

WINNING STRATEGIES SEMINAR

Preserving Issues for Appeal
Rosemary Cakmis, AFPD,
Middle District of Florida



HOW, WHEN, & WHY
TO OBJECT, RAISE & PRESERVE ISSUES

Rosemary T. Cakmis
Assistant Federal Public Defender
Chief, Appellate Division
rosemary_cakmis@fd.org

James T. Skuthan
Acting Federal Public Defender
Middle District of Florida
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
(407) 648-6338

Contents

I.	General Rules	1
	A. Goals	1
	B. How	1
	C. When	2
	D. Why	2
II.	Pre-Trial Motions	7
	A. Fed. R. Crim. P. 12 Motions	7
	B. Tips	10
III.	Contemporaneous Objection Rule	11
	A. A party must make a timely “contemporaneous” objection to issues to get the district court to correct them and to preserve them for appeal	11
	B. Fed. R. Evid. 103	12
	C. Judge Tjoflat on Preserving Evidentiary Objections v. Plain Error Review of Evidentiary Rulings	12
	D. Exceptions to Contemporaneous Objection Rule are Rare	12
IV.	Some Common Trial Applications	16
	A. Closing Argument	16
	B. Confrontation Clause	16
	C. Evidence - <i>Brady</i>	16
	D. Judgment of Acquittal Motion	17
	E. Juror Issues	19
	F. Jury Instructions	20
V.	Guilty Plea	21
	A. In General	21
	B. Plea Agreement - Breach	22
	C. Plea Agreement - Appeal Waiver Language	22
	D. CAVEAT on Defendant’s Right to Appeal	24
VI.	Sentencing	24
	A. General Rules	24
	B. Sentencing - in General	32
	C. Sentencing - Allocation	36
	D. Sentencing - Restitution	37
	E. Resentencing the Second Time Around	38
	F. Federal Rule Criminal Procedure 35(a)	40
VII.	Appeal	45
	A. Arguing on Appeal against Forfeiture of Issues	45
	B. Issues Can be Waived During Appeal Even if Those Issues were Preserved in the District Court	47

I. General Rules.

A. Goals.

- * Zealously represent your client and advocate his rights at all stages of the proceedings - trial, plea, sentencing, and appeal.
- * If your client wants to plead guilty, ensure that his plea is knowingly, intelligently, and voluntarily entered.
- * If your client wants to enter a plea agreement, ensure that it is in his best interests and is not breached.
- * If your client wants to go to trial, ensure that he has a fair trial and receives effective assistance of counsel, who does everything ethically possible to achieve a verdict of not guilty.
- * If the verdict is guilty, be sure that every issue/ruling is preserved for appeal.
- * Obtain the best possible sentence for your client at sentencing.
- * If the sentence imposed is not the best possible sentence, be sure that every issue/ruling is preserved for appeal.
- * Do everything ethically possible to convince the appellate court to reverse any adverse rulings made by the trial court.

B. How.

Raise every issue. Object to every error. Argue every aspect of your claim. Proffer evidence. Make standing/continuing objections. Adopt co-defendants' motions/objections. File pre-trial motions in limine, and motions to dismiss and suppress. Renew motions/objections when appropriate. Preserve the record.

One party objects, and the others join. Know your judge and the rules of his/her court. Sometimes it is presumed that all parties opt in on each other's objections. To be safe, you should announce you opt in on all co-defendants' objections at the beginning of trial. Also, check to be sure if this applies to motions as well.

For example, in *United States v. Moore*, 104 F.3d 377 (D.C. Cir.1997), a motion for severance, made by a co-defendant charged with drug and weapons possession, was not attributed to the defendant for purposes of satisfying the requirement that the defendant preserve his objection for appellate review. The agreement between the defendants and court that all defense objections would be deemed jointly made did not apply to motions, and in any event the co-defendant's motion had been based on inability to call the defendant as a witness, and the defendant was basing his claim for severance on irreconcilable defenses.

Review the PSR thoroughly with your client. Object to the facts and conclusions in the PSR and at sentencing. Articulate all arguments and issues.

Expect to win in the district court, but do not forget to preserve the record for appeal, just in case. Even if relegated to plain error standard, still raise it -- chances are better on direct appeal than on collateral attack.

Do not ignore issues that your circuit has ruled against. The Eleventh Circuit has suggested litigants raise such issues, lest they be deemed abandoned in the event of a change in the law. "[A] litigant is never precluded from raising an issue simply because a previous appeal has been decided

that rejects a particular argument." *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004), *reh'g en banc denied*, 391 F.3d 1327 (11th Cir. 2004) (Hull, J., concurring). "This is so because there is nothing prohibiting this Court sitting *en banc* or the Supreme Court from reconsidering or overruling arguments that had been previously rejected." *Id.* (citing *Engle v. Isaac*, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573 (1982) ("Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.")).

C. When.

If possible, catch the error before it occurs. For example, prior to trial, file a motion in limine or a motion to suppress evidence. If your pretrial motion is denied, raise the objection again at the appropriate time during trial, *e.g.*, object when the evidence sought to be suppressed or admitted is admitted or excluded at trial. Again, proffer facts and explain all grounds and why the evidence is prejudicial or necessary. *See, e.g., United States v. Rutkowski*, 814 F. 2d 594 (11th Cir. 1987) (ruling that the defendant failed to preserve the evidentiary issue for appeal, because even though the defendant's attorney objected before trial to admission of the evidence, he failed to object during trial).

As discussed below, certain motions must be filed pre-trial, like motions challenging defects in the proceedings, discovery motions, and severance motions. *See* FRCrP 12(b)(3). The district court sets time limits for filing such motions. Failure to comply with these time limits can waive the right to file such motions in the district court.

There are also rules regarding objections during trial, such as the contemporaneous objection rule. Rules like the contemporaneous objection rule are not just a trap for the unwary practitioner. They actually can be helpful, in that they can bring an error to the district court's attention, so that it can rule on (and hopefully correct) the error in a timely manner.

There are also time constraints in place at sentencing. Everyone is alerted to the time periods for objections to the pre-sentence report (PSR). In the end, all objections to the PSR and the sentence must be presented to the district court before or at sentencing. The PSR must also be presented to the client at least 10 days before sentencing.

D. Why.

1. Why so many rules and time limits?

Not that I'm the *rule guru*, but there is some logic to the theory that if all the rules are timely followed in the trial court, then the trial court will have the opportunity to rule on and correct any and all errors. If every error gets fixed in the trial court, the client gets a perfect trial - no need for appeal. If the trial court rules against your client, by objecting and specifying facts and arguments, you preserve the issue for further review.

The contrary holds true as well. If an issue is not timely objected to or raised in the district court, the district court is not presented with the first opportunity to correct the "error" and the issue is not preserved for appellate review.

***United States v. Burgess*, 175 F.3d 1261, 1265 (11th Cir. 1999):** "The law is clear that, to be given effect, 'an objection must be framed with precision sufficient to inform the trial judge as to the matter about which the objection is raised and the grounds therefor.' . . . The idea behind this requirement is that the district court should be given 'the chance to correct errors before the case goes to the jury.'" [Citations omitted.]

***United States v. Pielago*, 135 F.3d 703, 709 (11th Cir. 1998):** "The contemporaneous

objection rule fosters finality of judgment and deters 'sandbagging,' saving an issue for appeal in hopes of having another shot at trial if the first one misses The contemporaneous objection rule also promotes the salutary interest of making the trial the main event. Failure to enforce it 'tends to detract from the perception of the trial of a criminal case. . . . as a decisive and portentous event.' . . . Moreover, requiring timely objections allows trial courts to develop a full record on the issue, consider the matter, and correct any error before substantial judicial resources are wasted on appeal and then in an unnecessary retrial. . . . A full record and a prior decision in the district court are essential ingredients to our substantive review of issues-- they flesh out an issue in a way the parties' briefs may not." [Citations omitted.]

2. What are the consequences of failing to comply with these rules and time limits?

The generic answer is: Losing the ability to have the district or appellate court correct an error or having to deal with a higher standard of review (plain error).

However, the reality is that your client is the one who ends up doing more time because an issue may have been won under harmless error review, but is lost under plain error review; or an issue is not raised at all. Not only does the client lose, but also you lose and the system loses because more litigation is very likely to ensue. *See, e.g., Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996) (finding failure to file a motion to suppress may be grounds for an ineffectiveness claim); *Sager v. Maass*, 84 F.3d 1212 (9th Cir. 1996) (finding counsel ineffective for not objecting to inadmissible evidence); *United States v. Glover*, 97 F.3d 1345 (10th Cir. 1996) (finding it was ineffective for counsel to fail to object to the higher methamphetamine range).

a. Forfeiture v. Waiver.

United States v. Lewis, 492 F.3d 1219 (11th Cir. 2007) (*en banc*): "Whereas **forfeiture** is the failure to make the timely assertion of a right, **waiver** is the intentional relinquishment or abandonment of a known right." *Id.* at 1121 (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777 (1993)) (emphasis added). In *Olano*, the Supreme Court clarified that "[m]ere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S. at 733, 113 S.Ct. at 1777 (citation omitted). Thus, while forfeited claims are reviewed under Rule 52(b) for plain error, waived claims are not. *Lewis*, 492 F.3d at 1221 (citing *Olano*, at 733, 113 S.Ct. at 1777. "Under Federal Rule of Criminal Procedure 52(b), this Court may correct a 'plain error that affects substantial rights ... even though it was not brought to the [district] court's attention.'" *Lewis*, 492 F.3d at 1221 (quoting FED. R. CRIM. P. 52(b)).

Lewis is important for several reasons. It is a 2007 *en banc* decision. It rejected prior Eleventh Circuit precedent that refused to consider double jeopardy claims raised for the first time on appeal. In doing so, it clarified the distinction between waiver and forfeiture. Before *Lewis*, the courts, as well as counsel, used the term "waiver" loosely to refer to almost any claim not raised in the district court. Even after *Lewis*, the word "waiver" is often inadvertently used in lieu of forfeiture. However, the difference between waiver and forfeiture is not a matter of mere semantics, but is critical to whether an issue is lost forever or can be revived under plain error review. *Olano* is the leading Supreme Court case on plain error.

b. Defining Plain Error.

***United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770 (1993)**: A court of appeals has discretion under Rule 52(b) to correct "plain errors or defects affecting substantial rights" that were forfeited because not timely raised in the district court, which it should exercise only if the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson*, 297 U.S. 157, 160 (1936). There are three limitations on appellate authority under Rule 52(b). First, there must be an "error." A deviation from a legal rule during the district court proceedings is an error unless the defendant has waived the rule. Mere forfeiture does not extinguish an error. Whether a particular right is waivable, whether defendant must participate personally in the waiver, whether certain procedures are required for waiver, and whether defendant's choice must be particularly informed or voluntary depend upon the right at stake. Second, the error must be "plain," a term synonymous with "clear" or, equivalently, "obvious." Third, the plain error must "affect substantial rights," which normally means that the error must be prejudicial, affecting the outcome of the district court proceedings. Normally a court of appeals engages in a specific analysis of the district court's record to determine prejudice, and the defendant bears the burden of persuasion. The Court did not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial" or whether there are errors that should be presumed prejudicial.

***United States v. Atkinson*, 297 U.S. 157, 160 (1936)**: The error is plain error where it would seriously affect the "fairness, integrity, or public reputation of judicial proceedings".

***United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002)**: While indictment's failure to include any allegation regarding quantity of drugs involved in alleged conspiracy rendered conspirators' enhanced sentences erroneous under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000), error did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error, where evidence that this conspiracy involved at least 50 grams of cocaine base was overwhelming and essentially uncontroverted.

***United States v. Pielago*, 135 F.3d 703, 709 (11th Cir. 1998)**: "The narrowness of the plain error rule is a reflection of the importance, indeed necessity, of the contemporaneous objection rule to which it is an exception. . . . 'In the absence of plain error. . . it is not our place as an appellate court to second guess the litigants before us and grant them relief they did not request, pursuant to legal theories they did not outline, based on facts they did not relate.' Because the contemporaneous objection rule is essential to the integrity and efficiency of our judicial process, we have stressed that '[t]he plain error test is difficult to meet.'" [Citations omitted.]

The Eleventh Circuit further explained that two situations in which an error becomes "plain error" are (1) where a squarely-on-point intervening decision of the Eleventh Circuit or the Supreme Court makes the error plain, or (2) where the error is egregious and strikes at a core principle which the violated rule or law embodies. *Id.* at 711.

***United States v. Antonietti*, 86 F.3d 206 (11th Cir. 1996)**: Reversal for error that has not been objected to is possible, but not required, where error is plain and affects substantial rights.

c. Plain Error v. Harmless Error.

Plain error is a difficult standard of review to meet, but it is not impossible, and it is certainly better to have some review than no review at all. Harmless error, which is applied to preserved issues, is a much better standard of review. The difference between plain error review and harmless error review is often outcome determinative on appeal. The Eleventh Circuit explained the difference between plain and harmless error review in ***United States v. Turner*, 474 F.3d 1265, 1275-1276 (11th Cir.2007)**:

Plain-error review differs from harmless-error review in both purpose and scope. *See United States v. Simmons*, 961 F.2d 183, 185 n. 1 (11th Cir.1992) (per curiam). Most notably, unlike harmless-error review, plain-error review is intended to enforce the requirement that parties lodge *timely* objections to errors at trial so as to provide the district court with an opportunity to avoid or correct any error, and thus avoid the costs of reversal and a retrial. *Id.* (citing *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988)). "Consequently, proof of a plain error involves not only a showing of harm, but also proof that the error was so conspicuous that the 'judge and prosecutor were derelict in countenancing it.'" *Id.* (quoting *United States v. Bonavia*, 927 F.2d 565, 570 (11th Cir.1991)). "An error that is not harmless, then, is not necessarily a plain error." *Id.* In addition to the differences in *purpose* served by the plain-error and harmless-error standards, the standards also differ in *application* in two significant ways. *United States v. Monroe*, 353 F.3d 1346, 1352 (11th Cir.2003). First, under plain-error review, the defendant bears the burden of persuasion to show prejudice or an effect on substantial rights, whereas under harmless-error review, the government has the burden of establishing harmlessness beyond a reasonable doubt. *Id.* Second, "plain-error review has the additional requirement that an appellate court then must decide whether to exercise its discretion to notice a forfeited error." *Id.* We will exercise our discretion to correct *only* those errors that "seriously affect [] the fairness, integrity or public reputation of judicial proceedings." *United States v. Vonn*, 535 U.S. 55, 63, 122 S. Ct. 1043, 152 L. Ed.2d 90 (2002) (quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993)).

d. Some cases where the plain error standard was met:

***United States v. Miranda*, 197 F.3d 1357, 1359 (11th Cir 1999):** The defendant was convicted of conspiracy to launder money based on conduct that occurred before the enactment of the substantive money laundering statutes. The Eleventh Circuit held that this "naked ex post facto violation" constituted plain error. *Id.* The court did not mention whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.

***United States v. Webster*, 84 F.3d 1056 (11th Cir. 1996):** When a law is clarified between trial and appeal, a point of appeal will be preserved as plain error.

***United States v. Cobbs*, 967 F.2d 1555 (11th Cir. 1992):** Illegal sentences subject to review as plain error include sentences that are beyond the statutory power of the court to impose them.

***Harris v. United States*, 149 F.3d 1304 (11th Cir. 1998):** In this § 2255 case, the Eleventh Circuit reiterated existing authority, which holds that jurisdictional defects cannot be procedurally defaulted. The defendant received an enhanced sentence based upon 21 U.S.C. § 851(a)(1). That drug enhancement statute (unlike the "career offender" guidelines and the armed career criminal statute) requires the government to file an information, prior to the sentencing hearing, in order to trigger the statutory enhancement provision. In the instant case, the defendant had actual notice that the government was seeking to enhance his sentence pursuant to § 851. However, the government did not follow the proper procedure and did not file an "information" with the clerk.

After beginning his prison term, the defendant filed a § 2255 action. The government responded that the claim was procedurally defaulted and that even if defense counsel was ineffective for failing to raise the issue on direct appeal, there was no prejudice since the defendant was aware of the enhancement at the change of plea hearing.

The Eleventh Circuit reiterated that a sentencing court is without jurisdiction to impose an enhanced sentence, pursuant to § 851, unless the government properly files the § 851 notice in

compliance with the statute (*see United States v. Olson*, 716 F.2d 850, 853 (11th Cir. 1993)). The court then held, as to defendant's §2255 claim, that he did not have to show cause and prejudice to collaterally attack an enhanced sentence on the grounds that the district court lacked jurisdiction to impose the enhanced sentence. The court held that such was the case even though the defendant failed to object at trial or on direct appeal. Thus, any defendant who pled under similar circumstances, or where the information was filed AFTER the change of plea, may be entitled to relief.

***United States v. Alborola-Rodriguez*, 153 F.3d 1269 (11th Cir. 1998)**: One issue the court dealt with involved its ability to *sua sponte* address the district court's lack of subject matter jurisdiction. The district court ordered that the defendant be deported as a condition of his supervised release. Since the district court lacked jurisdiction to impose such a condition, the Eleventh Circuit *sua sponte* reversed this condition of supervised release.

***United States v. Barajas-Nunez*, 91 F. 3d 826, 833 (6th Cir. 1996)**: The court concluded it was plain error for a sentencing court to disregard the guidelines because "[p]ermitt[ing] sentencing courts to disregard governing law would diminish the integrity and public reputation of the judicial system."

e. Some cases where the plain error standard was not met.

