v. Gaudet, 81 F.3d 585, 592 (5th Cir. 1996) (citing United States v. Segler, 37 F.3d 1131, 1136-37 (5th Cir. 1994)).

[123]See, e.g., Blaik v. United States, 161 F.3d 1341, 1342-43 (11th Cir. 1998); Barnickel v. United States, 113 F.3d 704, 706 (7th Cir. 1997); Smullen v. United States, 94 F.3d 20, 25-26 (1st Cir. 1996); United States v. Watroba, 56 F.3d 28, 29 (6th Cir. 1995).

failure to comply with those conditions.

Consequences of Failure to Preserve Error

Failure to preserve error generally results in the application of the stringent "plain error" test. The plain-error test derives from Federal Rule of Criminal Procedure 52(b), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[124] In order for there to be "plain error" warranting reversal, four elements must be satisfied:

(1) There must be an "error." "Deviation from a legal rule is 'error' unless the rule has been waived."[125]

(2) The error must be "plain." "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.'"[126] More recently, the Court has elaborated that this requirement means that the error is not "subject to reasonable dispute."[127]

The Supreme Court in Olano declined to decide whether the error had to be

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[124]Fed. R. Crim. P. 52(b).

[125]United States v. Olano, 507 U.S. 725, 732-33 (1993); see also United States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (en banc).

[126]Olano, 507 U.S. at 734 (citations omitted); see also Calverley, 37 F.3d at 162-64.

[127]Puckett v. United States, 556 U.S. 129, 135 (2009).

plain at the time of trial/sentencing, or merely at the time of appeal.[128] However, in 1997, the Supreme Court held that "in a case . . . where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."[129] And, in 2013, the Supreme Court tied up a loose end on this point when it held that "whether a legal question was settled or unsettled at the time of trial, 'it is enough that an error be "plain" at the time of appellate consideration" in order for the second prong of the Olano plain-error test to be satisfied.[130]

(3) The plain error must "affect substantial rights," which normally, although not necessarily always, means that the error prejudiced the defendant.[131] The

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[128]Olano, 507 U.S. at 734 ("We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified. At a minimum, the Court of Appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law.")

[129]Johnson v. United States, 520 U.S. 461, 468 (1997).

[130]Henderson v. United States, 133 S. Ct. 1121, 1130-31 (2013) (citation omitted).

[131]Olano, 507 U.S. at 734-35; Calverley, 37 F.3d at 164. In Olano, the Court suggested that "[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." Olano, 507 U.S. at 735. In United States v. Reyna, 358 F.3d 344, 350-52 (5th Cir. 2004) (en banc), (2004), the Fifth Circuit followed the suggestion of Olano and held that the violation of a defendant's right to allocute before sentence should be presumed prejudicial when the defendant shows both a violation of the right and an opportunity for such violation to have played a role in the district court's sentencing decision. See also Molina-Martinez v. United States, 136 S. Ct. 1338, 1345, 1349 (2016) (generally, where a district court relies upon an incorrect Guidelines range, that reliance will suffice to show an effect on a defendant's substantial rights).

defendant bears the burden of proving that his substantial rights were affected by the plain error.[132] To make this showing, an appellant normally must show a ***reasonable probability*** of a different outcome but for the error;[133] however, "the reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different."[134]

(4) Finally, even if all of the first three factors are satisfied, "the Court of Appeals has authority to order correction but is not required to do so."[135] It should exercise its discretion to correct the plain forfeited error if failure to correct the error would result in a "miscarriage of justice" or, put another way, "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"[136] "Th[is] prong [of plain-error review] is meant to be applied on a case-specific and fact-intensive basis,"[137] because "a 'per se approach to plain-error review is

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[132]See Olano, 507 U.S. at 734; Calverley, 37 F.3d at 164.

[133]See United States v. Dominguez Benitez, 542 U.S. 74, 83 & n.9 (2004) (to establish an effect on substantial rights for purposes of plain-error review, defendant must normally show a reasonable probability that, but for the error, the outcome of the proceeding would have been different).

[134]Id. at 83 n.9 (citation omitted).

[135]Olano, 507 U.S. at 735; see also Calverley, 37 F.3d at 164.

[136]Olano, 507 U.S. at 736 (citation omitted); see also Calverley, 37 F.3d at 164.

[137]Puckett, 556 U.S. at 142.

flawed.'"[138]

The plain-error standard is difficult to meet. Even more alarmingly, it can preclude relief in a number of cases where reversal would result had the error in question been properly preserved. Proper preservation of errors is, therefore, key to effective representation of our clients.

Conclusion

Since we can't win all our cases, appeals are unfortunately necessary. We stand a much better chance on appeal when the error in question is preserved, thus avoiding the handicap of plain-error review. Hopefully, the above tips and pointers will help you to preserve errors for appellate review.

[138] Id. (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985)). Note, however, that in United States v. Sabillon-Umana, 772 F.3d 1328, 1333-35 (10th Cir. 2014), the Tenth Circuit, through now-Justice Gorsuch, held that errors in the application of the Sentencing Guidelines presumptively satisfy both the third and the fourth prongs of plain-error review.