

**PRESERVING ERROR IN FEDERAL COURT:
Requirements and Traps**

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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

The first “gotcha” with respect to pretrial motions in federal court is Federal Rule of Criminal Procedure 12(b)(3), which requires that certain motions *must* be raised prior to trial:

- (1) Motions alleging defects in the institution of the prosecution;¹
- (2) Motions alleging a defect in the indictment or information (other than that it fails to invoke the court’s jurisdiction or to state an offense);²
- (3) Motions to suppress evidence;³

¹ FED. R. CRIM. P. 12(b)(3)(A).

² FED. R. CRIM. P. 12(b)(3)(B).

³ FED. R. CRIM. P. 12(b)(3)(C)

- (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 also schedule a motion hearing.”⁶ *If the motions specified in Rule 12(b)(3) are not filed before the motions date set by the court (including any extension the court provides) or (where no motions date is set) before trial, this failure constitutes a waiver of the defenses, objections, and requests you would have made in those motions.*⁷ However, “[f]or good cause, the court may grant relief from the waiver.”⁸ What constitutes “good cause” will, of course, vary from case to case. In one case for example, the Fifth Circuit found that there was “cause shown” 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.⁹

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 count on getting an evidentiary

⁴ FED. R. CRIM. P. 12(b)(3)(D).

⁵ FED. R. CRIM. P. 12(b)(3)(E).

⁶ FED. R. CRIM. P. 12(c).

⁷ FED. R. CRIM. P. 12(e). The failure to file a motion of the type described in Rule 12(b)(3) by the deadline results in a complete extinguishment of the claim that could have been raised therein; thus, if it is raised for the first time on appeal, the Fifth Circuit will not even conduct plain error review of the claim. See United States v. Chavez-Valencia, 116 F.3d 127, 129-33 (5th Cir.) (suppression issue), cert. denied, 522 U.S. 926 (1997).

⁸ FED. R. CRIM. P. 12(e).

⁹ United States v. Cathey, 591 F.2d 268, 271 n.1 (5th Cir. 1979) (addressing previous version of rule that required “cause shown” rather than “good cause”).

hearing to flesh out your record.¹⁰ 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.”¹¹ 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.”¹² “General or conclusory assertions, founded upon mere suspicion or conjecture will not suffice.”¹³ 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 virtually impossible to get any appellate relief.¹⁴ Additionally, especially with motions to suppress, you should be careful to allege

¹⁰ 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.

¹¹ 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)).

¹² Harrelson, 705 F.3d at 737.

¹³ Id.

¹⁴ See, e.g., United States v. Smith-Bowman, 76 F.3d 634, 637-38 (5th Cir.) (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), cert. denied, 518 U.S. 1011 (1996).

all possible grounds for suppression: a motion to suppress evidence based on one theory will not preserve for an appeal the claim that the same evidence should be suppressed on another theory.¹⁵

The next 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, in 2000, the Federal Rules of Evidence were amended to provide that “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.”¹⁶ However, at least in the Fifth Circuit, 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 error for appeal, an objection or offer of proof as to the subject presented by a motion in limine must be made at trial.”¹⁷ It is probably a good idea 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”

¹⁵ See, e.g., United States v. Maldonado, 42 F.3d 906, 909-13 (5th Cir. 1995) .

¹⁶ FED. R. EVID.103(a).

¹⁷ United States v. Graves, 5 F.3d 1546, 1552 n.6 (5th Cir. 1993) (bolded emphasis added), cert. denied, 511 U.S. 1081 (1994); see also id. at 1551-52.

by testifying and then being impeached by the prior convictions.¹⁸ 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 contest the propriety of the Rule 609 ruling on appeal.¹⁹

In addition, even if a defendant received a favorable pretrial Rule 609 ruling, the evidence may still come in if the defendant “opens the door.”²⁰ In fact, inadmissible evidence may become admissible when the defendant waives the protection or “invites the error.” For example, despite the fact that Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f) prohibit the admission of statements made by a defendant during plea negotiations, a defendant may waive the protections of those rules so as to allow the government to use the statements, not just for impeachment or rebuttal purposes but also for use during the government’s case-in-chief.²¹ During cross-examination, defense counsel may “open the door” by questioning a government witness’ experience triggering the expert testimony requirements under Fed. R. Evid. 702’s and allowing the government to recharacterize its witness

¹⁸ 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.”).