***Johnson v. United States*, 520 U. S. 461 (1997)**: The district court plainly erred in failing to submit the question of the materiality of a false statement to the jury. However, the Supreme Court held that this plain error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because the evidence supporting materiality was overwhelming and materiality was essentially uncontraverted at trial and on appeal. *Id.* at 470. Reversal for failure to allow the jury to consider materiality in light of the overwhelming, uncontraverted evidence of materiality, would have had no effect on the judgment. In deciding that the jury instruction did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, the Supreme Court stated "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Id.* (quoting R. Traynor, *The Riddle of Harmless Error*, 50 (1970)).

***United States v. Frost*, 139 F.3d 856 (11th Cir. 1998)**: As in *Johnson v. United States*, 520 U. S. 461 (1997), the *Frost* court found that there was overwhelming evidence of materiality. Based on this overwhelming evidence and the lack of any convincing argument that the false statement was not material, the court found no basis to conclude that the error seriously affected the fairness, integrity, or public reputation of judicial proceeding or resulted in a miscarriage of justice. *Id.* at 860-861.

***United States v. Humphrey*, 164 F.3d 585 (11th Cir. 1999)**: The defendant pled guilty to possessing cocaine base with intent to distribute (21 U.S.C. § 841(a)(1)), and to using and carrying a firearm in a drug trafficking crime (18 U.S.C. § 924(c)(1)). At the plea hearing, the district court failed to inform the defendant that sentences on these two counts had to be served consecutively. No one objected. The Eleventh Circuit found this was not plain error under the rule requiring that a defendant be informed of the consequences of his guilty plea because federal circuits were split on the issue of whether the court is required to inform a defendant about the consecutive nature of multiple sentences. Because said issue had not been resolved by the governing circuit, any error was not so obvious or clear under current law that it could be termed "plain error."

II. Pretrial Motions.

Some issues should be raised pretrial, and some must be raised pretrial in order to get the district court to consider them. As a general rule, if it can be raised pretrial, raise it, unless there is some particular reason it will harm your case.

A. Fed. R. Crim. P. 12 Motions.

1. **Fed. R. Crim. P. 12(b)(2)** provides: "A party *may* raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." (Emphasis added).

This may be done, for example, by way of a motion in limine. However, be advised that a motion in limine does not eliminate the need for objection at trial.

***Ohler v. United States*, 529 U.S. 753, 120 S. Ct. 1851 (2000)**: The Supreme Court ruled that a defendant waived the right to appeal an adverse in limine ruling that her prior conviction was admissible for impeachment purposes when she preemptively introduced evidence of the conviction on her direct examination. The Court noted the ordinary rule that a party waives an objection to the introduction of evidence when that party introduces evidence on the same subject matter. The Court pointed out that a ruling on a motion in limine is not final, and that the trial judge could reverse his/her ruling up until the time the government sought to impeach the defendant with the prior conviction.

2. **Rule 12(b)(3)** provides that certain motions **must** be raised before trial, including challenges to the following:

a. defects in the institution of the proceedings, for example:

The **Speedy Trial Act** provides, in pertinent part, that "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2); *United States v. Register*, 182 F.3d 820 (11th Cir. 1999) (holding the defendant waived relief under the Speedy Trial Act by failing to make a motion to dismiss the indictment based on the Act).

When raising a speedy trial claim, be sure to raise the constitutional claim also and challenge it at all relevant junctures.

***United States v. Twitty*, 107 F.3d 1482 (11th Cir. 1997)**: Delay of two years between the defendant's indictment on multiple charges related to bank fraud and conspiracy in connection with real estate development and the beginning of his trial did not violate his Sixth Amendment right to speedy trial, even though length of delay was presumptively prejudicial. The government was found to be neither negligent nor purposefully dilatory in its prosecution of defendant. Of particular importance, of course, was the fact that the defendant failed to assert his constitutional speedy trial right in timely fashion, to object to any grant of continuance, to object to any of co-defendants' motions requesting additional delays, to request severance, or to identify actual prejudice to his defense resulting from delay. The failure to assert the constitutional right to speedy trial is weighed heavily against the defendant. The defendant's failure to object here militated against finding a constitutional violation.

Where defendants do not file a motion for a change of venue prior to trial, they also have been held to have waived any objection to venue and have not been allowed to raise a challenge to venue for the first time on appeal.

United States v. Dabbs, 134 F.3d 1071, 1078 (11th Cir. 1998) (holding that "the appellants waived their venue challenge when they failed to raise it in the district court."); *United States v. Bustos-Guzman*, 685 F.2d 1278, 1280 (11th Cir. 1982) ("Because defendants did not file a motion for a change of venue prior to trial, they waived any objection to venue and may not raise it for the first time on appeal."); *United States v. Hankins*, 581 F.2d 431, 438 n. 11 (5th Cir.1978) ("It is elementary that venue can be waived if not timely raised.").

In *Dabbs*, the Eleventh Circuit rejected the defendants' reliance on *United States v. Bowdach*, 414 F.Supp. 1346 (S.D.Fla.1976), *aff'd*, 561 F.2d 1160 (5th Cir.1977), for the proposition that a general motion for acquittal is sufficient to preserve a venue challenge unless the district court requires the defendants to particularize their objections. Additionally, the Eleventh Circuit rejected *Bowdach*'s suggestion that defendants do not have to specifically articulate a challenge to venue or that the district court bears responsibility for notifying defendants of their burden. Instead, the Eleventh Circuit read its holding in *Bustos-Guzman* as requiring defendants to clearly articulate their objection to venue. *Bustos-Guzman*, 685 F.2d at 1280. The Eleventh Circuit noted that other circuits also require defendants to specifically articulate a venue challenge. *See United States v. Potamitis*, 739 F.2d 784, 791 (2d Cir. 1984); *Gilbert v. United States*, 359 F.2d 285, 288 (9th Cir. 1966).

The *Dabbs* Court also noted that there is an **exception to the rule** that a failure to object to venue before trial constitutes a waiver, but that exception was irrelevant in *Dabbs*. 134 F.3d at 1078 n.8. In *United States v. Daniels*, 5 F.3d 495, 496 (11th Cir.1993), the Court held that "when an indictment contains a proper allegation of venue so that a defendant has no notice of a defect of venue until the Government rests its case, the objection is timely if made at the close of the evidence." (Internal quotation marks omitted.).

- b. defects in the indictment/information--
BUT at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;**

United States v. Ross, 131 F.3d 970 (11th Cir. 1997): The defendants' appellate vagueness objection to the indictment was rejected because they made no prior objection to the form of the indictment and there was no clear prejudicial error given that the closing arguments of the parties showed a mutual understanding of the straightforward language of the indictment.

United States v. Rivera, 77 F.3d 1348 (11th Cir. 1996): Appellant waived his claim that the conjunctive indictment was so duplicitous as to violate Fifth Amendment where he failed to object on this ground prior to trial.

- c. suppression of evidence,**

Remember: if your pretrial motion to suppress is denied, you must object again if the government refers to the evidence in opening statements, closing arguments, and when the government offers the evidence at trial. *See, e.g., United States v. Rutkowski*, 814 F. 2d 594 (11th Cir. 1987) (holding Defendant failed to preserve the evidentiary issue for appeal, because even

though the defendant's attorney objected before trial to admission of the evidence, he failed to object during trial).

Also remember: if your client pleads guilty, he waives any suppression issue unless specifically preserved during the guilty plea. *See United States v. Crumpton*, 222 Fed. Appx. 914, 2007 WL 879807 (11th Cir. March 26, 2007) (holding defendant waived the right to appeal the district court's denial of his motion to suppress when he entered an unconditional, voluntary guilty plea, and the district court was not required to explain general waiver effect guilty plea had on appellate rights).

d. discovery (Rule 16);

See, e.g., United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973): Where there was no reason to believe that discovery was inadequate to notify defense counsel of intent by government to introduce evidence of out-of-court photographic identification of defendant, defendant's motion for pretrial hearing regarding such evidence, made on day of trial, came too late.

e. severance of parties or charges (Rule 14).

United States v. Gelzer, 50 F.3d 1133 (2d Cir. 1995): Failure to raise claim of improper joinder before trial results in waiver of that issue on appeal.

But see United States v. Bordeaux, 84 F.3d 1544 (8th Cir. 1996): First defendant, who renewed motion for severance at time he moved for judgment of acquittal or new trial, preserved severance issue for plenary review, while second defendant who did not renew severance motion, and thus prevented district court from ruling on motion at any time after exact nature of first defendant's testimony was known, was entitled to review only for plain error.

3. Rule 12(b)(4), which is entitled "Notice of the Government's Intent to Use Evidence," provides:

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

4. Rule 12(c) allows the district court "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."

Read all pretrial orders, including seemingly form orders like standard discovery orders, carefully. Discovery orders differ among the judges. Judges sometimes change their orders and deadlines without notice. Make waiver work for you. Hold the other party to his/her deadlines. Whatever you do, don't miss your deadlines. *See, e.g.:*

United States v. Avery, 205 Fed. Appx. 819, 2006 WL 3713766 (11th Cir. 2006): On

September 6, 2005, before trial, the district court had entered a scheduling order, requiring the parties to submit all motions, including motions to dismiss the indictment, by September 26, 2005. The order also included a waiver provision, which indicated that the failure to raise any defenses or objections in a timely motion would constitute waiver unless the party could demonstrate excusable neglect. On November 25, 2005, Avery filed a motion to dismiss the indictment on the basis of "outrageous government conduct." *Id.* at 822. The district court did not rule on Avery's motion to dismiss the indictment, and trial began on November 28, 2005. Avery renewed his motion to dismiss the indictment at the close of the government's case. The court first found that Avery's motion was untimely and that he did not establish a sufficient excuse for the delay. The court also denied Avery's motion on the merits. *Id.*

On appeal, the Eleventh Circuit's holding dealt with Federal Rules of Criminal Procedure 12(b)(3)(B), (c), & (e).

A motion to dismiss an indictment must be made prior to trial. Fed.R.Crim.P. 12(b)(3)(B). A district court may set a deadline by which parties must make pre-trial motions. Fed.R.Crim.P. 12(c). However, "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver." Fed.R.Crim.P. 12(e). In Avery's case, the district court entered a scheduling order in which the court required that any motion to dismiss the indictment be filed by September 26, 2005. Avery filed his motion to dismiss on November 25, 2005, which was the Friday before his trial began the following Monday. Thus, under the explicit language of Rule 12 and the court's scheduling order, Avery waived his right to move to dismiss the indictment. Nonetheless, Avery argues on appeal that the facts upon which his motion relied could not have been fully discovered until trial. However, given that Avery's motion to dismiss contained three pages of detailed facts regarding the government's conduct in his case, his argument that the necessary facts could not have been discovered prior to trial is meritless. As such, the district court correctly determined that Avery's motion to dismiss was untimely.

Id. at 824-825.

5. **Rule 12(e) states: "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver."**

B. Tips.

1. **Specify facts.** Do not wait for an evidentiary hearing to flesh out the factual basis for your motion. Evidentiary hearings are not always granted. To get an evidentiary hearing, you must provide detailed facts, not conjecture.

2. **Specify all your grounds for the motion.** Only the grounds presented to the district court will be considered on appeal.

3. **Be careful not to *open the door or invite the error.*** When you are introducing evidence or examining a witness, if you even remotely touch upon some matter that somewhat relates to damaging evidence, you will probably be found to have "opened the door" to

allow that damaging evidence to come in. So even if it would otherwise have been error to have admitted it into evidence, once you "opened the door," the government will rush in through the opened door with the tainted evidence and the court will most likely say you *invited the error*.

See *United States v. Love*, 449 F.3d 1154 (11th Cir. 2006) (Doctrine of invited error is implicated where party induces or invites district court into making an error; it is a cardinal rule of appellate review that party may not challenge as error a ruling or other trial proceeding invited by that party).

If this occurs, don't give up without a fight. You can still argue the probative value is outweighed by the prejudice. However, it is best to keep the door shut in the first place.

III. During trial: Contemporaneous objection.

A. A party must make a timely "contemporaneous" objection to issues to get the district court to correct them and to preserve them for appeal.

What is "contemporaneous"? The Eleventh Circuit answered that in *United States v. Turner*, 474 F.3d 1265 (11th Cir. 2007).

In *Turner*, the defendant argued that the district court erred by admitting hearsay testimony, in violation of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968). *Turner*, 474 F.3d at 1267. Although the defendant objected in the district court, she did not object when the testimony was admitted. In fact, as stated by the Eleventh Circuit, "Turner had ample opportunity to lodge a *Bruton* objection during the two direct examinations at issue but did not. An objection was made by the defense only the next day, and then only after the district court *sua sponte* raised the matter." *Id.* at 1276.

Obviously, if the district court *sua sponte* raised the matter, it knew about it, but that was not sufficient. Nor was it sufficient that the matter was objected to the day after the error occurred, even though trial was still ongoing. Rather, the Eleventh Circuit looked to the purposes of the contemporaneous objection rule and held that the objection the day after the error did not fulfill the purposes.

We can discern no reason why this Circuit's well-settled requirement of a contemporaneous objection to preserve an evidentiary ruling for appellate review should not apply here. "[O]ne of the fundamental purposes of the contemporaneous objection rule is to protect judicial resources, in particular by ensuring that the trial courts will have an opportunity to avoid errors that might otherwise necessitate time-consuming retrial." *United States v. David*, 83 F.3d 638, 644-45 (4th Cir.1996). Another purpose of the contemporaneous objection rule is to prevent counsel from "sandbagging" the courts by withholding a valid objection from the trial court in order to obtain a new trial when the error is recognized on appeal." *Id.* at 645. Neither purpose would be served were we to accept Turner's suggestion that her non-contemporaneous arguments concerning the *Bruton*-violative testimony sufficed to preserve the issue and entitle her to harmless-error review. . . . By failing to interpose a timely objection during the direct examination of either witness, the defense provided the district judge with no timely opportunity to avoid serious error that might otherwise have necessitated a time-consuming retrial.

Id. at 1276. Thus, the *Bruton* violation was reviewed for plain error, instead of harmless error.

In general, it is permissible to raise an evidentiary objection to physical evidence, *i.e.*, an exhibit, at the time it is offered for admission. *See United States v. Weiland*, 420 F.3d 1062 (9th Cir. 2005).

B. Fed. R. Evid. 103 provides that the party must object to evidentiary rulings and state specific grounds. If the ruling excludes evidence, the substance of the evidence must be made known to the court by an offer of proof, unless it is apparent from the context within which the questions were asked.

United States v. Quinn, 123 F.3d 1415 (11th Cir. 1997): Formal offer of proof is not required to preserve an objection to the exclusion of evidence; where the substance of the evidence is apparent to the court from its context, appellant is entitled to ordinary appellate review of the exclusion.

United States v. Simon, 964 F.2d 1082, 1085 (11th Cir.1992): "This court generally does not review evidentiary rulings except on the grounds asserted in a contemporaneous objection."

C. Judge Tjoflat on Preserving Evidentiary Objections v. Plain Error Review of Evidentiary Rulings.

In *United States v. Stephens*, 365 F.3d 967 (11th Cir. 2004), Judge Tjoflat discussed the "wide discretion" district courts enjoy in making evidentiary rulings and how a defendant may obtain the reversal of a conviction based on an evidentiary ruling. *Id.* at 973.

First, he may argue that the district court erred in applying a Federal Rule of Evidence Second, a defendant may contend that, notwithstanding the correctness of the court's evidentiary ruling, the admission or exclusion of a piece of evidence violated a constitutional guarantee. In many cases, this is essentially making an as-applied constitutional challenge to a particular rule of evidence.

Id. In *Stephens*, the district court erred in applying the Federal Rule of Evidence. Thus, that (as opposed to the constitutional aspects of an evidentiary challenge) was the focus of the Court's discussion.

Judge Tjoflat explained how to present an evidentiary challenge on appeal:

To successfully challenge a verdict on the basis of a district court's incorrect evidentiary ruling, a party must follow a three-step process. First, he must demonstrate either that his claim was adequately preserved or that the ruling constituted plain error. *See* Fed. R. Evid. 103(a), (d). Second, he must establish that the district court abused its discretion in interpreting or applying an evidentiary rule. *See United States v. Todd*, 108 F.3d 1329, 1331 (11th Cir.1997) ("We review a district court's evidentiary rulings under the abuse of discretion standard."). Finally, he must establish that this error "affected ... a substantial right." Fed.R.Evid. 103(a); *see also United States v. Sellers*, 906 F.2d 597, 601 (11th Cir.1990) ("Even where an abuse of discretion is shown, nonconstitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were affected."); 28 U.S.C. § 2111 ("On the hearing of any appeal ... the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

Id. at 974.

He also explained how to preserve an objection to a district court's exclusion of certain evidence:

To preserve an objection to a district court's exclusion of certain evidence, "the

substance of the evidence [must be] made known to the court by offer or [be] apparent from the context within which questions were asked.” Fed.R.Evid. 103(a)(2). In this case, Stephens's attorney made a thorough proffer to the court about the anticipated contents of the excluded witnesses' testimony. Consequently, we have no problem in concluding that the record is sufficiently developed to allow us to review this claim. *See United States v. Sheffield*, 992 F.2d 1164, 1170 (11th Cir.1993) (“[B]ecause the trial court and prosecutor were well aware of the substance of the evidence, and the record reflects the substance of the evidence, we find that the defense counsel made an adequate proffer.”).

