

PRESERVATION OF ISSUES
By Howard Pincus, AFPD
Appellate Division, Denver, CO
July 2003

I. Reasons for the preservation requirement

- A. Gives trial court opportunity to correct errors.
- B. Generates record for appellate review.
- C. Gives adversary chance to make arguments and, if necessary, take corrective action. See United States v. Mitchell, 783 F.2d 971, 976 (10th Cir. 1986).
- D. Prevents sandbagging. See id.

II. Rules and statutes governing objections

- A. Federal Rule of Criminal Procedure 12(b) (3) -- objections that must be raised before trial.
 - 1. Motion alleging defect in instituting proceedings (such as selective prosecution, see United States v. Bryant, 5 F.3d 474, 476 (10th Cir. 1993)).
 - 2. Motion alleging defect in indictment (other than that indictment fails to invoke court's jurisdiction or to state an offense).
 - 3. Motion to suppress evidence.
 - a. Preserves issue for review on grounds asserted in motion and does not require party to renew objection when evidence is introduced at trial. See Lawn v. United States, 355 U.S. 339, 353 (1958);

United States v. Campos, 221 F.3d 1143, 1146 n.1 (10th Cir. 2000).

- b. Court of appeals will not consider trial evidence that undermines pre-trial decision unless party asks court to reconsider its decision at trial. Must, if necessary, inform court of the new legal basis for excluding the evidence. United States v. Humphrey, 208 F.3d 1190, 1204 (10th Cir. 2000).
4. Motion to sever charges or defendants under Federal Rule of Criminal Procedure 14.
5. Motion for discovery under Federal Rule of Criminal Procedure 16.
6. Court may set deadline for making pretrial motions. See Fed. R. Crim. P. 12(c).
 - a. Defenses, objections or requests not made by deadline are waived. See Fed. R. Crim. P. 12(e).
 - b. If district court grants relief from the failure to raise an issue pre-trial, court of appeals can find issue to be waived if there is not good cause for the failure. See Bryant, 5 F.3d at 476.
- B. Alleged violations of the Jury Selection and Service Act. Must be made “before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of due diligence, the grounds therefor, whichever is earlier.” 28 U.S.C. § 1867(a).
- C. Competency of child witness must be raised in written motion and party must make an “offer of proof of incompetency.” 18 U.S.C. § 3509(c)(3); United States v. Norman T., 129 F.3d 1099, 1104-05 (10th Cir. 1997).

- D. Federal Rule of Criminal Procedure 24(b). Need not use all peremptory challenges to raise erroneous denial of challenge for cause, but if do use peremptory to remove the juror, no violation of Rule 24 or of due process. See United States v. Martinez-Salazar, 528 U.S. 304, 315-17 (2000).
- E. Evidentiary objections -- Federal Rule of Evidence 103.
- F. No need for exceptions -- Federal Rule of Criminal Procedure 51.
- G. Objections to the court's charge -- Federal Rule of Criminal Procedure 30.
- H. Sentencing objections -- Federal Rule of Criminal Procedure 32.

III. Content of objections

- A. State the action requested and the ground upon which the objection is made at a time when the error can be cured.
- B. Principle embodied in Federal Rule of Criminal Procedure 51(b): must inform the court “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.”
- C. Objections should be specific.
 - 1. General objection to the admission of evidence does not preserve a specific ground if there is any ground for admission. See United States v. Wilson, 244 F.3d 1208, 1217-18 (10th Cir. 2001).

2. General objection to relevancy inadequate where parts of proof is relevant and part is not. See United States v. Mann, 884 F.2d 532, 537 (10th Cir. 1989).
 3. Relevance objection does not preserve Rule 403 objection.
 4. Hearsay objection does not preserve Confrontation Clause claim. United States v. Perez, 989 F.2d 1574, 1582 (10th Cir. 1993) (en banc).
 5. Objection that “more prejudicial than probative,” “no foundation,” and “no authenticity as to who wrote” defendant's name on form did not preserve hearsay objection. United States v. Lott, 310 F.3d 1231, 1248 (10th Cir. 2002), cert. denied, 123 S. Ct. 1612 (2003).
 6. Duress argument forfeited where defendant claimed it applied to government theory that he acted as an aider and abettor, but not to his actions as a principal, and jury convicted on latter theory. United States v. Haney, 318 F.3d 1161, 1163-66 (10th Cir. 2003) (en banc).
 7. Objection that alerts court to the issue may be deemed adequate despite failure to cite rule or guideline. See United States v. Tisdale, 248 F.3d 964, 976 (10th Cir. 2001) (saying defendant is serving state sentence and asking court to make federal sentence concurrent preserved issue, though it would have been preferable to cite U.S.S.G. § 5G1.3), cert. denied, 534 U.S. 1153 (2002).
- D. Objections based on conduct in courtroom not apparent from the record (e.g., a sleeping juror) should be made in detail to ensure there is an adequate basis for review.