¹⁹ 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”).

²⁰ See United States v. Maldonado, 472 F.3d 388 (5th Cir. 2006) (defendant opened the door to the admission of evidence of arrest of defendant and his co-defendant in connection with the seizure of marijuana in another, uncharged incident, by testifying that he never suspected that co-defendant would store marijuana in the trailer they jointly occupied and that he did not know who placed the marijuana in the trailer).

²¹ United States v. Sylvester, 583 F.3d 285 (5th Cir. 2009), cert denied, 130 S. Ct. 310 (2010).

as an expert and expand his/her testimony on rebuttal.²² Even an objection to testimony regarding pre-arrest, pre-Miranda silence, may not preserve the constitutional claim when defense counsel fails to object to the district court's curative instruction and fails to obtain a definitive ruling.²³

Proffer, Proffer, Proffer

“Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, *and* . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.”²⁴ The Fifth Circuit appears to have added a gloss to Rule 103(a)(2), requiring 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*, have been made known to the court: “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 admitted.’”²⁵ Thus, in making

²² United States v. Carey, 589 F.3d 187 (5th Cir. 2009).

²³ United States v. Potts, 644 F.3d 233, 236-237 (5th Cir. 2011).

²⁴ FED. R. EVID. 103(a) & (2) (emphasis added); see, e.g., United States v. Scott, 48 F.3d 1389, 1397-98 (5th Cir.) (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), cert. denied, 516 U.S. 902 (1995).

²⁵ United States v. Clements, 73 F.3d 1330, 1336 (5th Cir. 1996) (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, id.

a proffer, the prudent practitioner in the Fifth Circuit 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.²⁶ 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.²⁷

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 to the discovery, production, and introduction of evidence. 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."²⁸ Likewise,

²⁶ See Ballis, 28 F.3d at 1406-07.

²⁷ Id.

²⁸ Scott, 48 F.3d at 1394 (internal quotation marks and citations omitted). In Scott, the Fifth Circuit rejected the defendant's claim that a continuance was necessary in order to secure the services of a voice expert for analysis of evidentiary tapes, on the basis that the 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 id.

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.²⁹

The Fifth Circuit has upheld a district court's denial of a defense request for appointment of an investigator under the Criminal Justice Act (18 U.S.C. § 3006A(e)(1)) where the request (1) lacked the requisite specificity as to the prospective witnesses the defense wished to contact and their relevance; (2) did not specify other investigative leads which the defense wished to pursue; and (3) did not recite that defense counsel had ferreted out information through his own efforts which was likely to lead to the discovery of relevant evidence.³⁰ 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.

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.

²⁹ 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))).

³⁰ See United States v. Gadison, 8 F.3d 186, 191 (5th Cir. 1993).

The Contemporaneous Objection Rule³¹

The contemporaneous objection rule is codified at Federal Rule of Evidence 103(a)(1) which provides that “[e]rror may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected, *and* . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”³² There are two notable exceptions to the contemporaneous objection rule: first, no objection is required where the judge presiding at the trial testifies in the trial as a witness.³³ Second, where the judge calls or interrogates witnesses, the objection may be deferred until “the next available opportunity when the jury is not present.”³⁴

It bears repeating that, unless the judge renders a definitive pretrial ruling on the motion, as allowed under Fed. R. Evid. 103(a), a pretrial motion in limine will *not* obviate the need for a contemporaneous objection at trial. Rather, “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.”³⁵ This does not mean,

³¹ 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).

³² FED. R. EVID. 103(a) & (1) (emphasis supplied).

³³ FED. R. EVID. 605. Rule 605 provides that “[t]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.”

³⁴ 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).

³⁵ Graves, 5 F.3d at 1552 n.6; see also id. at 1551-52.