Id. (Footnote omitted).

Because the defendant properly preserved his objections (and properly presented them on appeal), and the Eleventh Circuit found the district court erred in excluding certain evidence, the Court reversed and remanded for a new trial on all counts except for the count where the defendant was arrested and caught with the drugs in hand. The sentence on that count was vacated. *Id.* at 970 n.3, 980.

In *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006), Judge Tjoflat authored the majority opinion, as well as a special concurrence in which he "explain[ed] why I believe appellate courts so rarely-and, in my view, *should only rarely*-notice plain evidentiary errors." *Id.* at 1299 (emphasis in original). He limited the scope of his concurrence to discussing "only the admission of evidence by the prosecution, over no objection, in criminal cases." *Id.*

In sum, Judge Tjoflat "would not engage in plain error review of the admission of excludable evidence unless I were certain that there could be no reasonable strategic reason for not objecting at the time the evidence was admitted." *Id.* at 1304. Why?

To begin, I recite what should now be a familiar standard: Under plain error review, an appellate court may exercise its discretion to notice an error that is plain and that affects substantial rights, so long as the error affects the fairness, integrity, or public reputation of judicial proceedings. It should be immediately apparent that the standard itself sets an extraordinarily difficult burden for a defendant to overcome-particularly in instances where the district court has substantial discretion to admit evidence (for example, where the defendant claims that the probative value of a piece of evidence is substantially outweighed by its potential for unfair prejudice, *see* Fed.R.Evid. 403). Evidentiary rulings, of which counsel and the trial judge should have been aware, are often quite case- and fact-specific and it is therefore unlikely that a defendant would be able to point to a court decision or evidentiary rule making the admission of the evidence obviously erroneous. Despite this difficulty, there certainly are circumstances in which an appellate court could say that, given extant case law at the time of appeal, a piece of evidence admitted at trial was clearly excludable (*e.g.*, hearsay that is not otherwise admissible under Federal Rules of Evidence 803 or 804). I do not believe, however, that even such circumstances are properly recognizable as plain error.

What is often overlooked in the rote application of the plain error standard is that, without objection, it is almost impossible to conclude that the district court committed error at all. It is one thing to say that evidence, if objected to, should have been excluded; it is quite another to say that admission of evidence over no objection is error in some abstract sense. The error in the former circumstance is the district court's failure to sustain the defendant's objection; in the latter, the error is evidently the improper infringement upon a defendant's unwaivable right to be tried

only by admissible evidence. The problem with the second formulation is that defense counsel can waive evidentiary restrictions, and often has legitimate strategic reasons for doing so. Defense counsel may believe, for example, that a piece of evidence will turn out to be exculpatory rather than inculpatory, or counsel may want to tie a witness to certain statements. Reviewing admission of evidence for plain error, however, can serve to transform defense counsel's strategic decisions into district court errors. Trial counsel's sound strategy does not become plain error at appellate counsel's urging.

A conclusion that the admission of certain evidence constitutes plain error is a determination that the evidence was so obviously inadmissible and prejudicial that, despite defense counsel's failure to object, the district court, *sua sponte*, should have excluded the evidence. Thus, the existence of plain error review forces the district court, in an effort to avoid the reversal of conviction and a retrial, to intervene and exclude the evidence on its own initiative. In determining whether to do so, the district court must either ignore the possibility that defense counsel is choosing not to object for strategic reasons (and therefore intervene in every instance) or must weigh that possibility against the potential time and cost of a retrial (assuming one is even possible under the circumstances). To the extent the district court even attempts the latter analysis, however, it does so at a specific moment during the course of the trial without the benefit of the entire record (in particular, what other evidence the prosecution is prepared to offer, and what use the prosecution or defense intends to make of the evidence). Because it is extraordinarily difficult, if not impossible, to determine, mid-trial, whether the admission of a certain piece of excludable evidence prejudices a defendant's substantial rights, the possibility of a retrial creates an incentive for the district court *always* to intervene. This result essentially deprives defense counsel of the ability to determine strategically a client's most effective defense—a consequence I would prefer to avoid. . . .

I should be quick to add that I hold no illusions of infallibility with respect to the legal profession. In some cases, defense counsel may actually fail to notice that inadmissible evidence is being admitted. In others, however, counsel may make a strategic decision not to object to the admission of evidence. The role of an appellate court under plain error review, therefore, is to sort out the error from the strategy, to the extent strategy is considered at all. This is a role for which appellate courts are particularly ill-suited. I believe our ineffective assistance of counsel case law is instructive in this regard.

Ineffective assistance claims invariably involve a determination of whether an attorney was acting strategically or incompetently. We have appropriately concluded that such determinations ought not to be made on direct appeal. . . . Without factual development, it is nearly impossible for an appellate court to determine whether or not counsel's decisions were strategic or to assess the overall quality of counsel's representation. . . . Similarly, in the context of plain error review of "improperly" admitted evidence, it is extremely difficult, although not impossible, to determine whether counsel's failure to object to the admission of excludable evidence was error or strategy. . . . Given the factual dependency of this determination, I do not believe appellate courts should find plain evidentiary error—save for the extreme case where there could be no reasonable strategic reason for declining to object at the time the evidence is admitted. There is a forum better suited for this purpose—namely a collateral attack proceeding on a claim of ineffective

assistance of counsel.

Moreover, were we to review claims of evidentiary error without factoring in the strategic reasons not to object (i.e., by simply applying the plain error doctrine and assuming that all excluded evidence admitted with no objection is error), we would, in fact, be providing defense counsel with a strategic reason not to object. Despite our stated concern about ensuring that plain error review does not, in effect, serve as a trial strategy, . . . plain error review in this context does precisely that. Defense counsel may choose not to object to the admission of certain evidence—perhaps believing it may turn out to be exculpatory—with the understanding that, if wrong, the defendant will have an opportunity to challenge the admission of the evidence on appeal. Where we find evidence of this strategy in the record, we do not find plain error. . . .

Presented, then, with the choice between (1) presuming legitimate strategy and finding error in the extreme case and (2) presuming error and rarely finding improper strategy, I choose the former. I arrive at this conclusion by borrowing further from our ineffective assistance case law. As is oft stated, we generally presume that lawyers perform competently. . . .

. . . I believe this presumption is just as relevant in the plain error context as in the ineffective assistance context. As such, so long as we are unable to take judicial notice that no competent attorney would fail to object to the admission of certain evidence, I would not say that the district court's failure *sua sponte* to intervene and exclude the evidence is error.

Not only do I believe that our ineffective assistance case law is instructive as to how we should treat claims of plain evidentiary errors, but I also believe that there is a connection between the two issues that is rarely, if ever, discussed. In order to satisfy the first three prongs of the plain error standard, we would have to find: error, that should have been obvious to counsel, and that seriously prejudiced the defendant's substantial rights. In other words, counsel was incompetent for not having objected. In fact, counsel may have been incompetent as many as three times (once at the time of the evidence was admitted, once more when he failed to move to strike the evidence, and yet again during closing argument should the Government comment on the evidence) or perhaps only once but as late as closing argument when the previously latent prejudice became clear. Yet, if we then choose not to exercise our discretion to notice the error, or if we could not say that the error affected the fairness, integrity, or public reputation of judicial proceedings, plain error would not be found. Thus, we would not order a retrial on direct appeal, but, without the benefit of briefing or factual development, we would essentially be providing a very firm grounding for a subsequent ineffective assistance determination on collateral attack. What makes this particularly troubling for me is that in an ineffective assistance claim, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” . . . Yet, because we would not find plain error if we were to believe that defense counsel strategically chose not to object, a finding of plain error that affects defendant's substantial rights—a determination likely made with no consideration of strategy and certainly made with no stated presumption in favor of strategy—at least implies that defense counsel's failure to object was not strategic. Consequently, in such circumstances, there is a strong argument to be made that we unwittingly shifted the presumption on collateral attack from strategy to incompetence. The justification

for this result is not apparent to me.
Id. at 1299-1305 (footnotes and citations omitted).

D. Exceptions to Contemporaneous Objection Rule are Rare.

1. **Fed. R. Evid. 605:** if the presiding judge testifies as a witness, no objection is needed.

2. **Fed. R. Evid. 614c:** if the judge calls or interrogates a witness, you can defer the objection until the next available opportunity when jury is out.

IV. Some Common Trial Applications.

A. Closing Argument.

Closing argument is fertile ground for improper prosecutorial comments, *e.g.*, appealing to the emotions of the jury, burden shifting, misusing evidence, commenting on evidence not admitted at trial, etc. However, if there is no objection, the district court does not have a chance to correct the error, and the appellate court is less likely to correct it under the plain error standard.

***United States v. Alexander*, 237 Fed. Appx. 399, 2007 WL 934714 (11th Cir. Mar. 29, 2007):** Because Alexander did not object to the government's closing arguments at trial, "relief is available to rectify only plain error that is so obvious that failure to correct it would jeopardize the fairness and integrity of the trial." (Quoting *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir.1997)).

B. Confrontation Clause.

***United States v. Anderton*, 136 F.3d 747 (11th Cir. 1998):** In this child pornography case [18 U.S.C. § 2252 (a)], the court held that the district court properly relied on a state child abuse investigator's hearsay testimony in departing upward on the basis of sexual exploitation of the minor. The sentencing court found this testimony credible and reliable and used it in imposing the enhancement. The Eleventh Circuit held that the defendant had waived any Confrontation Clause argument by failing to raise it at the time of the sentencing hearing.

C. Evidence - *Brady*.

***United States v. Kersey*, 130 F.3d 1463 (11th Cir. 1997):** The court held that a defendant's motion for new trial based on newly discovered evidence under FED. R. CRIM. P. 33 did not properly preserve the defendant's argument that the government had also committed a *Brady* violation, where the defendant did not *specifically* argue that a *Brady* violation had occurred. Instead, the defendant merely contended that the new evidence would produce a different trial outcome. Distinguishing the stringent 5-part "new evidence" test under Rule 33 from the *Brady* test of materiality -- which attaches greater significance to evidence of impeachment value and which, in certain circumstances, requires only a showing of a reasonable probability of a different outcome -- the Court held that the district court did not plainly err in failing to apply a *Brady* analysis. The new evidence -- a document of ambiguous evidentiary value that the government disclosed after trial -- did not serve to exculpate the defendant. "[W]e cannot say that the [late-disclosed document] would have had 'a definite impact on the credibility of an important prosecution witness.'" *United States v. Crockett*, 534 F.2d 589, 601 (5th Cir. 1976). Contrary to [the defendant's] view, cross-examining a government witness about the document] would not have, with any reasonable probability, changed the verdict. *See United States v. Arnold*, 117 F.3d 1308, 131 (11th Cir. 1997)." Instead, the document was likely more inculpatory than exculpatory. Thus, the district court did not plainly err in failing to rule on the *Brady* issue.

D. Judgment of Acquittal Motion

1. Make your motion at the close of the government's case in chief.
2. Renew it at the close of all the evidence.
3. State your reasons.

***United States v. Jones*, 32 F.3d 1512, 1516 (11th Cir.1994)**: When a defendant "failed to renew his motion for judgment of acquittal at the end of all of the evidence, his conviction must be affirmed unless a manifest miscarriage of justice would result" because "a defendant's decision to present his case after denial of a motion for judgment of acquittal operates as a waiver of his objection to the denial of his motion for acquittal."

***United States v. Greer*, 440 F.3d 1267, 1271 (11th Cir. 2006)**: "This [manifest miscarriage of justice] standard requires [us to determine] that the evidence on a key element of the offense is so tenuous that a conviction would be shocking."

***United States v. Bichsel*, 156 F.3d 1148 (11th Cir. 1998)**, is a classic example of why you need to renew your motion for judgment of acquittal after the close of all the evidence. The defendants herein were charged with entering the military installation located at Ft. Benning, Georgia. They were on the property protesting U.S. military policies. To prove the case against the defendants, the government had to show they had received notice that Ft. Benning's commander had barred future entry, pursuant to 18 U.S.C. § 1382. As to some of the defendants, the only proof that said notice was received was the signed returned receipt postcards bearing the alleged signature of the defendant. These defendants argued that there was insufficient proof to establish that the actual defendants had, in fact, endorsed the cards. Unfortunately, although the defendants moved for a judgment of acquittal after the government rested, they did not renew their motion at the close of all the evidence. Consistent with Eleventh Circuit case law, the court held that the defendants waived any objection to the sufficiency of the evidence. In such cases, the court held, the convictions would be affirmed unless there is a manifest miscarriage of justice – if the evidence "on a key element of the offense is so tenuous that a conviction would be shocking." (quoting *United States v. Tapia*, 761 F.2d 1488, 1491-92 (11th Cir. 1985)). The court conceded that some of the defendants may not have actually received the letters barring future entry. However, the court held that "a factfinder may legitimately infer that a defendant actually received a letter addressed to him or her when the sender received a return receipt bearing what purports to be the defendant's signature. This inference is strong enough that the district court's reliance on it is hardly 'shocking.'" 156 F.3d at 1150-51.

***United States v. Reddick*, 2007 WL 1063149 (11th Cir. April 11, 2007)**: Both Defendants moved for a judgment of acquittal after the government rested. Defendant Houston presented a case, but did not renew his motion for judgment of acquittal after presenting his case at trial. On appeal, the Eleventh Circuit held that his conviction was reversible only for manifest injustice.

Defendant Reddick did not present a case or renew his motion after his co-defendant's case, which presumably did not relate to him. No mention was made on appeal of him waiving or forfeiting his right to appeal on this basis. However, the government argued that Reddick's failure to offer reasons to the district court in support of his motion did not preserve his argument for a judgment of acquittal based on insufficient evidence. The Eleventh Circuit responded: "Even assuming that Reddick preserved his argument, we decide, for the reasons that will be discussed, that his claim fails."

The moral: It is better to state your reasons for your JOA argument because if you have a good argument, the court might not be willing to assume it is preserved.

***United States v. Hunerlach*, 197 F.3d 1059 (11th Cir. 1999)**: The court noted that the defendant had moved for a judgment of acquittal based on sufficiency of the evidence. The

defendant's argument in the district court is not detailed in the opinion. On appeal, the defendant argued that the district court had erred in denying the motion for two reasons. The first reason concerned the lack of proof as to the elements of the crime. The court reviewed this matter *de novo* and found sufficient evidence as to the elements. *Id.* at 1068. The second aspect of the defendant's argument on appeal was a purely legal matter, *to-wit*: whether, under Eleventh Circuit precedent, IRS Form 433A was a "return" or "statement" that could serve as a basis for a conviction under 26 U.S.C. § 7206(1). *Id.* Because the defendant did not raise this legal issue before the district court, the Eleventh Circuit reviewed the matter under the plain error standard. *Id.* at 1068-1069.

United States v. Castro-Lara, 970 F.2d 976 (1st Cir. 1992): A defendant who moves for judgment of acquittal at the end of the prosecution's case, but then fails to renew that motion after presenting evidence in his own behalf, waives the original motion. However, even absent any motion for judgment of acquittal at trial, a defendant who files a timely post-trial motion for acquittal stands on the same footing as a defendant who moves for acquittal at the close of all evidence, and is accordingly entitled to the benefit of the same standard of appellate review on a challenge to the sufficiency of evidence to support the conviction as a defendant who seeks judgment of acquittal at the close of the evidence.

United States v. Cardenas Alvarado, 806 F.2d 566 (5th 1986): The court discussed the advantages and disadvantages of renewing a JOA motion after a co-defendant presents a case:

In examining the evidence, Cardenas contends that we can consider only the evidence introduced during the government's case-in-chief in evaluating the sufficiency of the evidence against him because he rested at the close of the government's evidence. Cardenas is incorrect because he renewed his motion for judgment of acquittal at the close of all of the evidence. When a defendant chooses to present evidence in his behalf following his motion for acquittal and then renews his motion for judgment of acquittal at the end of all the evidence, we have held that "the 'waiver doctrine' requires the reviewing court to examine all the evidence rather than to restrict its examination to the evidence presented in the Government's case-in-chief." *United States v. White*, 611 F.2d 531, 536 (5th Cir.), *cert. denied*, 446 U.S. 992, 100 S. Ct. 2978, 64 L. Ed.2d 849 (1980). In *White*, the defendant apparently called witnesses and presented evidence, whereas in this case Cardenas did not do so. Cardenas, however, utilized his codefendant's testimony concerning duress in his closing argument, and requested that the jury be instructed on duress. In addition, an examination of the record reveals no other reason for Cardenas to ask for a coercion instruction except that he hoped to benefit from his codefendants' version of what happened. Under these circumstances, we believe that *White* allows us to review all of the evidence in evaluating its sufficiency. We express no opinion, however, on whether or not our view would be the same in a situation where a defendant has other reasons to ask for a coercion instruction apart from hoping to benefit from the testimony of codefendants.