IV. Motions in limine

- A. Federal Rule of Criminal Procedure 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.”
- B. If “the court makes a definitive ruling on the record admitting or excluding evidence,” Fed. R. Evid. 103(a), do not have to renew evidentiary objection when evidence introduced at trial.
- C. This rule applies if the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation. See e.g., United States v. Harrison, 296 F.3d 994, 1001 (10th Cir. 2002), cert. denied, 123 S. Ct. 919 (2003).
- D. Rule 404(b) objections will rarely meet this test because the admission of Rule 404(b) evidence usually depends on what other evidence is admitted.
 - 1. For similar reasons, a “continuing objection” is generally not sufficient to preserve a Rule 403 or 404(b) issue, which depend on specific factual context. See United States v. McVeigh, 153 F.3d 1166, 1200 (10th Cir. 1998).
 - 2. But if government does not claim on appeal that the continuing objection failed to preserve the issue, the court may elect to treat the issue as preserved. See United States v. Charley, 189 F.3d 1251, 1257 n.4 (10th Cir. 1999).
- F. Lack of renewed objection may affect scope of review
 - 1. Appellate court need not consider trial evidence unfavorable to ruling. Harrison, 296 F.3d at 1003.

2. But opponent can rely on either new evidence at trial or any failure of the evidence at trial to conform to the movant's proffer at the in limine hearing. Harrison, 296 F.3d at 1002.
 3. If new or additional facts become available, proponent must renew motion to take advantage of those facts on appeal. Rule 103, 2000 advisory committee notes; Harrison, 296 F.3d at 1002-03.
- G. Must renew objection to claim other party violated the terms of the in limine ruling.

VI. Offers of proof

- A. Must make the substance of the evidence known to court or it must be apparent from the context in which the question was asked. United States v. Adams, 271 F.3d 1236, 1241 (10th Cir. 2001), cert. denied, 535 U.S. 978 (2002).
- B. Merely telling the court the content of the proposed testimony is not an offer of proof. Rather, the offer must (1) describe the evidence and what it tends to show and (2) identify the grounds for admitting the evidence. Id.
- C. Rule 103(a)(2) does not mandate a particular form of an offer of proof.
 1. Offer should be specific and detailed.
 2. Offer must demonstrate the content and purpose of the proffered evidence to make clear why the evidence should be admitted and how the failure to admit the evidence will result in prejudice

D. Ways to make an offer of proof

1. Examine witness before court and have answers reported on record (most desirable).
2. Statement of counsel as to what testimony will be (least desirable because of potential to fall short of requisite standards).
3. Statement written by counsel describing the answers the witness would give were the witness to testify.
4. Written statement of the witness's testimony signed by the witness and offered as part of the record.
5. Make sure to have any documents used in offer of proof marked as exhibit so it is part of the appellate record. See Adams, 271 F.3d at 1142 (report faxed to judge, but not marked as exhibit or included with any pleading was not part of the record).

VII. Scope of cross-examination

- A. Must inform court of the substance and purpose of the cross-examination, unless clear from context. United States v. Martinez, 776 F.2d 1481, 1485 (10th Cir. 1985).
- B. Defendant must testify to complain that cross-examination about prior convictions should have been limited. Luce v. United States, 469 U.S. 38, 43 (1984).

VIII. Limiting instructions

- A. Must object to the inadequacy of any limiting instruction or review will only be for plain error. See United States v. Rodriguez-Aguirre, 108 F.3d 1228, 1235 (10th Cir. 1997).
- B. Must object to the failure to give a limiting instruction. See United States v. Robinson, 978 F.2d 1554, 1561 (10th Cir. 1992).