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.

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*.”³⁶ Failure to comply with this requirement will mean that instructional errors will be reviewed only for plain error.³⁷

In assessing compliance with the objection requirement of Rule 30, the Fifth Circuit has cautioned against exalting form over substance:

The procedure for requesting charges, and for objections, should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed. If it be applied blindly and without the benefit of analysis of particular fact situations before individual courts in specific cases it will be transformed from a sound principle of judicial administration into a trap for the unwary³⁸

³⁶ FED. R. CRIM. P. 30(d) (emphasis added).

³⁷ See id.

³⁸ United States v. Davis, 583 F.2d 190, 195 (5th Cir. 1978) (internal quotation marks and citation omitted); see also United States v. Edwards, 968 F.2d 1148, 1153 (11th Cir. 1992) (applying

Under this pragmatic, commonsense approach to Rule 30, an objection will be deemed sufficiently specific so long as the district court “perceive[d] the basis of [the defendant’s] objection,”³⁹ and had “a full understanding of its nature”;⁴⁰ or, put another way, the objection will be considered sufficient if it was “adequate to alert the court of [the defendant’s] position”⁴¹

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.”⁴² However, a defendant need not 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.⁴³ Keep in mind, though, the objection must be *sufficiently specific* to preserve the error on appeal.⁴⁴

Fifth Circuit cases [including Davis] as binding precedent of its predecessor court, Eleventh Circuit held that “[o]verly technical application of Rule 30 in this case would not serve the purposes of the Rule nor meet the ends of justice”), cert. denied, 506 U.S. 1064 (1993).

³⁹ Henderson v. United States, 425 F.2d 134, 144 (5th Cir. 1970).

⁴⁰ United States v. Eiland, 741 F.2d 738, 742 (5th Cir. 1984) (citing Henderson, 425 F.2d at 140).

⁴¹ United States v. Williams, 985 F.2d 749, 755 (5th Cir.), cert. denied, 510 U.S. 850 (1993).

⁴² FED. R. CRIM. P. 30(a).

⁴³ See, e.g., Eiland, 741 F.2d at 741 (“[Defendant’s] objection to the omission of this charge had the same effect as a valid request for the instruction.”) (footnote omitted).

⁴⁴ See, e.g., United States v. Bohuchot, 625 F.3d 892 (5th Cir. 2010) (Fifth Circuit reviewing for plain error in a prosecution for bribery, conspiracy to commit bribery, and money laundering conspiracy, because the defendants’ objection to the definition of the “corruptly” element of bribery did not preserve their claim that the indictment was constructively amended by the proof adduced at trial).

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.⁴⁵ (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."⁴⁶) 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.⁴⁷

Another possible problem is a party's use of peremptory challenges on the impermissible

⁴⁵ See United States v. Martinez-Salazar, 528 U.S. 304, 307 & 315-17 (2000).

⁴⁶ Id. at 307; see also id. at 314-15.

⁴⁷ 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 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). This type of claim was recognized in the Fifth Circuit before Martinez-Salazar. See, e.g., United States v. Muñoz, 15 F.3d 395, 396-98 (5th Cir.), cert. denied, 511 U.S. 1134 (1994); United States v. Bryant, 991 F.2d 171, 174 & n.3 (5th Cir. 1993); United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976). Justice Souter's concurrence notwithstanding, however, it seems doubtful whether this type of claim has survived Martinez-Salazar.

basis of race or gender, in violation of Batson v. Kentucky⁴⁸ and its progeny.⁴⁹ 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.⁵⁰ 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.⁵¹ At this point, the burden shifts to the striking party to explain its strikes.⁵² 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.⁵³

It is incumbent upon every trial practitioner to move for judgment of acquittal (1) at the close of the government's evidence; and (2) at the close of all the evidence.⁵⁴ Failure to do so will forfeit the usual standard of review for claims of insufficiency of the evidence, and any such claims

⁴⁸ 476 U.S. 79 (1986).

⁴⁹ 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).