Furthermore, our decisions in *United States v. Belt*, 574 F.2d 1234 (5th Cir.1978), and *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir.1974), *cert. denied*, 420 U.S. 1003, 95 S. Ct. 1446, 43 L. Ed. 2d 761 (1975), are not to the contrary. In *Belt* the codefendant Williams tried to show through testimony that Belt, and not Williams, was the guilty party. Belt rebutted that testimony but did not attempt to rebut the government's case against him. We held that the district court erred in failing to grant a judgment of acquittal for Belt at the close of the government's case. In *Arias-Diaz* we held that the testimony by a codefendant does not result in a waiver. 497 F.2d at 169. As we have already mentioned, however, Cardenas utilized his

codefendant's testimony concerning duress and requested a jury instruction on duress. Consequently, we believe that *Belt* and *Arias-Diaz* are inapplicable to the instant case.

Id. at 570 n.2.

E. Juror Issues.

1. Refusal to strike a juror for cause.

- a. Use a peremptory challenge to strike the juror who the court refused to strike for cause.
- b. Use all your peremptory challenges.
- c. Identify other jurors who you would have stricken if you had not had to use your preemptories on jurors who should have been stricken for cause.

2. Improper use of peremptory (*Batson*)

- a. Object before venire is dismissed and trial begins. (It is not enough to object before the jury is sworn.)
- b. Make a prima facie case of why the strike was exercised for an impermissible reason; then the burden shifts to the other party to show a permissible reason.
- c. Object to the reasons given and ask for a ruling.

3. Fair Cross-Section Challenge

Campbell v. Louisiana, 523 U.S. 392 (1998): The Court declined to consider whether a "fair cross-section" challenge to the jury could be made because that claim had not been perfected in the court below.

4. Alternate Jurors During Deliberations

United States v. Olano, 507 U.S. 725 (1993): The presence of the alternate jurors during jury deliberations was not objected to in the trial court and was an error that the court of appeals was authorized to correct under Rule 52(b).

United States v. Bendek, 146 F.3d 1326 (11th Cir. 1998): On Thursday, the fourth day of the trial, the court learned that one of the jurors had an airline reservation for a trip out of town on Saturday and was not scheduled to return until the following Tuesday. Since it was not clear that the jury would have returned a verdict by the end of the day Friday, the court suggested allowing all 13 jurors to retire and commence deliberations. If they could not reach a verdict by Friday, the remaining 12 jurors (11 of the original jurors plus the alternate) could come back on Monday and continue deliberations. The attorneys were asked whether they objected. No one did. The court of appeals held that, assuming permitting the alternate juror to deliberate and return a verdict with the regular jurors constituted plain error which affected the defendants' substantial rights, it did not warrant reversal because the defendants could not show that the jury size affected the fairness, integrity or public reputation of the proceeding.

F. Jury Instructions.

***Bryan v. United States*, 524 U.S. 184 (1998)**: The Supreme Court held that to support a conviction for conspiring to engage in the sale of firearms without a license and actually engaging in sale of firearms without a license under 18 U.S.C. §§ 922(a)(1)(A), 924(a)(1)(D), the government was required to show willful conduct on the part of the defendant. The Supreme Court went on to explain that "willfully" violating the statute requires a showing that the defendant knew his conduct was unlawful, not that he was aware of the particular licensing requirement. The Court then found that although the trial court erred by instructing the jury that a defendant need not know that his conduct was unlawful, the error did not require reversal. How could this not require reversal? The Supreme Court *reasoned* that the defendant did not object to the instruction at trial; it was unlikely that the jury was misled given the other instructions that were given; the defendant did not raise the argument in the court of appeals; and the grant of certiorari did not cover the issue.

***Jones v. United States*, 527 U.S. 373 (1999)**: The Court rejected Jones' argument that the instructions confused the jury regarding the consequences of a deadlock. The Court noted that the instructions were reviewable for "plain error" because Jones did not voice objections to the instructions; further, his request for an instruction did not preserve an objection to the instruction as given, because courts cannot speculate on what "sorts of objections might be implied through a request for an instruction."

***United States v. Burgess*, 175 F.3d 1261 (11th Cir. 1999)**: The defendant was charged with traveling in interstate commerce with the intent to engage in sexual relations with a juvenile [18 U.S.C. § 2423(b)] and with two counts of using a computer affecting interstate commerce to knowingly entice a juvenile to engage in sexual acts [18 U.S.C. § 2422(b)]. The case was reversed and remanded to the district court for a new trial based on the judge's failure to read a requested jury instruction. During the charge conference, defense counsel asked the court to read the standard Eleventh Circuit pattern jury instruction relating to the defendant's decision not to testify. The district court indicated that it would give the instruction. However, at the conclusion of the instructions, when the district court asked if there were any objections, defense counsel indicated that the district court had not read the requested instruction regarding the defendant not testifying. The district court responded that it believed the instruction had been given. On appeal, the government argued that the defendant had waived the issue because his attorney did not "press the point any further after the court said the instruction had been given." The Eleventh Circuit held that the defendant clearly had met his burden of raising a sufficient objection and had preserved the issue for appeal. However, a reversal is not automatic when the judge fails to give a requested instruction regarding the defendant not testifying at trial. The Eleventh Circuit analyzed the district court's error under the harmless error doctrine. It then held that it was not convinced beyond a reasonable doubt that the district court's error did not contribute to the conviction.

Moral: Even when you object, the government argues waiver.

***United States v. West*, 142 F.3d 1408 (11th Cir. 1998)**: At the charge conference, the court decided to instruct the jury that it could determine whether a coconspirator authored the notebook. This was error the Eleventh Circuit held. However, the defense attorney did not object to this jury instruction. Thus, the Eleventh Circuit held that the plain error standard applied. In affirming the Eleventh Circuit stated: ". . . the court's instruction to the jury, while plainly erroneous, did not affect the defendant's substantial rights such that it was prejudicial and not harmless."

***United States v. Mitchell* 146 F.3d 1338 (11th Cir. 1998)**: Because the defendant did not object to the district court's failure to instruct the jury that 18 U.S.C. § 2113(a) [bank robbery] is a lesser- included offense of § 2113(d)[armed bank robbery], the district court's failure to so instruct the jury did not require reversal. Since the choice not to seek a lesser included offense instruction

may be due to trial strategy, requiring a district court to give such an instruction is "at odds" with such strategy.

V. Guilty Plea.

A. In General

***United States v. Crumpton*, 222 Fed. Appx. 914, 916-917, 2007 WL 879807 (11th Cir. March 26, 2007)**: Eleventh Circuit law is clear that when a defendant enters a voluntary, unconditional guilty plea, he waives the right to challenge all nonjurisdictional defects in the proceedings, which would include a court's denial of a motion to suppress. *See United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir.2003). "A defendant who wishes to preserve appellate review of a non-jurisdictional defect while at the same time pleading guilty can do so only by entering a 'conditional plea' in accordance with Fed.R.Crim.P. 11(a)(2)." *United States v. Pierre*, 120 F.3d 1153, 1155 (11th Cir.1997).

Where there is a plea agreement, Federal Rule of Criminal Procedure 11(b)(1)(N) requires that the district court inform the defendant of "the terms of any plea-agreement provision waiving the right to appeal" in open court during the colloquy. But there is nothing in Rule 11 imposing an obligation on the district court to inform the defendant that his unconditional plea waives some of his appellate rights. . . .Nor can we find any binding circuit precedent suggesting that the district court must inform a defendant entering an unconditional, voluntary guilty plea that he is waiving his right to appeal any nonjurisdictional issues.

***Libretti v. United States*, 516 U.S. 29 (1995)**: FED. R. CRIM. P. 11(f)'s requirement that a trial court find a factual basis for a guilty plea does not, by its plain language, apply to issues surrounding criminal forfeiture. Therefore, the trial court is not required to find a factual basis for a stipulated criminal forfeiture embodied in a plea agreement. The right provided by Rule 31(e) to a special jury verdict regarding forfeiture can be waived by a defendant pleading guilty. Without said right being mentioned in the plea agreement and without specific advice by the court that the right will be waived by a guilty plea.

***United States v. Tomeny*, 144 F.3d 749 (11th Cir. 1998)**: The defendants were charged with making a false statement, in violation of 18 U.S.C. § 1001. Both defendants filed a motion to dismiss on the theory that 16 U.S.C. § 1857(1)(I), preempted § 1001, based on the facts of this particular case. After the district court denied the motion to dismiss, the defendants pled guilty and appealed based on the preemption issue. As an initial issue, the Eleventh Circuit held that, by arguing § 1857(1)(I) preempts § 1001, the defendants effectively claimed that the indictment failed to charge a legitimate offense. Thus, the appellate court held, the defendants' claim was jurisdictional and was not waived by entering a plea of guilty.

***United States v. Tyndale*, 209 F.3d 1292 (11th Cir. 2000)**: The court rejected the argument that the defendant's guilty plea was involuntary or was taken in violation of Fed. R. Crim. P. 11 because the sentencing court failed to advise him of the sentence enhancements to which he was subject, pursuant to 18 U.S.C. § 3147 and U.S.S.G. § 2J1.7, because his crime occurred while he was released on bond awaiting trial. The court noted that no objection was raised at the colloquy and the issue was therefore reviewable for plain error. The court found no plain error, noting that the district court did advise the defendant that he would be sentenced under the guidelines, and that the statutory enhancement could have been for as little as one day, a "de minimis" increase.

***United States v. Pierre*, 120 F.3d 1153 (11th Cir. 1997)**: Defendant's unconditional plea of guilty, made knowingly, voluntarily, and with benefit of competent counsel, waives all non-

jurisdictional defects in that defendant's court proceedings, including speedy trial issues. To preserve appellate review of a non-jurisdictional defect while pleading guilty, the defendant must enter a "conditional plea" which must be in writing and must be consented to by court and by the government. The government's consent to such a plea requires express approval, *i.e.*, direct assent requiring no inference or implication. Silence or inaction by government is not consent. However, here, the guilty plea that was entered and accepted only on the reasonable, but mistaken, belief that defendant preserved speedy trial issues for appeal was, as matter of law, not knowing and voluntary.

United States v. Cunningham, 194 F.3d 1186 (11th Cir. 1999): As a condition of his guilty plea, defendant reserved the right to appeal only whether § 922(g)(8) required him to know that his possession of the firearm violated federal law. Nevertheless, because the defendant offered no argument on this issue on appeal, the court of appeals found that he abandoned it.

B. Plea Agreement - Breach.

United States v. Hedges, 175 F.3d 1312 (11th Cir. 1999): The defendant argued that the government violated its obligation under the plea agreement to recommend that he be sentenced based upon a lesser amount of loss. The defendant claimed the government reached a plea agreement by (1) endorsing the PSR's \$92 million loss estimate and adducing evidence at the sentencing hearing to support that estimate; (2) contending the defendant played a crucial role in the conspiracy; and (3) disputing the defendant's narrow interpretation of relevant conduct under U.S.S.G. § 1B1.3. The Eleventh Circuit held that this argument was barred absent plain error because the defendant failed to object at sentencing. The court then found no plain error, stating that the government did not violate the plea agreement because the agreement did not bind the government regarding the total loss, the level of the defendant's involvement in the conspiracy, or the proper interpretation of "relevant conduct."

C. Plea Agreement - Appeal Waiver Language.

Be aware (and beware) of the waiver of appeal language in the plea agreement. This is a common form of catch-22 in the Eleventh Circuit, especially the Middle District of Florida.

United States v. Howle, 166 F.3d 1166 (11th Cir. 1999): A plea agreement containing a defendant's knowing and voluntary waiver of his right to appeal was enforceable to bar the defendant's appeal of his sentence, even though the sentencing judge strongly encouraged him to appeal the sentence, and even though the legal issues the defendant sought to raise were difficult or debatable. In fact, the appeal waiver even precludes the appeal of blatant error. First, in footnote 6, the court stated:

We note that Howle, after the district court suggested that the case involved a difficult legal issue appropriate for appellate review, could have moved to withdraw his guilty plea. See Fed.R.Crim.P. 32(e). If the motion were granted, Howle then would have regained the right to appeal (and the Government would have regained the right to pursue the other counts in the indictment). Howle did not make such a motion.

Although the footnote is clearly dicta, it gives at least some opening in those situations where there is waiver language and where the guidelines sentence was not anticipated by the defendant at the time of the plea. In such a case, it may be worth a try to move to withdraw the plea based upon footnote 6. The other interesting footnote in the case is footnote 5 which speaks for itself. In describing that even blatant error can be waived by an appeal waiver clause, Judge Tjoflat indicates in footnote 5 that: "In extreme circumstances -- for instance, if the district court had sentenced

Howle to a public flogging -- due process may require that an appeal be heard despite a previous waiver". Note that Judge Tjoflat indicated that a public flogging MAY (not SHALL!) constitute a denial of due process.

***United States v. Benitez-Zapata*, 131 F.3d 1444 (11th Cir. 1997):** Pursuant to the plea agreement in this case, the defendant effectively waived his right to appeal the sentencing court's decision that he was a minor participant in the conspiracy and its refusal to review the government's decision not to move for a downward departure based on substantial assistance. The district court specifically questioned the defendant about waiver at the plea hearing, and the defendant acknowledged the terms of the waiver, which included issues appealed. The court also found that the record demonstrated the defendant's understanding of the significance of the waiver. Moreover, the defendant's waiver of the right to appeal the sentence was not rendered invalid by the district court's statement during the sentencing hearing that the defendant could appeal the sentence within 10 days, notwithstanding the defendant's claim that the statement made the waiver confusing. The statement was made as a closing remark at the sentencing hearing after the waiver was discussed and established at the plea hearing, and was consistent with the defendant's right to appeal under the exceptions to the waiver specified in the plea agreement.

***United States v. Buchanan*, 131 F.3d 1005 (11th Cir. 1997):** The defendant pled guilty pursuant to a plea agreement. In the agreement, the defendant waived his right to appeal. The defendant then sought to appeal an issue the plea agreement said the parties agreed to dispute at the sentence hearing. The court held that the defendant's waiver in the plea agreement of his right to appeal the sentence was enforceable because it was knowingly and voluntarily entered. The waiver was found to include the issues the parties agreed to dispute at the sentence hearing because the issues were not expressly exempted from the appeal waiver language in the plea agreement.

The court also stated that when a defendant attempts to appeal a sentence in the face of an appeal waiver, the government may file a motion to dismiss the appeal based upon a waiver and attach a copy of the plea agreement, any part of the plea colloquy related to the waiver, and any other part of the record that casts light on whether the defendant knowingly and voluntarily agreed to the waiver. In response, the defendant may put forward any part of the record that the government has not already brought to the appellate court's attention. Where it is clear from the plea agreement and plea colloquy, or from some other part of the record, that the defendant knowingly and voluntarily entered into a sentence appeal waiver, that waiver should be enforced without requiring briefing on the merits.

Cases where appeal waiver was not enforced:

***United States v. Petty*, 80 F.3d 1384 (9th Cir. 1996):** Waiver of appeal of an unanticipated error was not enforceable.

***United States v. Ready*, 82 F.3d 551 (2nd Cir. 1996):** Waiver of appeal did not cover issue of restitution and was not waived.

***United States v. Zink*, 107 F.3d 716 (9th Cir. 1997):** Waiver of appeal of sentence did not cover a restitution order.

***United States v. Agee*, 83 F.3d 882 (7th Cir. 1996):** A waiver of appeal, not discussed at the plea colloquy, was invalid.

***United States v. Ruelas*, 96 F.3d 1324 (9th Cir. 1996):** Waiver of appeal did not waive jurisdictional claim.

***United States v. Baramdyka*, 95 F.3d 840 (9th Cir. 1996):** An appeal waiver does not bar a claim of ineffective assistance of counsel.

D. CAVEAT on Defendant's Right to Appeal

Even if your client has an appeal waiver & even if he said he did not want to appeal *before* he was sentenced, be sure to thoroughly discuss the pros & cons of appeal with your client *after* sentencing. It is imperative that you personally visit your client after sentencing and discuss whether he wants to appeal. It is wise to confirm his decision in writing, with his signature, so there is no mistake later. At a minimum, send him a follow-up letter.

The Supreme Court noted in *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), that counsel's performance is clearly deficient if he "disregards specific instructions from the defendant to file a notice of appeal. . . ." Thus, if the client wants to appeal, you must file a notice of appeal, regardless of whether you think the appeal is frivolous. You can always file an *Anders* brief. See *Anders v. California*, 386 U.S. 738 (1967). However, if your client states he wants to appeal and you fail to file the notice of appeal, you are ineffective. If you fail to discuss his right to appeal after sentencing, and the 10 days lapse, and you receive a letter asking you to appeal on the 11th day, you have a problem that a simple visit with a confirmation letter after sentencing could have solved.

Montemoino v. United States, 68 F.3d 416 (11th Cir. 1995): Absent an express waiver of the right to appeal his sentence, a defendant who pleads guilty and who is sentenced under the guidelines has a right to direct appeal of his sentence. Because of that opportunity, a defendant has no right to raise guideline sentencing issues in a § 2255 proceeding. Therefore, if the defendant requests his attorney to file an appeal and counsel fails to do so, he is entitled to an out-of-time appeal on any sentencing issue, even without a showing that there would have been a viable ground for the appeal.

Although *Montemoino* excepted cases where there was an express waiver of the right to appeal the sentence, if the district court finds the defendant asked his attorney to appeal and the attorney did not appeal, the defendant will be granted a belated appeal almost without fail. Possible issues on appeal could include the voluntariness of the plea and an exception to the appeal waiver.

VI. Sentencing.

A. General Rules

United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995): *Lawrence* is a good case to read for its lessons on the importance of objections as they relate to the fact finding process at sentencing and the meaning of the preponderance of the evidence standard.