IX. Jury instructions

- A. Submission of a requested charge is not enough to preserve. Jones v. United States, 527 U.S. 373, 388 (1999). It does not put the court "'clearly on notice as to the asserted inadequacy' of the jury instruction." United States v. Fabiano, 169 F.3d 1299, 1303 (10th Cir. 1999) (quotation omitted).
- B. Must instead make a specific objection to the charge and identify the grounds for the objection. See Fed. R. Crim. P. 30(d).
- C. If court modifies proposed instructions and party fails to object to the modified instructions, review is only for plain error. United States v. Bailey, 327 F.3d 1131, 1143 (10th Cir. 2003)
- D. Objection may be deemed preserved where court has already made a definitive ruling on an issue that is later reflected in the jury instructions. See United States v. Pearl, 324 F.3d 1210 (10th Cir. 2003) (Motion to dismiss indictment on ground that statute's definition of child pornography was constitutionally overbroad preserved issue of erroneous jury instructions. Court "had already issued a ruling squarely finding the CPPA's definition of child pornography constitutional -- a ruling manifested in the erroneous jury instruction."), cert. denied, 123 S. Ct. 2591 (2003).

X. Guilty Pleas

- A. Must object to defects in Rule 11 colloquy to preserve issue. See United States v. Vonn, 535 U.S. 55, ___, 122 S. Ct. 1043, 1046 (2002).
- B. In the Tenth Circuit, a defendant does not need to object to the government's breach of a plea agreement. See United States v. Guzman, 318 F.3d 1191, 1195 n.2 (10th Cir. 2003); United States v. Peterson, 225 F.3d 1167, 1170 & n.2 (10th Cir. 2000) (stating rule and noting circuit split), cert. denied, 531 U.S. 1131 (2001).
- C. Conditional guilty pleas under Federal Rule of Criminal Procedure 11(a)(2).

XI. Sentencing Issues

- A. Party must object to presentence report within 14 days of receiving it. See Fed. R. Crim. P. 32(f)(1). Must include any “objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.” Id. The district court “may, for good cause shown, allow a party to make a new objection at any time before sentence is imposed.” Fed. R. Crim. P. 32(i)(1)(D).
- B. Failure to object to fact in presentence report, or at the hearing, acts as admission of the fact. United States v. Richardson, 86 F.3d 1537, 1554 (10th Cir. 1996).
- C. Appellate court may review unobjected-to sentencing issues where the district court's reliance on the presentence report is itself plain error. United States v. Ivy, 83 F.3d 1266, 1297 (10th Cir. 1996).
- D. Where no notice of a special condition, failure to object at sentencing is not waiver. The lack of notice makes it “impossible for the parties to anticipate the nature of the special condition and short-circuit[s] the significance of any opportunity to comment.” United States v. Bartsma, 198 F.3d 1191, 1197 (10th Cir. 1999)

XII. Exceptions to the general requirement of an objection

- A. Claims of ineffective assistance of counsel. Can always be brought, and almost always should be brought, in collateral proceedings. See Massaro v. United States, 123 S. Ct. 1690, 1696 (2003); United States v. Galloway, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc).
- B. Challenges to the sufficiency of the indictment or to the court's jurisdiction
 - 1. May be made for first time on appeal. See United States v. Prentiss, 256 F.3d 971, 983 (10th Cir. 2001) (en banc); United States v. Gama-Bastidas, 222 F.3d 779, 785 (10th Cir. 2000); United States v. Bullock, 914 F.2d 1413, 1414 (10th Cir. 1990).
 - 2. Rule applies not just to whether indictment fails to state any offense, but also to whether it states the offense of conviction. Gama-Bastidas, 222 F.3d at 785 n.3.
 - 3. Ex post facto argument implicates question of whether indictment states an offense and can be raised at any time. United States v. Haddock, 956 F.2d 1534, 1544 (10th Cir. 1992).

4. If the indictment is not challenged at trial, it must be construed liberally in favor of validity. It will be upheld unless it is “so defective that by any reasonable construction, it fails to charge the offense for which the defendant is convicted.” Gama-Bastidas, 222 F.3d at 786 (quotation omitted).
 5. Facial or technical challenges to indictment, such as multiplicity, must be raised pre-trial.
- C. If the district court actually considers a basis asserted on appeal, that basis is preserved (at least where the adversary also has addressed the issue). United States v. McSwain, 197 F.3d 472, 478 n.3 (10th Cir. 1999)
- D. Issue is preserved “[i]f a party does not have an opportunity to object to a ruling or order.” Fed. R. Crim. P. 51(b)
1. Narrow exception
 2. Usually applies where there is a change in the law and depends on whether the law is sufficiently developed to require an objection. See United States v. Strahl, 958 F.2d 980, 983 (10th Cir. 1992) (consider issue where raises compelling challenge to term of imprisonment, legal precedent in support did not exist until after notice of appeal filed, and because consideration would in any event be de novo).