⁵⁰ See United States v. Maseratti, 1 F.3d 330, 335 (5th Cir. 1993) (citation omitted) (Batson claim waived because not made prior to dismissal of the venire), cert. denied, 510 U.S. 1129 (1994) & 511 U.S. 1036 (1994) & 513 U.S. 910 (1994).

⁵¹ See Batson, 476 U.S. at 93-97.

⁵² See id. at 97-98.

⁵³ 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).

⁵⁴ See FED. R. CRIM. P. 29(a).

will be reviewed only for a “manifest miscarriage of justice.”⁵⁵ Such a miscarriage exists only if the record lacks any evidence pointing to guilt or if the evidence was so tenuous that a conviction would be “shocking.”⁵⁶ A narrow exception to this 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.⁵⁷ 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.”⁵⁸

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

⁵⁵ E.g., United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, 500 U.S. 926 (1991). This writer and other federal public defenders in the Western District of Texas have challenged this reduced standard as violative of due process, equal protection, and Federal Rule of Criminal Procedure 29. Although the Fifth Circuit has recognized that there is some force to these arguments, see, e.g., United States v. Paniagua, No. 93-8722 (5th Cir. Dec. 16, 1994) (unpublished) (citing United States v. Pennington, 20 F.3d 593, 597 & n.2 (5th Cir. 1994) and United States v. Sias, No. 93-5475, at 4 n.1 (5th Cir. Sept. 30, 1994), cert. denied, 514 U.S. 1009 (1995)), the Fifth Circuit has avoided deciding the issue on the merits in every case in which it is raised, either by finding an exception to the waiver rule (e.g., Pennington) or by finding that the result would be the same irrespective of the standard applied (e.g., Paniagua). The Fifth Circuit has also suggested that the two standards might, in fact, be indistinguishable; but has likewise declined to decide this issue. See, e.g., Pennington, 20 F.3d at 597 n.2 (5th Cir. 1994); see also United States v. Davis, 583 F.2d 190, 199 (5th Cir. 1978) (Clark, J., concurring).

⁵⁶ E.g., United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988).

⁵⁷ 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)).

⁵⁸ E.g., Pennington, 20 F.3d at 597 n.2 (citing United States v. Gonzalez, 700 F.2d 196, 204 n.6 (5th Cir. 1983)).

29(c).⁵⁹ 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.”⁶⁰

It has long been the law in the Fifth Circuit that 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.⁶¹ However, in 2002, the en banc Fifth Circuit held that “[w]here . . . a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count.”⁶² This means that, whenever you assert specific grounds for acquittal, you may be waiving 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 waiver rule by first making a general motion

⁵⁹ 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. Allison, 616 F.2d 779, 784 (5th Cir.) (even though defendant did not move for judgment of acquittal either at the close of the government’s case-in-chief or at the conclusion of her case, question of the sufficiency of the evidence was nevertheless preserved by defendant’s timely post-verdict motion for judgment of acquittal), cert. denied, 449 U.S. 857 (1980); see also FED. R. CRIM. P. 29(c)(3).

⁶⁰ FED. R. CRIM. P. 29(c)(1).

⁶¹ See, e.g., Huff v. United States, 273 F.2d 56, 60 (5th Cir. 1959).

⁶² United States v. Herrera, 313 F.3d 882, 884 (5th Cir. 2002) (en banc) (emphasis in original; citations omitted), cert. denied, 537 U.S. 1242 (2003).

for judgment of acquittal, and then adding your particular arguments.⁶³ 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 presents special considerations in the Fifth Circuit. In United States v. Carreon-Palacio, the Fifth Circuit held that

[a] defendant indicted by an instrument which lacks sufficient allegations to establish venue waives any future challenge by failing to object before trial. In situations where adequate allegations are made but the impropriety of venue only becomes apparent at the close of the government's case, a defendant may address the error by objecting at that time, and thus preserve the issue for appellate review.⁶⁴

And, in United States v. Delgado-Nuñez, the Fifth Circuit held that a venue issue was waived when it was not specifically raised either before or during trial, and the defendant was on notice of a defect in venue.⁶⁵

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.⁶⁶ 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

⁶³ 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."