Although not as rigorous as the reasonable doubt or clear and convincing standards, the preponderance standard is not toothless. It is the district court's duty to ensure that the Government carries this burden by presenting reliable and specific evidence.

As one of our sister circuits noted:

[T]he Guidelines do not reduce district court judges to mere automatons, passive compilers of ciphers, or credulous naifs who must accept as canon all that which is presented to them regarding a defendant's involvement in the crime charged or conduct relevant thereto.... [T]he preponderance of the evidence standard ... does not relieve the sentencing court of the duty of exercising the critical fact-finding function that has always been inherent in the sentencing process.... [The standard signifies] a recognition of the fact that if the probation officer and the prosecutor believe that the circumstances of the offense, the defendant's role in the offense, or other pertinent

aggravating circumstances, merit a lengthier sentence, they must be prepared to establish that pertinent information by evidence adequate to satisfy the judicial skepticism aroused by the lengthier sentence that the proffered information would require the district court to impose.

Id. at 1566-1567 (quoting *United States v. Wise*, 976 F.2d 393, 402-03 (8th Cir.1992)).

Moreover, while the Guidelines allow a district court to “consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy,” U.S.S.G. § 6A1.3(a) (Nov. 1, 1994), this relaxed evidentiary standard does not grant district courts a license to sentence a defendant in the absence of sufficient evidence when that defendant properly objects to a PSR’s conclusory factual recitals. *See id.* § 6A1.3 comment. (“The court’s resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.”). The necessity of requiring reliable evidence in support of the Government’s conclusions is particularly manifest in cases such as this, where the quantity of drugs attributed to a defendant can have a marked impact on the length of his sentence. *See United States v. Morillo*, 8 F.3d 864, 870 (1st Cir.1993) (noting that “drug quantity profoundly affects sentence length”).

Id. at 1567.

Once the Government has presented proper evidence, the district court must either: (1) make an explicit factual finding as to the allegation; or (2) determine that no such finding is necessary because the matter controverted will not be taken into account in sentencing the defendant. Fed.R.Crim.P. 32(c)(3)(D). If the court declines to resolve a factual challenge because it is not relying on the disputed matter in determining the sentence, it must expressly set out in writing any disputed facts left unresolved. *Id.*; *see also Shukwit v. United States*, 973 F.2d 903, 904-05 (11th Cir.1992) (per curiam).

Id.

Because the defendants in *Lawrence* objected to the government’s approximation of the drug quantity attributable to them, the government was required to move forward with evidence supporting its position. The Court thus applied the clear error standard of review, because the defendants objected in the district court, to determine whether the district court clearly erred in finding that the government had proved the quantity attributable to each defendant by a preponderance of the evidence. *Id.* The Eleventh Circuit found that the district court had so erred. *Id.* at 1567-1569.

The district court primarily relied on the PSRs as the basis for its findings. Unfortunately, the PSRs did not provide the necessary evidentiary foundation to support the appellants’ sentences. . . .

The only other sources of evidence that could possibly support the court’s findings are the prosecutor’s brief proffers of evidence and the appellants’ admissions at their Rule 11 hearings. Like the PSRs, however, these sources do not sufficiently support the court’s findings. The proffers consisted of perfunctory summaries of the evidence that the Government stood ready to present and references to the video surveillance tapes that were entered into evidence at the separate trial of some of the appellants’ co-indictees. The district court heard no testimony on the quantity issue, did not require that any surveillance videotapes be entered into evidence at the

hearings, and did not examine any physical evidence. As a result, there is no evidence from the sentencing hearings for us to review. Moreover, no trial evidence exists because none of the appellants went to trial. . . .

The only testimonial evidence on the record relevant to the quantity calculation is the testimony the appellants gave at their Rule 11 hearings; this testimony does not, however, sufficiently support the scope of responsibility assessed or the facts and conclusions asserted in the PSR and adopted by the district court. Each appellant merely admitted that he distributed (or aided and abetted the distribution of) cocaine base in the vicinity of 3855 April Street on a specific day; this does not-by itself or in combination with the other information-make the appellants responsible for the cocaine base dealt in the vicinity over the following two months. . . .Finally, although evidence and testimony that was presented at another trial may be used in a defendant's sentencing hearing, the Government's references to the evidence presented at the trials of co-indictees is insufficient in this case: None of the appellants was given the opportunity to test its reliability or validity . . .nor is that evidence before us in any form that enables us to review the district court's findings in a meaningful way.

Id. at 1567-1568 (citations omitted).

In vacating the sentences and remanding for further proceeding, the Court concluded by stating:

In this case, the district court did not ensure-as it was obligated to-that the Government carried its burden of proof. As a result of this failure, the record in each appellant's case does not support the district court's findings. We therefore remand the appellants' cases to the district court for resentencing. *See [United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir.1993)]* (remanding for resentencing because the district court failed to make individualized findings and because the trial evidence did not support the quantity of drugs attributed to each appellant); *[United States v. Beasley, 2 F.3d 1551, 1561-1563 (11th Cir.1993)]*(remanding for resentencing because of the lack of a discernable factual basis for the appellants' sentences). In remanding, we express no opinion regarding whether the quantity of cocaine base the Government contended was properly attributable to each appellant may ultimately be proven correct. We do require, however, that the district court base its findings on reliable and specific evidence rather than on the conclusory language of a PSR, the sparse evidence given at a Rule 11 hearing, and the prosecution's mere reference to evidence adduced in the separate trials of co-indictees.

Id. at 1568-1569.

1. Object or Forfeit.

United States v. Jones, 899 F.2d 1097, 1103 (11th Cir. 1990), is the landmark - or at least the most often cited - case in the Eleventh Circuit on the requirement for objections at sentencing. *Jones* also introduced the requirement that the district courts conduct a *Jones* inquiry. After the court imposes sentence, it must offer the parties the opportunity to object. [*Jones* was later reversed on other grounds, it remains the law of the Eleventh Circuit.]

"Where the district court has offered the opportunity to object and a party is silent or fails to state the grounds for objection, objections to the sentence will be waived for purposes of appeal, and this court will not entertain an appeal based upon such objections unless refusal to do so would result in manifest injustice."

***United States v. Bostic*, 371 F.3d 865 (6th Cir. 2004):**

Therefore, we exercise our supervisory powers over the district courts and announce a new procedural rule, requiring district courts, after pronouncing the defendant's sentence but before adjourning the sentencing hearing, to ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised. If the district court fails to provide the parties with this opportunity, they will not have forfeited their objections and thus will not be required to demonstrate plain error on appeal. If a party does not clearly articulate any objection and the grounds upon which the objection is based, when given this final opportunity speak, then that party will have forfeited its opportunity to make any objections not previously raised and thus will face plain error review on appeal. Providing a final opportunity for objections after the pronouncement of sentence, "will serve the dual purpose[s] of permitting the district court to correct on the spot any error it may have made and of guiding appellate review."

Id. at 872-873 (quoting *United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990)) (footnote omitted).

***United States v. Weir*, 51 F.3d 1031 (11th Cir. 1995):** The government had not waived the issue by its failure to repeat its objection after sentence was imposed. "If the relevant objection is raised after the presentation of the [pre-sentence] report, however, but before the actual imposition of the sentence, *Jones* is satisfied."

2. Object or Admit.

***United States v. Wade*, 458 F.3d 1273 (11th Cir. 2006):** In his written response to the PSI, Wade objected to application of the Armed Career Criminal Act (ACCA), but only on the basis that "attempted burglary cannot be used as a predicate offense under the definition used [in] 18 U.S.C. § 924(e)." *Id.* at 1275. That objection focused on attempted burglary as a category of crime; it did not dispute the PSI's allegation that stated "Court documents" established that Wade had been convicted of the crime as a result of attempting to kick in the door of a residence and commit a theft inside. *Id.*

When the district court pointed out that the crime involved Wade attempting to kick the door in, Wade did not dispute that. Nor did he voice any disagreement with the prosecutor's statement that "in this case the defendant attempted to kick the person's door." *Id.* at 1276. In overruling Wade's objection, the district court acknowledged the general concerns about use of attempted burglary convictions for ACCA purposes, but explained, "when he's trying to kick in the door, [that] presents conduct which is narrow and offers the potential for violence." *Id.* Wade made no protest about the court's characterization of the actual facts underlying the conviction, nor did he question the source of those facts. *Id.*

On appeal, Wade argued that the district court erred in sentencing him as an armed career criminal because attempted burglary under Georgia law is not a violent felony within the meaning of § 924(e)(2)(B) and therefore cannot serve as one of the three predicate offenses. Wade also argued that his implicit admission throughout the sentence proceeding, even when coupled with the explicit one at oral argument on appeal, that he was convicted because he attempted to kick in the door of a residence, is immaterial under the categorical approach of *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159 (1990). The Eleventh Circuit disagreed.

It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes. . . . It is also established law that the failure to object to a district court's factual findings precludes the argument that there was error

in them. . . Finally, Wade also conceded at oral argument that his attempted burglary conviction resulted from an attempt to kick in the door of a residence to commit a theft, and we accept that concession. . . For all of these reasons, we will treat the prior conviction we are considering as one for attempted burglary of a dwelling, which is how it was treated in the district court.

Id. at 1277.

***United States v. Bennett*, 472 F.3d 825 (11th Cir. 2006):** "Bennett failed to object to the facts of his prior convictions as contained in his PSI and addendum to the PSI despite several opportunities to do so; thus, he is deemed to have admitted those facts. . . the district court did not err in relying on the undisputed facts in Bennett's PSI to determine that his prior convictions were violent felonies under the ACCA and, therefore, that he was an armed career criminal. *Id.* at 833-834.

***United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006):** The defendant's "failure to contest the 37 grams imputed in the PSR constituted an admission of that quantity."

***United States v. Burge*, 407 F.3d 1183, 1191 (11th Cir. 2005):** The defendant "waived his objections to the factual statements about his relevant conduct in the presentence report and, therefore, admitted the facts in that report."

***United States v. Hedges*, 175 F.3d 1312 (11th Cir. 1999):** The defendant did not object to the conclusory statements set forth in the PSR to support the loss amount. Thus, the statements were undisputed, and the sentencing court was allowed to rely on them despite the absence of supporting evidence. These undisputed statements were sufficient to support the finding that the defendant caused or reasonably foresaw the acts that resulted in the \$92 million loss because the statements established that this defendant played an important role in the overall conspiracy.

***United States v. Stafford*, 258 F.3d 465, 475-76 (6th Cir. 2001):** The defendant's failure to object to the PSR was an admission as to the drug quantities and types and thus provided the factual basis for the sentencing enhancement.

Sample PSR Objection (for ACCA purposes - adapt as needed for career offender or other sentencing issues). This is just one sample outline. You will need to add specificity and clarity based on your own case either in the PSR Objection or in argument at the sentencing hearing.

Mr. Smith objects to the following paragraphs. . . .

Paragraphs #-# & #-#: Mr. Smith objects to being sentenced under the Armed Career Criminal Act, 18 U.S.C. § 924(e). [explain reasons, such as not a generic burglary, improper reliance on the otherwise clause, etc.].

Based on *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) (holding that failure to object to allegations of fact in a PSR "admits those facts for sentencing purposes"), Mr. Smith specifically objects to all the descriptions, characterizations, and information (factual and legal) contained in these paragraphs.

If and as appropriate, you might also make a claim such as . . . Mr. Smith further objects to the inclusion of these paragraphs and their contents based upon *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), and *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219 (1998).

Finally, Mr. Smith submits that the descriptions, characterizations, and information in these paragraph are based upon documents other than those allowed by *Shepard v. United States*, 544 U.S.

13, 26, 125 S. Ct. 1254, 1263 (2005) (holding “that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information”).

3. Be specific. State all your grounds for the objections.

Comprehensive written objections to the PSR and addendum are the key to preserving sentencing issues. Renew objections at the sentencing hearing to be safe.

Even if the defendant objects at sentencing, when he does not clearly state the grounds for the objection in the district court, he is relegated to plain error review on appeal. *United States v. Massey*, 443 F.3d 814, 818 (11th Cir. 2006); *See also United States v. Zinn*, 321 F.3d 1084, 1087 (11th Cir. 2003).

***United States v. Massey*, 443 F.3d 814, 819 (11th Cir. 2006):** The Eleventh Circuit reiterated its precedent that,

[F]or a defendant to preserve an objection to her sentence for appeal, she must “raise that point in such clear and simple language that the trial court may not misunderstand it.” *United States v. Riggs*, 967 F.2d 561, 565 (11th Cir.1992).

When the statement is not clear enough to inform the district court of the legal basis for the objection, we have held that the objection is not properly preserved. *Id.* The defendant also fails to preserve a legal issue for appeal if the factual predicates of an objection are included in the sentencing record, but were presented to the district court under a different legal theory. *See United States v. Reyes-Vasquez*, 905 F.2d 1497, 1499-1500 (11th Cir.1990).

Id. at 819.

In *Massey*, the record established that defense counsel, "in objecting to the enhancement for obstruction of justice, repeatedly referenced the effect of Zoloft and heroin on her mental state during her stay in the hospital. In so doing, he did not specifically utter the words 'intent' or 'mens rea,' and he often referred to the fact that there was no 'material hindrance,' a different legal theory from 'willfulness,' when discussing this issue." *Id.* Notwithstanding, the Court found, "in reviewing the record in its entirety, that the issue of Massey's mental state at the time of the attempted concealment, and, therefore, her capacity to commit the obstruction of justice, was adequately presented to the district court. Thus, we review the issue for clear error." *Id.*

***United States v. Bennett*, 472 F.3d 825, 832 (11th Cir. 2006):**

A sentencing court's findings of fact may be based on undisputed statements in the PSI. *United States v. Wilson*, 884 F.2d 1355, 1356 (11th Cir. 1989). Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact. *United States v. Sepulveda*, 115 F.3d 882, 890 (11th Cir. 1997). However, challenges to the facts contained in the PSI must be asserted with specificity and clarity. *See United States v. Aleman*, 832 F.2d 142, 145 (11th Cir. 1987). Otherwise, the objection is waived. *See United States v. Shelton*, 400 F.3d 1325, 1330 (11th Cir. 2005); *United States v. Norris*, 50 F.3d 959, 962 (11th Cir. 1995).

***United States v. Gonsalves*, 121 F.3d 1416 (11th Cir. 1997):** While the defendant did object, in general, to the district court's failure to adjust his sentencing guidelines downward for acceptance of responsibility, he did not object *specifically* to the district court's consideration of past criminal

activity as one factor. Noting that the properly considered and articulated factors were sufficient to support the district court's denial of the adjustment, the Eleventh Circuit refused to hear the defendant's challenge to the erroneous consideration of an additional factor (past criminal activity) because that same argument was not presented to the district court.

***United States v. Bougie*, 279 F.3d 648, 650-51 (8th Cir. 2002):** Court could accept specific facts in PSR as true because the defendant did not object to specifics.

***United States v. Williams*, 469 F.3d 963 (11th Cir. 2006):** *Williams* is another example of why when you object, you have state all your arguments. On appeal, the defendant argued that the district court erred by applying the mandatory minimum term of life imprisonment under § 841(b)(1)(A)(ii) for two reasons. One was preserved, one was not, resulting in two different standards of review.

First, *Williams* argued that, in order to be subject to mandatory minimum term of life imprisonment under § 841(b)(1)(A)(ii)(II), he had to be involved in a transaction involving five or more kilograms of cocaine after his second prior conviction became final. He contended that the mandatory life sentence was erroneously imposed because, after his June 28, 2005 conviction became final, he was not involved in a violation of § 841(a) involving five or more kilograms of cocaine and, at most, conspired to possess with intent to distribute two kilograms of cocaine. This argument regarding the interpretation and application of § 841(b)(1)(A) was preserved and was reviewed *de novo*. *Id.* at 965-968.

Alternatively, *Williams* argued that there was insufficient time and criminal conduct between his state conviction and federal arrest to warrant the use of the state conviction for enhancement purposes. He pointed out that slightly more than two months elapsed between his conviction and the end of the conspiracy and the extent of his involvement after his conviction was telephone conversations concerning possessing with intent to distribute cocaine. *Williams* did not object before the district court on the ground that his second prior conviction could not be used for enhancement purposes due to insufficient time and criminal conduct. Accordingly, this argument was reviewed for plain error.

In order for an error to be plain, it must be obvious or clear under current law. . . . “[W]here neither the Supreme Court nor this Court has ever resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue.” . . .

Id. at 966 (citations omitted).

If there was an error in counting his June 28, 2005 conviction as a prior conviction under § 841(b)(1)(A), *Williams* cannot establish that it was plain. The test as to whether to use a prior conviction to enhance a sentence under § 841(b)(1)(A) is not mere passage of time; rather “the focus of the inquiry is on the degree of criminal activity that occurs after a defendant's conviction for drug-related activity is final rather than when the conspiracy began.” . . . Although less than two months elapsed between the time *Williams*'s prior conviction became final and his arrest on September 20, 2005, the focus of the inquiry is on the degree of criminal activity following the prior conviction's finality. . . . Furthermore, we have not set a minimum time limit. . . .

Williams, 469 F.3d at 967 (citations omitted). The Court also noted the circuit split on the issue. *Id.* at 967-968.