XIII. Effect of failure to preserve

- A. Error is deemed forfeited and ordinarily may only be reviewed for plain error. See Fed. R. Crim. P. 52(b).

- B. To obtain relief on plain-error review there must be (1) error, (2) that is plain or obvious, and (3) that affects substantial rights. United States v. Olano, 507 U.S. 725, 733-34 (1993). If all three prerequisites are met, the court of appeals has discretion to notice the error, but only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” Id. at 736 (quotation omitted; brackets by Court in Olano).
- C. Error is generally not plain where there is no Supreme Court authority or controlling circuit authority, and other circuit authority is divided. Haney, 310 F.3d at 1161.
- D. Even plain-error review “is not appropriate when the alleged error involves the resolution of factual disputes.” United States v. Easter, 981 F.2d 1549, 1556 (10th Cir. 1992).
- E. The relaxed application of plain-error doctrine in 10th Circuit
 - 1. Where failure to raise objection on specific ground is mitigated by an objection on a related ground. United States v. Jefferson, 925 F.2d 1242, 1254 (10th Cir. 1991)
 - 2. Where the error is a constitutional one. United States v. Walser, 275 F.3d 981, 985 (10th Cir 2001), cert. denied, 535 U.S. 1069 (2002); Jefferson, 925 F.2d at 1254.
- F. Court may, on rare occasions, exercise discretion to reach issues not raised in the district court.
 - 1. Where “the proceedings below resulted in a record of amply sufficient detail and depth from which the determination may be made.” United States v. Mendez, 118 F.3d 1426, 1431 n.2 (10th Cir. 1997) (quotation omitted).

2. Pure questions of law whose resolution is important to the public interest. See United States v. Saenz-Mendoza, 287 F.3d 1011, 1012 n.1 (10th Cir.) (the issue “is purely a question of law central to the merits, the factual record and legal arguments are fully developed, and the issue is important to the public interest”), cert. denied, 123 S. Ct. 315 (2002).
- G. Failure to preserve challenge to sufficiency of evidence is of little consequence because, although plain-error language is sometimes used, the standard applied in the Tenth Circuit “is essentially the same as if there had been a timely motion for acquittal.” United States v. Bowie, 892 F.2d 1494, 1497 (10th Cir. 1990); see also United States v. Duran, 133 F.3d 1324, 1335 n.9 (10th Cir. 1998).

XIV. Ensuring review of issues in the court of appeals

- A. Must provide adequate record
1. Appellants represented by counsel have duty to cause the record on appeal to be transmitted to the appellate court. United States v. Hubbard, 603 F.2d 137, 139-40 (10th Cir. 1979).
 2. If the appellant does not designate the relevant record, the court of appeals will hold the appellant has not met the burden of proving factual findings were clearly erroneous or that rulings were an abuse of discretion.
 3. Court will refuse to review sentencing issue where claim was raised in objections to presentence report where report is not included in the record. United States v. Svacina, 137 F.3d 1179, 1187 n.9 (10th Cir. 1998).
 4. Unless there is a statement under Fed. R. App. P. 10(c) that a transcript is unavailable, the failure to file trial transcript waives any sufficiency questions and precludes review of evidentiary rulings, even for plain error. United States v. Vasquez, 985 F.2d 491, 495 (10th Cir. 1993).
- B. Appellant must provide essential citations to the record to carry the burden of proving error. United States v. Rodriguez-Aguirre, 108 F.3d 1228, 1238 n.8 (10th Cir. 1997).
- C. By rule, appellant must demonstrate where in the record an issue was raised in the district court. 10th Cir. R. 28.2(C)(1); United States v. Nichols, 169 F.3d 1255, 1264 (10th Cir. 1999).
- D. Court will not consider a claim where a party fails to provide any argument or legal authority. United States v. Graham, 305 F.3d 1094, 1107 (10th Cir. 2002).

- E. Issue must be raised in the opening brief. Cannot raise for the first time in a reply brief, at oral argument, or on a petition for rehearing.