⁶⁴ 267 F.3d 381, 392-93 (5th Cir. 2001).

⁶⁵ 295 F.3d 494, 496-97 (5th Cir. 2002), cert. denied, 537 U.S. 1173 (2003).

⁶⁶ Cf. FED. R. CRIM. P. 12(b)(2) ("A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.").

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.

Finally, Fifth Circuit case law is currently evolving regarding prosecutorial misconduct. Especially with regards to prosecutorial misconduct during closing argument in which the Court of Appeals has expressed frustration with both the prosecutors for repeatedly committing the errors and with the defense for failing to object.⁶⁷ In a recent unpublished opinion, the Fifth Circuit held that defense counsel's performance was deficient for failing to request a curative instruction and move for a mistrial, after the trial court sustained his objections to the prosecutor's improper remarks.⁶⁸

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 district court.⁶⁹ Furthermore, "a reviewing

⁶⁷ A paper is attached by Assistant Federal Public Defender H. Michael Sokolow, to provide an overview of recurring types of improper closing arguments by prosecutors. See Appendix, H. Michael Sokolow, Prosecutorial Misconduct in Closing Arguments, (2009).

⁶⁸ Burkett v. Thaler, 379 Fed. Appx. 351, 359 (5th Cir. 2010) (unpublished).

⁶⁹ 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 pre-sentencing motion to withdraw her guilty plea).

court may consult the whole record when considering the effect of any error on substantial rights,”⁷⁰ and is not limited merely to the transcript of the plea colloquy.⁷¹ 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.”⁷²

Unless a timely objection is made to the government’s alleged breach of its plea agreement with the defendant, the claim of breach is forfeited, and the defendant may obtain relief on that claim only by satisfying the plain-error standard of Fed. R. Crim. P. 52(b).⁷³ Moreover, when the rights acquired by the defendant in his plea agreement relate to sentencing, a showing of an effect on substantial rights (the third prong of plain-error review) requires a showing of a reasonable probability that, but for the breach, the outcome of the proceeding – *i.e.*, the sentence – would have been different.⁷⁴

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).

⁷⁰ Vonn, 535 U.S. at 59.

⁷¹ See id. at 74-75.

⁷² United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004).

⁷³ Puckett v. United States, 129 S. Ct. 1423, 1428 (2009) (decision below: United States v. Puckett, 505 F.3d 377 (5th Cir. 2007)).

⁷⁴ Id. at

This is especially true with respect to the factual determinations underlying the selection of the Guidelines offense level – e.g., drug quantity, amount of loss, role in the offense, etc.– since a considerable body of Fifth Circuit law has held that questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.⁷⁵

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.”⁷⁶ The objection must raise *all* the 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.⁷⁷ Furthermore, “a party must raise a claim of error with the district court in such a manner so that the district court may correct itself and thus, obviate the need for [appellate review].”⁷⁸ An imprecise, unexplained, or pro forma objection during the sentencing hearing will not pass muster.⁷⁹ A motion filed post-sentencing does not preserve for

⁷⁵ See, e.g., United States v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 500 U.S. 924 (1991); United States v. Young, 981 F.2d 180, 188 (5th Cir. 1992), cert. denied, 508 U.S. 955 & 980 (1993); United States v. Guerrero, 5 F.3d 868, 871 (5th Cir. 1993), cert. denied, 510 U.S. 1134 (1994).

⁷⁶ 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)), cert. denied, 542 U.S. 911 (2004).

⁷⁷ 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 arguments raised on appeal for plain error only.”) (citing United States v. Cabral-Castillo, 35 F.3d 182, 188-89 (5th Cir. 1994)).

⁷⁸ United States v. Krout, 66 F.3d 1420, 1434 (5th Cir. 1995) (quoting United States v. Bullard, 13 F.3d 154, 156 (5th Cir. 1994)) (internal quotation marks omitted), cert. denied, 516 U.S. 1136 (1996) (two cases).