Accordingly, *Williams* cannot show that his attempt to obtain two kilograms of cocaine, which was prevented by the actions of law enforcement officers, was clearly or obviously an insufficient degree of criminal activity so as to preclude the use of his second prior conviction for enhancement purposes.

Id. at 968.

4. Object to anything that occurs at sentencing, but is not covered in your objections to the PSR, e.g., the court's failure to make findings.

United States v. Gregg, 179 F.3d 1312 (11th Cir. 1999): The defendant waived his objection to the absence of more factual findings by the district court by not requesting more detailed findings at sentencing.

5. Exception to Objection Requirement at Sentencing: 18 U.S.C. § 3553(c)(1).

Pursuant to 18 U.S.C. § 3553(c)(1), a district court is required to state, in open court, the reason for its particular sentence, and if the sentence “is of the kind, and within the range [recommended by the Guidelines] and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range.” 18 U.S.C. § 3553(c)(1).

United States v. Williams, 438 F.3d 1272, 1274 (11th Cir. 2006): The Eleventh Circuit has rejected the government's argument that by not objecting in the district court, a defendant abandons his claim under § 3553(c)(1) and our standard of review is for plain error only. The Court cited its pre-*Booker* decision in *United States v. Veteto*, 920 F.2d 823, 826 (11th Cir.1991): “Congress has specifically proclaimed that a sentencing court shall state ‘the reason for imposing a sentence [exceeding 24 months] at a particular point within the range.’ ... When a sentencing court fails to comply with this requirement, the sentence is imposed in violation of law” *Williams*, 438 F.3d at 1274 (quoting *Veteto*, 920 F.2d at 826) (alterations in original) (emphasis removed).

United States v. Bonilla, 463 F.3d 1176 (11th Cir. 2006): The question of whether a district court complied with 18 U.S.C. § 3553(c)(1) is reviewed *de novo*, even if the defendant did not object below.

6. The party does not waive an objection at sentencing where the issue is not apparent until written judgment is entered.

United States v. Bull, 214 F.3d 1275 (11th Cir. 2000): The court upheld the sentencing court's imposition of mental health treatment for anger control as a special condition of supervised release, unrelated to the nature of the conviction for use of an unauthorized access device, in violation of 18 U.S.C. § 1029(a)(2). The court rejected the government's argument that the defendant had waived the issue, pointing out that he could not have objected to it because the court first required the treatment in its written judgment.

7. Be sure your client shows up for sentencing.

United States v. Jordan, 216 F.3d 1248 (11th Cir. 2000): The court held that a defendant who voluntarily absents himself from sentencing by becoming a fugitive, and who is then sentenced in absentia in accordance with Fed. R. Crim. P. 43, waives his right, under 18 U.S.C. § 3552, to have ten days to review the PSR. Citing *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir.1994), the court concluded that flight in this situation warrants a waiver because it creates an undue burden on the government (due to the delay and uncertainty), and a significant interference with the operation of the judicial process (due to the disruption of finality).

United States v. Davenport, 151 F.3d 1325 (11th Cir. 1998): Shortly after his guilty plea, the defendant absconded and could not be located. Twenty-two days prior to the scheduled sentencing, the defendant's attorney received the PSR in the case. The day before the scheduled

sentencing, the defendant was apprehended. The next morning, the defendant had three hours to review the PSR with his attorney. The defense attorney moved for a continuance on the grounds that he needed additional time to review the PSR with his client. In denying the continuance, the district court held that the lack of time to evaluate the PSR was attributable to the defendant and his conduct. On appeal, the Eleventh Circuit reversed holding that 18 U.S.C. § 3552(d) unambiguously provides a criminal defendant with at least ten days in which to review his PSR before sentencing. The government argued that the defendant had waived the ten-day period by his actions. The Eleventh Circuit held that a defendant's flight is not a manifestly clear indication of a knowing and voluntary relinquishment of the statutory right to review a PSR. Thus, a defendant does not waive his right to a PSR solely by absconding prior to sentencing, as long as he shows up for sentencing.

8. Don't invite the Error!

In *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006), the Eleventh Circuit did not reach the merits of the defendant's arguments because it concluded that he induced or invited the ruling he claimed was error. "It is a cardinal rule of appellate review that a party may not challenge as error a ruling or other trial proceeding invited by that party." *United States v. Ross*, 131 F.3d 970, 988 (11th Cir.1997) (quotations omitted). "The doctrine of invited error is implicated when a party induces or invites the district court into making an error." *United States v. Stone*, 139 F.3d 822, 838 (11th Cir.1998). "Where invited error exists, it precludes a court from invoking the plain error rule and reversing." *United States v. Silvestri*, 409 F.3d 1311, 1327 (11th Cir.2005) (quotations omitted).

Love induced or invited the district court to impose a sentence that included a term of supervised release. In his plea agreement and again at the plea colloquy, he expressly acknowledged the court could impose a term of supervised release of up to five years. At his sentencing, he did not object to a sentence including supervised release. To the contrary, Love's counsel repeatedly requested that in lieu of additional jail time the court sentence Love to time served followed by supervised release, and even suggested the court impose a term of two years' supervised release. Thus, Love is precluded from claiming the court erred in sentencing him to a term of five years' supervised release.

Id. at 1157.

B. Sentencing - in General.

United States v. Dudley, 463 F.3d 1221 (11th Cir. 2006): The defendant argued that USSG § 2A6.1(b)(4) was applied in violation of the Confrontation Clause because the district court relied on hearsay testimony at sentencing. Because he did not raise this argument before the district court, this claim was reviewed only for plain error. *Id.* at 1227. The defendant did not get past the second prong of the plain error analysis – the "plain" prong – because the Court found his argument was foreclosed by *United States v. Chau*, 426 F.3d 1318, 1323 (11th Cir.2005), wherein the Court held that a district court's reliance on hearsay testimony at a sentencing hearing is not plain error. *Id.* Because the Court ruled that *Chau* controlled, it held: "If the district court did rely on hearsay testimony to enhance Dudley's sentence, it did not plainly err in doing so." 463 F.3d at 1227.

The defendant also argued, for the first time on appeal, that his sentence violated his Sixth Amendment due process rights because of a USSG § 2A6.1(b)(4) enhancement. Specifically, he argued that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), because the enhancement was based on facts he did not admit. Because this argument was raised for the first time on appeal, it was also

reviewed only for plain error. 463 F.3d at 1227-1228.

***United States v. Smith*, 459 F.3d 1276, 1298-1299 (11th Cir. 2006)**: Smith was sentenced to 188 months (15 years, 8 months). On appeal, Smith requested resentencing, arguing that, prior to sentencing, he was not given formal notice of either (1) the enhanced sentencing range arising from a prior conviction "relating to the sexual exploitation of children," 18 U.S.C.A. § 2251(d); or (2) the requirement that he register as a sex offender as a condition of his supervised release.

At arraignment on the initial indictment, the court advised Smith that the § 2251(a) charge carried a 10-year minimum and 20-year maximum sentence. According to the statute effective at the time, the enhancement (based on his prior conviction) increased the sentencing range from 10-20 years to 15-30 years. 18 U.S.C.A. § 2251(d) (Apr. 2003 amendments). At arraignment on the superseding and second superseding indictments, Smith waived formal readings of the indictments. At no point prior to receiving the PSR was he advised that he might face anything more than a 10-20 sentence. Smith asserted this was a violation of his constitutional right to due process.

The Eleventh Circuit noted it was aware of no case law mandating a formal reading of the Federal Sentencing Guidelines. "The statute under which he was charged, 18 U.S.C. § 2251, specifically delineates the sentencing range for violations of its provisions, both with and without prior offenses relating to sexual exploitation of children. Moreover, 18 U.S.C. § 3583(d) mandates registration as a condition of supervised release for any person described in 18 U.S.C. § 4042(c)(4), a category of persons that includes individuals convicted of offenses categorized as 'Sexual Exploitation and Other Abuse of Children' (including both 18 U.S.C. § 2251 & 2252A). 18 U.S.C. § 4041(c)(4), 18 U.S.C. ch. 110; USSG § 5D1.3(7). The statutory scheme therefore mandated Smith's sentence." 459 F.3d at 1298-1299. Further, the Court ruled that the district court did not plainly err by not providing additional notice of the minimum sentencing provisions.

***United States v. Harness*, 180 F.3d 1232 (11th Cir. 1999)**: The court reversed for plain error an aggravating role sentence enhancement based on U.S.S.G. § 3B1.1(c), but affirmed an abuse of trust enhancement based on § 3B1.3, finding no plain error. Defendant, an accountant employed by the Red Cross, was convicted of illegal diversion of federal funds intended to benefit needy individuals facing eviction from their homes. The sentencing court imposed an aggravating role enhancement because the defendant had responsibility over the property and assets of the victim. The court held that this was an improper enhancement, because the enhancement requires that the defendant "organize, lead, manage, or supervise *another participant* in the criminal scheme." Because defendant was sentenced to the high end of the applicable guideline range, the error was plain and required resentencing even in the absence of defense objection at sentencing. The court, however, rejected the defendant's challenge to the enhancement based on abuse of a position of trust. The Court noted that defendant failed to object at sentencing that the only victim of his fraud was the U.S. government, with whom he did not have a position of trust. Citing *United States v. Hedges*, 175 F.3d 1312 (11th Cir. 1999), the court observed that the PSR identified the Red Cross as the victim, and that defendant failed to object to that conclusory statement, and the sentencing court could therefore rely on it. Given that factual premise, the defendant did abuse a position of trust, since he was a director of the very Red Cross program from which he was diverting money for personal use.

***United States v. Garrison*, 133 F.3d 831 (11th Cir. 1998)**: Appellant's counsel did not object to the \$2,500,000 fine when it was imposed. When the district judge asked if Appellant's counsel had "any objection to the Court's finding of fact and conclusions of law or to the manner in which sentence was pronounced", the following colloquy ensued:

Counsel: Your Honor, to preserve the record, we do object on the abuse of trust and role in the offense. Additionally, although not argued to you today, we footnoted in our sentencing memorandum our objection to

an upward departure in the fine level which the Court has imposed here.

Court: Yes.

Counsel: And we would state that we respectfully do not believe that the record reflects that the elements for such an upward departure exist in this case. And therefore, we wish to preserve our appellate issues on that.

Court: Certainly. All right. That is the judgment of the Court.

The Eleventh Circuit concluded that Appellant received reasonable notice of the potential of an upward departure in her fine because Appellant acknowledged that she received notice of the possibility of upward departure in her fine six days prior to her sentencing in the revised PSR, she objected to an upward departure in her sentencing memorandum, and she relied on that objection at sentencing. She acted upon this notice in her responsive sentencing memorandum and was content to rely upon her footnote response in that memorandum at sentencing, although the district judge gave her counsel the opportunity to object at sentencing following his statement of the reasons for upward departure in the fine. The district judge based his reasons for the upward departure in Appellant's fine on facts found in the PSR, which Appellant asserted to the court that she had reviewed, understood, and accepted as accurate. Appellant admitted that at the sentencing hearing, she did not object specifically to the lack of notice of the upward departure in the fine. Therefore, the standard of review was plain error, and the court found there was no plain error regarding notice of the upward departure in Appellant's fine.

United States v. Hernandez, 160 F.3d 661 (11th Cir.1998): The Eleventh Circuit found that the district court erred in departing upward, pursuant to U.S.S.G. § 4A1.3 (defendant's criminal history is understated), where the district court relied, in part, on the defendant's arrest record in the PSR without any additional evidence of the defendant's specific conduct in connection with said arrests. The court found, however, that this was harmless error because the probation office had miscalculated the defendant's criminal history score in favor of the defendant. Thus, the defendant should have been in the higher criminal history category. What the court did not discuss is that the government never objected to the criminal history level at the time of sentencing, nor did the government cross-appeal based upon the erroneous calculation of the criminal history.

Additionally, the defendant objected to the imposition of a fine. However, the defendant did not raise said objection in the district court. Thus, the Eleventh Circuit reviewed under a "plain error" analysis. The court held that the district court need not make specific findings with regard to the fine provided that the record reflects the district court's consideration of pertinent factors prior to imposing the fine. Finding such evidence in the record, the Eleventh Circuit affirmed the imposition of the fine. The court indicated, however, that when the record provides no guidance as to the court's reasons for imposing a fine, the case must be remanded so that factual findings can be made.

United States v. Bozza, 132 F.3d 659 (11th Cir. 1998): The defendant's sentence was enhanced pursuant to 18 U.S.C. § 3147 and U.S.S.G. § 2J1.7, because the charged offenses were committed while the defendant was released on bond. The defendant had pled guilty to impersonating a federal officer and travel fraud. Said offenses were committed while the defendant was released on bond in an unrelated case. After the defendant pled guilty to the impersonation and travel fraud charges, the government filed a notice to enhance his sentence pursuant to 18 U.S.C. § 3147 and U.S.S.G. § 2J1.7. The trial court imposed a consecutive sentence because of the fact the crimes were committed while the defendant was on bond. The defendant appealed, arguing that he never received notice of the enhancement prior to entering his plea of guilty, that § 2J1.7 commentary requires he receive sufficient notice before the government may seek such an enhancement, and that "sufficient" means prior to the trial or the entry of the plea. The defendant also

argued that the lack of notice violated Fed. R. Crim. P. 11, and thus invalidated his guilty plea. The government responded that the defendant was on sufficient notice on three occasions: when he signed his bond for his prior conviction; prior to sentencing, when the government filed a notice seeking enhancement; in the revised PSR. The court of appeals held that § 2J1.7 does not require a district court to notify the defendant of the sentencing enhancement prior to accepting his/her guilty plea. The court acknowledged that this position was contrary to the position of the Fifth Circuit in *United States v. Pierce*, 5 F.3d 791, 793 (5th Cir. 1993). In reaching its decision, the Eleventh Circuit also cited *United States v. Browning*, 61 F.3d 752 (10th Cir. 1995). In that case, it was undisputed that the only notice the defendant received concerning the sentencing enhancement came from the PSR. The Tenth Circuit held that the notice of enhancement was sufficient because the defendant received the notice prior to sentencing and, thus, had the opportunity to object to the enhancement. The Eleventh Circuit found *Browning* persuasive and held that the defendant in the instant case had notice of the enhancement prior to the sentencing hearing and had the opportunity to object.

***United States v. Kersey*, 130 F.3d 1463 (11th Cir. 1997):** Since the defendant failed to preserve an objection, under the Ex Post Facto Clause, to the district court's failure to use the sentencing guidelines manual in effect at the time of the defendant's commission of the offense, "we will review his Ex Post Facto argument only if failure to do so would result in manifest injustice. *See United States v. Jones*, 899 F.2d 1097, 1103 (11th Cir.), *cert. denied*, 498 U.S. 906 (1990)." The court found "no manifest injustice in refusing to review" the error where the sentence the defendant actually received -- 15 months -- fell within the guideline range that the defendant himself claimed to be applicable.

***United States v. Masters*, 118 F.3d 1524 (11th Cir. 1997):** When the sentencing judge was wrong on the guidelines issue, the prosecutor tried to give judge another avenue to upward depart. (The Eleventh Circuit called the prosecutor's behavior reprehensible in a footnote because the prosecutor was duty bound to inform the court that it could not do what it was doing.) Defense counsel objected to the upward departure and continued to object, but the defendant overrode counsel and told the judge to proceed. The Eleventh Circuit held that even though the court erred and everyone knew that the court erred, the fact that the defendant overrode counsel's objections meant that he knowingly waived the objection. Plain error did not apply because of the defendant's own objections. (The defendant is serving an additional 119 months.)

Moral: Reprehensible prosecutors and uncontrollable clients (who are probably just scared) = an extra 119 months and that is ok.

***United States v. Antonietti*, 86 F.3d 206 (11th Cir. 1996):** Counting seedlings as marijuana plants to calculate the base offense level was plain error affecting substantial rights and warranting vacatur of the sentences.

***United States v. Reese*, 67 F.3d 902 (11th Cir. 1995):** The trial court erred by attributing to the defendants all the cocaine distributed by the conspiracy while the defendants were involved in the conspiracy, on the grounds that the defendants could have reasonably foreseen such distribution, without considering the scope of criminal activity that each defendant agreed to undertake. This was error because the commentary to U.S.S.G. § 1B1.3, which is binding under *Stinson v. United States*, 508 U.S. 36, 113 S. Ct. 1913 (1993), was amended to require that defendants be held accountable for other conduct that is reasonably foreseeable and within the scope of criminal activity that the defendant agreed to undertake. The court also noted that although the defendants did not mention change in the circuit's law due to the amendment or the amendment's commentary, they had objected to the quantities of cocaine attributed to them. This was held to be sufficient to preserve the issue for appellate review.

***United States v. Smith*, 39 F.3d 1143 (11th Cir. 1994):** The government's objection at sentencing to the downward departure preserved the issue of the district court's authority to depart,

although the government did not articulate its argument before the district court in detail.

***United States v. Barajas-Nunez*, 91 F.3d 826, 833 (6th Cir. 1996)**: The Sixth Circuit concluded it was plain error for a sentencing court to disregard the guidelines because "[p]ermitt[ing] sentencing courts to disregard governing law would diminish the integrity and public reputation of the judicial system."

***United States v. Ivey*, 83 F.3d 1266 (10th Cir. 1996)**: The government's failure to object to a presentence report waived its complaint.

***United States v. Perkins*, 89 F.3d 303 (6th Cir. 1996)**: Orally raising an issue at sentencing preserved it for appeal.

***United States v. Byerley*, 46 F.3d 694 (7th Cir. 1996)**: The government waived an argument by taking an inconsistent position at sentencing.

***United States v. Martinez-Vargas*, 321 F.3d 245, 249 (1st Cir. 2003)**: Defendant waived or forfeited objection to PSR by not filing in timely manner.

***United States v. Diaz*, 176 F.3d 52 (2d Cir. 1999)**: Defendant failed to preserve sentencing claim for appeal by failing to object to PSR's 4-level enhancement.

***United States v. Aramony*, 166 F.3d 655, 662 (4th Cir. 1999)**: Mere objection by defendant to accuracy of PSR without affirmative showing that information is inaccurate leaves district court free to adopt findings of PSR.

***United States v. Clark*, 139 F.3d 485, 490 (5th Cir. 1998)**: If defendant fails to submit affidavits or other evidence to rebut information contained in PSR, sentencing court may adopt PSR without "further inquiry or explanation."

***United States v. Wing*, 135 F.3d 467, 469 (7th Cir. 1998)**: By failing to object at sentencing hearing, defendant waived right to object to PSR finding that he had supervisory role in illegal gambling operation.

***United States v. Overholt*, 307 F.3d 1231, 1251- 52 (10th Cir. 2002)**: Court may rely on PSR to apply aggravating role enhancement because defendant did not challenge PSR until sentencing hearing.

***United States v. Saro*, 24 F.3d 283, 290-91 (D.C. Cir. 1994)**: Defendant waived right to object to factual allegations because objections to PSR not made in timely manner; plain error, however, required resentencing.

C. Sentencing - Allocation

***United States v. Prouty*, 303 F.3d 1249 (11th Cir. 2002)**: Because the defendant failed to object to the failure of the court to grant him his right to allocution, the issue was reviewed on appeal for plain error. Because Rule 32(c)(3)(C), FRCP, specifically requires the district court to offer the defendant the opportunity to allocute, the court's failure to do so was a "clear" or "obvious" error. *Id.* at 1252. The court then held that "failing to give a defendant the opportunity to speak to the court directly when it might affect his sentence is manifestly unjust. Moreover, the right of allocution is 'the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process.'" *Id.* at 1253. Because the defendant was not sentenced to the lowest possible sentence, his sentence was vacated and the case was remanded for resentencing. *Id.*

***United States v. Ramsdale*, 179 F.3d 1320 (11th Cir. 1999)**: The Court rejected the argument that the sentencing court failed to seek allocution at the resentencing, noting that the defendant did not object to this at the time, and that no "manifest injustice" occurred because of the "limited nature" of the resentencing. Also, he had been allowed to allocute at the original sentencing.

D. Sentencing - Restitution.

***United States v. Morris*, 286 F.3d 1291 (11th Cir. 2002):** On appeal, Morris argued that the district court violated Federal Rule of Criminal Procedure 11 by ordering restitution where it failed to advise him, before he pled guilty, of the possibility that such an order might be issued. Because he did not raise the Rule 11 violation in the district court, it was reviewed for plain error on appeal.

The government conceded that Morris was not made aware of the possibility of an order of restitution at either the plea hearing or in the plea agreement. *Id.* at 1293. Thus, the Eleventh Circuit found that because the district court erred by failing to inform Morris of the possibility of restitution, it had to determine whether the error affected his substantial rights. *Id.* at 1294. In this regard, the Court noted:

Both the plea agreement and the plea colloquy, however, informed Morris that he faced a maximum fine of \$250,000 on the conspiracy to defraud count and a fine on the conspiracy to launder money count of the greater of \$500,000 or twice the value of the transaction. Because Morris faces a restitution order that is below the amount he was informed he could face in fines, the government contends that the his substantial rights were not impaired.

This is a question of first impression for this court. In *United States v. McCarty*, 99 F.3d 383 (11th Cir.1996), we concluded that a defendant's substantial rights were not affected when a district court failed to mention specifically the possibility of restitution but the defendant had been fully advised of his obligation to make restitution in the plea agreement. *See id.* at 386-87. Morris, however, was not made aware of the possibility of restitution in either the plea agreement or the plea hearing.

Although Federal Rule of Criminal Procedure 11(c) requires the district court to explain a defendant's liability for both fines and restitution, we hold that failure to do so does not impact a defendant's substantial rights where he was warned of a potential fine larger than the actual amount of restitution ordered. Here, the restitution order was considerably less than the fine Morris was warned of at the time of his guilty plea. In a case that involved an earlier version of Rule 11, the Supreme Court stated that "matters of reality, and not mere ritual, should be controlling." *McCarthy v. United States*, 394 U.S. 459, 467-68 n. 20, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969) (citation omitted). We agree with the holding of seven of the eight circuits to have ruled on this question that a defendant "is not prejudiced so long as his liability does not exceed the maximum amount that the court informed him could be imposed as a fine. It is the amount of liability, rather than the label 'restitution,' that affects [a defendant's] substantial rights." *United States v. Glinsey*, 209 F.3d 386, 395 (5th Cir.2000). Accordingly, we conclude that the district court's failure to mention the possibility of restitution was not plain error.

Id. at 1294-1295 (footnote omitted, but cases related below).

In the footnote omitted above, the court cited the First, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits, which agreed with the Fifth Circuit. *See United States v. Raineri*, 42 F.3d 36, 42 (1st Cir.1994) (holding that error is harmless where defendant is required to pay restitution in an amount less than the potential fine of which he was warned); *United States v. Gabriele*, 24 F.3d 68, 71 (10th Cir.1994) (holding that defendant's substantial rights not impaired when ordered to pay \$100,000 in restitution when he knew he could be fined up to \$750,000); *United States v. Fox*, 941 F.2d 480, 484-85 (7th Cir.1991) (holding that decision to plead guilty not prejudiced by court's failure to advise of possibility of restitution when defendant had notice of a possibly greater fine); *United States v.*

Miller, 900 F.2d 919, 921 (6th Cir.1990) (holding that error was harmless where defendant was required to pay restitution in an amount less than the maximum possible fine amount of which he had knowledge); *United States v. Pomazi*, 851 F.2d 244, 248 (9th Cir.1988), *overruled in part on other grounds*, *Hughey v. United States*, 495 U.S. 411, 110 S.Ct. 1979 (1990) (holding that there is no surprise or prejudice in failure to mention restitution in Rule 11 hearing when defendant was told of potential liability of \$500,000 and \$64,229 restitution order imposed); *United States v. Fentress*, 792 F.2d 461, 466 (4th Cir.1986) (holding that there is no surprise or prejudice by the imposition of \$38,000 restitution order when defendant might have been ordered to pay a maximum fine of \$40,000).

Only the Second Circuit took the opposite view. *See United States v. Showerman*, 68 F.3d 1524, 1528 (2d Cir.1995) (holding that the failure to mention the possibility of restitution at the Rule 11 hearing is not harmless error even when the restitution imposed is less than the maximum fine the defendant understood he might receive).

The *Morris* Court then moved on to the offense level enhancement for abuse of position of trust, which the defendant objected to, thereby properly preserving the issue for appellate review. The majority reversed and remanded on this issue, finding that said enhancement was not warranted on the facts of this case. *Id.* at 1300. Dissenting in part, Judge Hull would have affirmed the enhancement, relying, *inter alia*, on *United States v. Hedges*, 175 F.3d 1312, 1315 (11th Cir. 1999), (noting defendant "did not object to the statements in the PSI" and thus "these statements were undisputed, and the court was permitted to rely on them despite the absence of supporting evidence"). *Morris*, 286 F.3d at 1303 n.3.

***United States v. Romines*, 204 F.3d 1067 (11th Cir. 2000):** While on supervised release, the defendant absconded and stole money from someone unrelated to the offense for which he was on supervised release. At the revocation and sentencing hearing, the district court ordered him to pay restitution for the money he stole when he absconded from supervised release. The defendant failed to object to the restitution order at sentencing. The Eleventh Circuit held that the restitution order was plain error because it ordered restitution for conduct for which restitution was not authorized under the Victim and Witness Restitution Act, 18 U.S.C. §§ 3556, 3663(a)(1). Finding that the defendant could not be ordered to pay restitution for a crime for which he had not been convicted, the Eleventh Circuit vacated the judgment of restitution. (In so doing, the Court did not mention whether the error seriously affected the fairness, integrity, and public reputation of the judicial proceedings, presumably because an unauthorized sentence necessarily has such effect.)

***United States v. Miranda*, 197 F.3d 1357, 1359 (11th Cir 1999):** The defendant was convicted of conspiracy to launder money based on conduct that occurred before the enactment of the substantive money laundering statutes. The Eleventh Circuit held that this "naked ex post facto violation" constituted plain error. (The court did not mention whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.)

***United States v. Stinson*, 97 F.3d 466 (11th Cir. 1996):** The district court may delegate to the U.S. Probation Office the authority to set the amount of monthly restitution payments to be made by the defendant during supervised release. The defendant's failure to timely object to the district court's restitution order constitutes a waiver of the issue for appellate purposes.

E. Resentencing the Second Time Around.

***Bousley v. United States*, 523 U.S. 614 (1998):** This case started before the Supreme Court decided *Bailey v. United States*, 516 U.S.137 (1995). Petitioner pled guilty to drug possession with intent to distribute, 21 U.S.C. § 841(a)(1), and to "using" a firearm"during and in relation to a drug trafficking crime," 18 U.S.C. § 924(c)(1), but reserved the right to challenge the quantity of drugs

used in calculating his sentence. He appealed his sentence, but did not challenge the validity of the plea. The Eighth Circuit affirmed.

Subsequently, Petitioner sought habeas relief, claiming his guilty plea lacked a factual basis because there was no connection between the firearms found in the bedroom of the house and the garage where the drug trafficking occurred. The district court dismissed the petition on the ground that a factual basis for the plea existed because the guns were in close proximity to the drugs and were readily accessible. While Petitioner's appeal was pending, the Supreme Court held in *Bailey* that a conviction for using a firearm under § 924(c)(1) requires the government to show the active employment of the firearm, not its mere possession. In affirming the dismissal in this case, the Eighth Circuit rejected Petitioner's argument that *Bailey* should be applied retroactively.

The Supreme Court held that although Petitioner's claim was procedurally defaulted, he may be entitled to a hearing on its merits if he makes the necessary showing to relieve the default, *i.e.*, he must demonstrate either "cause and actual prejudice," or that he is "actually innocent". His arguments that the legal basis for his claim was not reasonably available to counsel at the time of his plea and that it would have been futile to attack the plea before *Bailey* do not establish cause for the default.

However, the district court did not address whether Petitioner was actually innocent of the charge, and the government did not contend that he waived this claim by failing to raise it below. Thus, on remand, Petitioner may attempt to establish actual innocence. Actual innocence means factual innocence, not mere legal insufficiency. Thus, the government would not be limited to the existing record, but could present any admissible evidence of Petitioner's guilt. Petitioner's actual innocence showing must also extend to charges that the government has forgone in the course of plea bargaining. The indictment only charged Petitioner with "using" firearms, and there was no record evidence that the government elected not to charge him with "carrying" a firearm in exchange for his guilty plea, Petitioner would not have to prove actual innocence of both "using" and "carrying" a firearm in violation of § 924(c)(1).

Unites States v. Milano, 32 F.3d 1499 (11th Cir. 1994), *superceded by statute on other ground*, as recognized in *United States v. Cook*, 291 F.3d 297 (11th Cir. 2002): Appellant filed written objections to the PSR. At the original sentencing in 1990, however, Appellant chose not to proceed on his objections, as a result of receiving the benefit of the government's motion for downward departure based upon U.S.S.G. § 5K1.1. With respect to his objections to the PSR, Appellant's trial counsel stated that "the fundamental question here is really how much in the way of drugs Mr. Milano had in his possession at the time he was arrested, or in his house, et cetera." Counsel then represented to the sentencing judge that Appellant's objections "might be moot" because the government had made a § 5K1.1 motion and that, if the judge were to "do something extraordinary" by sentencing Appellant to a term of supervised release and no further jail time, then "we needn't do anything with the PSI," and "what's in the PSI doesn't matter."

The district court adopted the recommendation in the PSR as to the applicable guidelines factors, granted the government's departure motion, withheld the imposition of confinement and placed Appellant on probation for a period of five years, subject to certain enumerated conditions of probation. The defendant then violated probation and returned to the court for the revocation and resentencing. Now that he was not facing probation, the errors became critical. However, the court held that because he waived any requirement that district court make findings as to any alleged factual inaccuracies contained in PSR at initial sentencing hearing, the district court was not required to consider defendant's objections to PSR before imposing sentence at probation revocation hearing!

Also, the defendant's claim that sentencing court in probation revocation proceeding was unaware of its statutory discretion to sentence defendant to term shorter than original sentence would not be considered on appeal, as defendant failed to raise that objection at sentencing and there was

no manifest injustice. The sentencing court properly offered defendant opportunity to make specific objections to sentence, and defendant failed to articulate that objection.

***United States v. Manarite*, 44 F.3d 1407, 1419 (9th Cir. 1995)**: Defendant waived his right to object to the PSR because he withdrew his objections at sentencing.

***United States v. Stinson*, 97 F.3d 466 (11th Cir. 1996)**: On resentencing, following reversal of the original sentence due to the district court's erroneous determination that the defendant was a career offender under U.S.S.G. § 4B1.1, the district court was not bound by its original denial of the government's motion for an upward departure. Thus, on resentencing the district court properly granted the departure motion so as to give the defendant exactly the same sentence he originally received when he was erroneously treated as a career offender, even though "the original sentencing court declined to depart upward." The government did not waive "its right to seek an upward departure at resentencing by not appealing the denial of departure at the original sentencing [T]he government is authorized to appeal only a downward departure from the guideline range. Thus, the denial of the government's upward departure motion was not an issue that the government could have raised on appeal."

***United States v. Carter*, 110 F.3d 759 (11th Cir. 1997)**: The court vacated the denial of the defendant's motion to reduce sentence where the district court abused its discretion by erroneously concluding that it would be impossible to estimate the dry weight of marijuana attributed to the defendant at the original sentencing. The defendant was sentenced before the 1993 amendment to the sentencing guidelines providing that only the usable weight of a controlled substance is to be counted in determining the applicable drug guideline. A 1995 guideline amendment clarified that in the case of wet marijuana, only the dry weight of the marijuana should be counted. Although the wet marijuana amendment was not made retroactive by the Sentencing Commission, it is effectively retroactive because even prior to that amendment's effective date, the Eleventh Circuit held that only the dry weight of marijuana is to be counted. The district court's denial of the sentence reduction motion --based on the sole reason that it was "impossible" to estimate the dry weight --- was not supported by the record where the defendant identified "witnesses who can testify concerning the degree of weight reduction that drying entailed." The court rejected the government's procedural default argument (that the defendant should have raised his claim on direct appeal, rather than by reduction motion) where the government failed to make the default argument in the district court and therefore waived the issue.

F. Federal Rule Criminal Procedure 35(a).

Rule 35(a), Fed. R. Crim. P., provides: "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Prior to 2002, the language contained in the current Rule 35(a) was located in Rule 35(c). *See* Fed.R.Crim.P. 35, Advisory Comm. Notes, 2002 Amendments. Thereafter, subsection (c) was moved to subsection (a), but no change in practice was intended by the move. *Id.*

***United States v. Lett*, 483 F.3d 782 (11th Cir. 2007)**: Lett pled guilty to seven counts of possession with intent to distribute, all in violation of 21 U.S.C. § 841(a)(1). The PSR recommended, and the government did not object to, that level being lowered: by two levels because he met the five criteria for a safety valve reduction; by another two levels because he accepted responsibility for his crime; and by one more level because he timely notified the government of his intention to plead guilty. Those reductions resulted in an offense level of 27.

He faced a mandatory minimum prison sentence of 60 months on five of the counts under 21 U.S.C. § 841(b)(1)(B). About those statutory mandatory minimum sentences, and the resulting

inapplicability of the U.S.S.G. § 5C1.2 safety valve provision, the PSR stated: "Based on a total offense level of 27 and a criminal history category of I, the guideline range of imprisonment is 70 to 87 months. Counts 8, 9, 10, 11, and 12, each carry a mandatory minimum penalty of 60 months. Although it appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue." 483 F.3d at 784.

Neither the government nor Lett lodged any objection to the PSR, and with the consent of both parties the district court adopted it as written. *Id.* The district court determined that a variance from the guidelines was warranted, but also decided that the statutory five-year mandatory minimum provided the lowest sentence it could impose: "There is no way that I can legally go below that five-year mandatory minimum, even if I wanted to. So, discretion is limited by Congress, who has dictated that people who commit these kind of crimes shall serve no less than 60 months, or five years." *Id.* at 785. Hence, the court sentenced the defendant to 5 years' in prison. *Id.*

Four days after sentencing, a friend of the defendant wrote the court to state that the safety valve provisions in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 operated to free the court of the mandatory minimum otherwise required by 21 U.S.C. § 841(b)(1)(B). He told the court he was concerned that defense counsel had not raised the argument, and that time for doing something about it under Fed.R.Crim.P. 35(a) was running out. He sent copies of his letter to defense counsel and the government, but the record shows neither filed a response. *Id.* at 786.