⁷⁹ 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. Ocana, 204 F.3d 585, 589 (5th Cir.) (issues of relevant conduct

appeal the claimed error.⁸⁰

It is important to remember that the **defense** carries the burden of proving mitigating factors by a preponderance of relevant and sufficiently reliable evidence.⁸¹ 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.⁸² Furthermore, even as to sentencing factors on which the government has the burden of proof, a mere objection to the PSR may do little or nothing to preserve an issue for appellate review, as 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,”⁸³ and “[m]ere objections do not suffice as

and role in the offense sufficiently preserved for appeal where, although defendant did not cite specific Guidelines provisions, “she did make a general objection that notified the court of her disagreement with the use of the November 1997 offense in her sentencing, and gave the district court the opportunity to address the relevance of the unadjudicated conduct”), cert. denied, 531 U.S. 880 (2000). It is best not to count on such appellate forgiveness, however.

⁸⁰ See, e.g., United States v. Henderson, 646 F.3d 223 (5th Cir. 2011) (motion to correct sentence under Fed. R. Crim. P. 35(a) did not preserve error that the district court impermissibly increased defendant’s sentence for rehabilitative purposes, in violation of Tapia v. United States, ___ U.S. ___, 131 S. Ct. 2382 (2011)).

⁸¹ See, e.g., United States v. Alfaro, 919 F.2d 962, 965 & n.10 (5th Cir. 1990) (citations in footnote omitted).

⁸² See, e.g., United States v. Patterson, 962 F.2d 409, 415 (5th Cir. 1992) (citing United States v. Johnson, 823 F.2d 840, 842 (5th Cir. 1987)).

⁸³ 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)), cert. denied, 531 U.S. 1202 (2001).

competent rebuttal evidence.”⁸⁴

Because Booker⁸⁵ changed the role of the Guidelines and ultimately altered appellate review of sentences, a quick look at Booker and its progeny has been included to emphasize the necessity of objecting to the sentence imposed if a defendant is to have any hope of relief on appeal. In Booker, a separate majority of the Court (the remedy majority) stripped the Guidelines of their mandatory nature and rendered them purely advisory. Id. at 245, 259-61. The Court excised 18 U.S.C. § 3553(b)(1), as well as § 3742(e), the section allowing de novo appellate review of departures. Booker, 543 U.S. at 258-59. The Court also directed sentencing judges to impose sentences pursuant to 18 U.S.C. § 3553(a), and held that the Courts of Appeal should review the district judge’s sentence for “reasonableness.” Id. at 259-61. In Rita v. United States, 551 U.S. 338 (2007), the Supreme Court held that an appellate court may *presume* that a within Guidelines sentence is reasonable, based on the assumption that both the Sentencing Commission and the sentencing judge have analyzed the § 3553(a) factors. Finally, Gall v. United States, 552 U.S. 38, 51 (2007), directs appellate review of district court sentences for both procedural and substantive reasonableness.

Accordingly, even if you have filed written objections prior to sentencing and argued for a below-Guideline sentence that you reurged at sentencing, you must object *after* the sentencing court’s imposition of the sentence to preserve the reasonableness of the sentence.⁸⁶ Your objection

⁸⁴ United States v. Parker, 133 F.3d 322, 329 (5th Cir.) (citation omitted), cert. denied, 523 U.S. 1142 (1998) (two cases).

⁸⁵ United States v. Booker, 543 U.S. 220 (2005).

⁸⁶ See United States v. Mondragon-Santiago, 564 F.3d 357, 361 (5th Cir.), cert. denied, 130 S. Ct. 192 (2009).

must also be twofold post-Gall for review of procedural and substantive reasonableness.⁸⁷ By way of example, you would need to object to the reasonableness of a sentence by saying, “the court has *not adequately explained* the sentence *and* the sentence is *greater than necessary* under the factors enumerated in 18 U.S.C § 3553(a).” Moreover, a failure to object to an upward variance will be reviewed only for plain error. For example, the Fifth Circuit has held that a district court’s imposition of a 120-month sentence (almost three times greater than the advisory Guideline imprisonment range of 46 to 57 months) did “not appear so plain to us as to warrant reversal.”⁸⁸

For Guideline downward departures, unless you 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.⁸⁹ 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 law,” and appellate jurisdiction does therefore lie, under 18 U.S.C. § 3742(a) (1).⁹⁰ The moral is that, if possible, you should get the sentencing judge to expressly articulate on the record that s/he would depart if s/he thought s/he had the authority to do so.