The district court issued an order modifying Lett's sentence on the last day of the seven-day period for correcting sentences under Rule 35(a), as extended by the counting provision in Fed.R.Crim.P. 45(a)(2). The court explained that at the sentence hearing it had accepted the PSR's recommendation that the safety valve provision did not apply to Lett's sentence because neither Lett nor the government had objected to the PSR, and because the court believed that result was correct. Having reconsidered, the court now decided otherwise.

In setting out the reasons for changing its mind, the court explained in detail how it had interpreted the safety valve provision in § 5C1.2 before the decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005). The district court concluded that in the post-*Booker* world, "when all five conditions of § 5C1.2 are satisfied, the Defendant is safety valve eligible and the Court's sentencing discretion is not bounded by a statutory mandatory minimum sentence, irrespective of whether the accurately calculated advisory guidelines sentencing range is above or below that mandatory minimum." *Id.* at 786-787. The district court then resentenced the defendant to time served, followed by supervised release. *Id.* at 787. The government appealed and the Eleventh Circuit reversed.

Rule 35(a)'s single sentence provides: "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed.R.Crim.P. 35(a). The district court did not claim, and Lett does not argue, that the court made an arithmetical or technical error in imposing the original sentence of sixty months. Instead, the issue is whether the district court's initial decision that the safety valve guideline did not apply to remove the mandatory minimum provision in Lett's case was a "clear error."

The Criminal Rules Advisory Committee explained that what it meant by "clear error" was "acknowledged and obvious errors in sentencing." Fed.R.Crim.P. 35 advisory committee's notes (1991). The committee went on to add:

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action The subdivision is not

intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence

....

Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing.

Id.

The Court went on to explain:

The [*United States v. Yost*, 185 F.3d 1178 (11th Cir.1999)], [*United States v. Rico*, 902 F.2d 1065 (2d Cir.1990)], and [*United States v. Cook*, 890 F.2d 672 (4th Cir.1989)] decisions trace out the boundaries of a narrow corrective power limited in scope to those obvious errors that result in an illegal sentence or that are sufficiently clear that they would, as the committee notes specify, “almost certainly result in a remand of the case to the trial court for further action.” Fed.R.Crim.P. 35 advisory committee's notes (1991). In this case the district court did not sentence Lett under the wrong guideline, as in *Yost*; it did not impose a sentence different from the one in the plea agreement, as in *Rico*; and it did not impose a sentence that was illegal under the applicable guidelines and statutory provisions, as in *Cook*.

At most, the district court misunderstood the breadth of its discretion under the safety valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, read in light of the *Booker* decision, causing the court to impose a sentence higher than it would have had it correctly gauged the law. Even so, the sentence the court did impose was plainly permissible under the guidelines and applicable statutes. We say “at most,” because it is not clear that the district court's initial understanding of the scope of its discretion was mistaken. It is not obvious that the *Booker* decision eviscerated mandatory minimum sentences in every case where the defendant meets the five criteria for safety valve treatment, including those in which the advisory guideline range is above the mandatory minimum. That result would be the effect of adopting the theory on which the re-sentencing in this case is based.

....

... the issue before us is whether, at the time the district court entered its Rule 35(a) order, it was clear that the court had erred in its earlier conclusion that a sentence below the mandatory minimum was not permissible in the circumstances of this case.

We are confident that conclusion was not clear error. Reasonable arguments can be made on both sides of the post-*Booker* mandatory minimum issue, and we have no doubt that they will be. But arguable error is one thing, and clear error is another. Regardless of how this issue is ultimately determined on the merits, the sentence the district court initially imposed was not illegal, and any error was not of an acknowledged and obvious type, the kind that would “almost certainly result in a remand of the case to the trial court for further action.” Fed.R.Crim.P. 35 advisory committee's notes (1991).

Id. at 788-789.

When clear error did not work, appellate counsel tried another argument. Unfortunately, it did not carry the day either, but it is interesting:

At oral argument, Lett's present counsel (who did not represent him in the district court) invited us to import into the Rule 35(a) “clear error” measure the plain error standard of Rule 52(b), as interpreted and applied in countless decisions. The invitation is logically appealing because the narrow purpose of Rule 35(a) dovetails

nicely with the scope of the plain error rule. Before an error is subject to correction under the plain error rule, it must be plain under controlling precedent or in view of the unequivocally clear words of a statute or rule; it must have adversely affected the outcome of the proceedings; and it must be such that the failure to correct it would seriously affect the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 732-37, 113 S.Ct. 1770, 1776-79, 123 L.Ed.2d 508 (1993); *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir.2005). If an error meets all those requirements, it is also the kind of obvious error that “would almost certainly result in a remand of the case to the trial court for further action” and would therefore come within the narrow scope of Rule 35(a). Fed.R.Crim.P. 35(a) advisory committee's notes (1991). As a margin note here, we point out that the Supreme Court has described the plain error rule with language that sounds like the Rule 35(a) “clear error” standard. In the *Olano* opinion, for example, the Court said that the “plain” in plain error “is synonymous with ‘clear’ or, equivalently, ‘obvious.’” 507 U.S. at 734, 113 S. Ct. at 1777.

All this may be well and good, but it does not help Lett. For the same reasons that the district court's view of the mandatory minimum requirements in light of the safety valve provisions is not an obvious error or mistake that almost certainly would have caused the sentence to be overturned on appeal, it is not plain error. . . .

We agree with the district court's recognition that the proper resolution of the mandatory minimum and safety valve issue that prompted its Rule 35(a) modification of Lett's sentence is not clear. There is no decision on point from any court, and reasonable people could differ about the matter. That means the court's initial understanding was not “an obvious error or mistake ... which would almost certainly result in a remand” if not corrected, which is the proper standard of clarity under the rule. Fed.R.Crim.P. 35(a) advisory committee's notes (1991). The district court used Rule 35(a) to take another stab at interpreting the applicable statutory and guideline provisions in light of the *Booker* decision, and the committee notes forbid use of the rule for that purpose. *Id.* (The rule “is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines.”).

We do not question the district court's good faith in attempting to work its way through the problem, and we are not unsympathetic to its desire to give Lett a sentence less than the mandatory minimum. Our review, however, is *de novo*, and our reading of Rule 35(a) requires that we vacate the court's order re-sentencing Lett and remand the case with instructions that it impose the original sentence of sixty months to run concurrently on each count.

Id. at 790-791 (citations omitted).

***United States v. Del Castillo*, 212 Fed. Appx. 818, 2006 WL 3772035 (11th Cir. Dec. 21, 2006):** Del Castillo was indicted on two counts: (1) knowingly and willfully, with the intent to do bodily harm, assaulting Felipe Avena with a dangerous weapon by stabbing him with a knife, without just cause or excuse, in violation of 18 U.S.C. § 113(a)(3) (count one); and (2) knowingly and willfully assaulting Avena by stabbing him with a knife, which resulted in serious bodily injury, in violation of 18 U.S.C. § 113(a)(6) (count two). At his original sentencing hearing, the district court determined that his guideline range for both counts of the indictment was 51 to 63 months' imprisonment, to run concurrently. The government then stated that, "I did notice the Court said concurrently, but I think because [Del Castillo] was charged with two subsections of the same

statute that a sentence on only one count would be appropriate in this case, not on both counts." *Id.* at **1. Del Castillo did not object to the government's request. The court sentenced Del Castillo to 62 months' imprisonment, three years' supervised release, and a \$100 special assessment on count 1. *Id.*

Thereafter, the government filed an emergency motion to amend or correct Del Castillo's sentence, arguing that it erroneously urged the court not to sentence Del Castillo on count two of his indictment. The government maintained that, under the test set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932), the two offenses to which Del Castillo pled guilty were separate offenses, and, thus, each required separate sentences. Del Castillo objected to the government's motion and argued: (1) Federal Rule of Criminal Procedure 35 was not the proper avenue for the government to raise previously litigated issues; and (2) the two counts were not separate offenses because they involved the same conduct and the statute of conviction merely created two separate punishment provisions. *Id.* at ** 1.

After a hearing, the district court found that the two counts, as charged in the indictment, constituted separate offenses because count one required proof that Del Castillo used a dangerous weapon and count two required proof that Del Castillo caused serious bodily injury. The court then resentenced Del Castillo to 62 months' imprisonment and 3 years' supervised release on both counts, to run concurrently, and a \$100 special assessment on each count, for a total of \$200. *Id.* at ** 2.

Del Castillo appealed this sentence, which the district court imposed upon the government's Federal Rule of Criminal Procedure 35(a) motion to correct his original sentence. Because Rule 35(a) gives the district court the authority to correct clear errors in an original sentence, the crux of the issue on appeal was whether the district court's failure to impose a sentence on both counts of Del Castillo's indictment was a clear error for purposes of Rule 35(a).

The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Furthermore, the Committee did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing.... The subdivision does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could *sua sponte* make the correction.

Fed.R.Crim.P. 35, Advisory Comm. Notes, 1991 Amendments. "Thus, under [Rule 35(a)], the district court may not simply change its mind, and any error to be corrected under that subsection must be obvious." [*United States v. Yost*, 185 F.3d 1178, 1181 (11th Cir.1999)] (holding that the district court had the authority to resentence a defendant under Rule 35(c), which was the former Rule 35(a), where the court had committed the "obvious error" of originally sentencing the defendant under the incorrect guideline).

Id. at ** 2-3.

The Eleventh Circuit concluded that "the two counts of Del Castillo's indictment constitute separate offenses because they each require 'proof of an additional fact which the other does not.' The district court thus committed clear error in failing to sentence Del Castillo on count two of his

indictment during the original sentencing. . . .Accordingly, the court properly resentenced Del Castillo pursuant to Rule 35(a) in order to correct the clear error in the original sentence." *Id.* at **3.

The Eleventh Circuit also rejected Del Castillo's arguments that the government invited and waived any error that occurred in the original sentence.

The invited error doctrine specifies that, when a party invites or induces the district court into making an error, we will not invoke plain error review and reverse on appeal. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir.2006). The invited error doctrine is not implicated here because the government did not appeal Del Castillo's original sentence, but rather, filed a Rule 35(a) motion to correct the error in the district court. While it appears that the government induced the error in the first instance, the invited error doctrine does not require this Court to vacate the "new" sentence and remand where, as explained above, the court properly corrected a clear error in the original sentence under Rule 35(a). Similarly, the fact that the government did not object to the sentence imposed at the original hearing does not establish that the government waived any opportunity to move to correct the sentence under Rule 35(a). This is especially true where Rule 35(a) provides an avenue to correct clear errors in sentencing, which occurred here, and allows the district court to *sua sponte* correct such an error. *See* Fed. R. Crim. P. 35, Advisory Comm. Notes, 1991 Amendments.

Id. at **4.

VII. Appeal

A. Arguing on Appeal against Forfeiture of Issues

1. **If the issue goes to the jurisdiction or authority of the court to act, it may be cognizable without objection, or it may just establish plain error.**

United States v. Goldin Industries, Inc., 219 F.3d 1268 (11th Cir. 2000) (*en banc*): The court held that under the RICO statute, 18 U.S.C. § 1962, the RICO "person" prosecuted under the statute must be separate and distinct from the RICO "enterprise" that has its affairs conducted through a pattern of racketeering activity. The court rejected the government's argument that the defendant waived this claim by failing to raise it in the district court. "[W]hether a statute prohibits the charged conduct may be considered *de novo* even if the issue is raised for the first time on appeal."

United States v. Walker, 59 F.3d 1196 (11th Cir. 1995): The defendant challenged the constitutionality of the Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), for the first time on appeal. The government argued that he had waived the issue because he failed to attack the statute's constitutionality in the trial court. The Eleventh Circuit disagreed, noting that as a general rule, a party must timely object at trial to preserve an issue for appeal. However, issues not preserved below are reviewed for plain error pursuant to FED. R. CRIM. P. 52(b). The Supreme Court had already ruled that the Congress exceeded its power to regulate interstate commerce when it enacted § 922(q)(1)(A). Therefore, the Eleventh Circuit said "[w]e can think of no plainer error than to allow a conviction to stand under a statute which Congress was without power to enact. In essence, the statute was void *ab initio*, and consequently, the district court below lacked subject matter jurisdiction with respect to that charge." The conviction was reversed, and the sentence vacated.

2. Argue fundamental fairness and justice.

Singleton v. Wulff, 428 U.S. 106, 121 (1976): "Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.' ". Rather than espousing an all inclusive list of examples, the Supreme Court left the exceptions to the discretion of the appellate courts, to be exercised on the facts of individual cases.

3. Adopt co-defendant's issue on appeal

When one defendant raises an issue, another defendant can adopt that same issue on appeal and argue it would be anomalous to reverse some convictions and not others when all defendants suffer from the same error. *See United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988); *United States v. Miles*, 10 F.3d 1135, 1137 n.3 (5th Cir. 1993); *United States v. Gray*, 626 F.2d 494, 497 (5th Cir. 1980).

But see United States v. Bichsel, 156 F.3d 1148 (11th Cir. 1998): During the appeal, the defendants raised a first amendment claim by attempting to adopt, by reference, briefs filed in the Eleventh Circuit in an unrelated case. The defendants in the instant case, however, did not brief the first amendment issue in their briefs, nor did they separately move to adopt the briefs from the other case. The court held that FED. R. APP. P. 28(I) does not permit adoption by reference *between* cases and unless a separate motion to adopt is made and granted, the appellate court will not consider issues not briefed and adopted by reference without a separate motion.

4. Check to be sure the district court conducted a proper *Jones* inquiry.

In *United States v. Jones*, 899 F.2d 1097, 1103 (11th Cir. 1990), the Eleventh Circuit held that the district court is required to offer the parties the opportunity to object at the conclusion of sentencing and if a party is silent or fails to state the grounds for objection, objections to the sentence will be waived for purposes of appeal. If the district court failed to conduct a proper *Jones* inquiry at the conclusion of sentencing, you can raise that as an issue on appeal. There are two possible remedies. One is to remand the case to the district court for resentencing, at which time the district court can conduct a *Jones* inquiry and all objections can be stated and ruled on, and hopefully resolved, by the district court, thereby possibly obviating the need for an appeal. The second remedy is to proceed with the appeal but to review the objections/issues *de novo*.

United States v. Campbell, 473 F.3d 1345 (11th Cir. 2007): After imposing sentence in supervised release revocation proceedings, court failed to elicit fully articulated objections by merely asking defendant "Is there anything further?"; there was no indication that defense counsel understood the court to be eliciting objections. Defendant did not waive claim that district court failed to consider Sentencing Guidelines and his advisory sentencing range by failing to raise argument in supervised release revocation proceedings, where district court had failed to elicit objections after imposing sentence. Because the court concluded that the district court violated *Jones* by failing to elicit objections after imposing the sentence, it concluded that Campbell had not waived his argument, and it applied the *de novo* standard of review to the legality of his sentence issue. However, where the record was insufficient to allow meaningful appellate review of issues, remand is necessary.

5. Argue the purposes of the rule have been satisfied.

***United States v. Costales*, 5 F.3d 480, 483 n. 3 (11th Cir. 1993):** The purpose of the rule requiring that sentencing objections first be raised in the district court "is simply to allow the district court the first opportunity to correct any error and to provide for a complete record on appeal." In *Costales*, the government satisfied that purpose by objecting to the downward departure, although it failed to object to the sentencing court's findings and conclusions after sentence was imposed. Thus, the government had not waived the issue for appeal.

***United States v. Weir*, 51 F.3d 1031 (11th Cir. 1995):** The government had not waived the issue by its failure to repeat its objection after sentence was imposed. "If the relevant objection is raised after the presentation of the report, however, but before the actual imposition of the sentence, *Jones* is satisfied. The district court clearly understood the Government's position and specifically rejected it. This satisfied the purpose of *Jones* to allow the district court to make a studied decision on the objection." [Citations omitted.]

***United States v. Smith*, 39 F.3d 1143, 1146 (11th Cir. 1994):** "Although the government did not articulate its argument before the district court in detail, it adequately raised the crux of its objection to the district's sentence"

***United States v. Dobbs*, 11 F.3d 152, 154 n.4 (11th Cir. 1994):** Defense counsel did not directly object to a lack of specific findings of perjury, but the Court broadly construed counsel's constitutional objection to include the degree of specific findings of perjury.

B. Issues Can be Waived During Appeal Even if Those Issues were Preserved in the District Court.

To properly raise an issue on appeal, that issue must be presented in the initial brief and must be argued. The issue cannot be simply mentioned in passing and not argued or else it will be deemed abandoned. Likewise, the issue cannot be raised in the reply brief. It must be raised and argued in the initial brief or else it will be waived or abandoned regardless of whether it is preserved below.

Note: It is not necessary to argue all issues properly raised in the initial brief at Oral Argument in order to preserve them. In fact, if you raise multiple issues in your initial brief, it is virtually impossible, and a bad idea, to even try to argue all of the issues during the 15 minutes allotted at Oral Argument.

***United States v. Crumpton*, 222 Fed. Appx. 914, 2007 WL 879807 (11th Cir. March 26, 2007):** "At the outset, we note that Crumpton does not specifically argue that the 60-month sentence imposed for possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A)(I) was unreasonable. Thus, he waives that claim." *Id.* at **4.

***Sepulveda v. U.S. Atty. Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005):** "When an appellant fails to offer argument on an issue, that issue is abandoned" and passing references to the issue are insufficient to prevent abandonment.

***Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 6 (11th Cir.1989):** A party waives an issue by failing to argue the merits of it in his brief on appeal.