⁸⁷ See id.(counsel must object to preserve procedural error of court failing to adequately explain its reasons for a sentence, and object to preserve substantive unreasonable error).

⁸⁸ United States v. Peltier, 505 F.3d 389, 392 (5th Cir. 2007), cert. denied 554 U.S. 921 (2008).

⁸⁹ United States v. DiMarco, 46 F.3d 476, 477-78 (5th Cir. 1995).

⁹⁰ United States v. Burluson, 22 F.3d 93, 95 (5th Cir.) (citation omitted), cert. denied, 513 U.S. 911 (1994); see also, DiMarco, 46 F.3d at 478.

You should be also especially careful to object to any objectionable noncustodial aspects of the sentence – e.g., punitive fines, costs of incarceration, restitution, etc. 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 additional consequence that 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, because, the Fifth Circuit has held, (1) a challenge to a cash fine or restitution order does not meet the “in custody” requirement of § 2255 because (2) Congress intended to limit the types of claims cognizable under § 2255 to claims relating to unlawful custody.⁹¹ 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 review it on the merits 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 failure to comply with those conditions.

⁹¹ 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)).

Consequences of Failure to Preserve Error

Failure to preserve error generally results in the application of the stringent “plain error” test.⁹² The plain error test derives from Federal Rule of Criminal Procedure 52(b), which provides that “[a] plain error that effects substantial rights may be considered brought to the court’s attention.”⁹³ 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.”⁹⁴

(2) The error must be “plain.” “‘Plain’ is synonymous with ‘clear’ or, equivalently, ‘obvious.’”⁹⁵ The Supreme Court in Olano declined to decide whether the error had to be plain at the time of trial/sentencing, or merely at the time of appeal.⁹⁶ However, in a later case, the Supreme Court held that “in a case . . . where the law at the time of trial was settled and clearly contrary to the

⁹² The word “generally” is used, because some errors may simply not be remediable on appeal without a timely objection. For example, as discussed above, suppression issues and other issues that must be raised by pretrial motion under Fed. R. Crim. P. 12(b)(3) are completely extinguished if not filed by the relevant deadline. See supra text, at 2 & n.7. Furthermore, as also discussed above, a number of Fifth Circuit cases have held that questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.

⁹³ FED. R. CRIM. P. 52(b).

⁹⁴ 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), cert. denied, 513 U.S. 1196 (1995).

⁹⁵ Olano, 507 U.S. at 734 (citations omitted); see also Calverley, 37 F.3d at 162-64.

⁹⁶ 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.”)

law at the time of appeal[,] it is enough that an error be ‘plain’ at the time of appellate consideration.”⁹⁷

(3) The plain error must “affect substantial rights,” which normally, although not necessarily always, means that the error prejudiced the defendant.⁹⁸ The defendant bears the burden of proving that his substantial rights were affected by the plain error.⁹⁹

(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.”¹⁰⁰ 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.’”¹⁰¹

The plain error standard is quite 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.

⁹⁷ Johnson v. United States, 520 U.S. 461, 468 (1997).

⁹⁸ 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.) (en banc), cert. denied, 541 U.S. 902 (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.

⁹⁹ See Olano, 507 U.S. at 734; Calverley, 37 F.3d at 164.

¹⁰⁰ Olano, 507 U.S. at 735; see also Calverley, 37 F.3d at 164.

¹⁰¹ Olano, 507 U.S. at 736 (citation omitted); see also Calverley, 37 F.3d at 164.

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.

APPENDIX:

Michael Sokolow, Prosecutorial Misconduct in Closing Arguments,
23rd Annual Staff Conference and Seminar,
Federal Public Defender, Southern District of Texas
(2009)