

# The Labors of Hercules:

## Overcoming Common Challenges on Appeal

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## I. EMERGING ISSUES

### A. Issues currently pending in the United States Supreme Court

1. Fifth Amendment - invocation and waiver of Miranda rights: Berghuis v. Thompkins, No.08-1470 (argued)
2. Fourth Amendment - government employee's expectation of privacy in text messages n work pager where informal personal use policy announced by non-policy making officer: City of Ontario v. Quon, No. 08-1332 (argued)
3. Mail fraud - 18 U.S.C. §1346 "honest services" provision:
  - a. Constitutionality as applied to conduct of private individual absent economic or property harm to private party to whom "honest services" owed: Black v. United States, No. 08-836 (argued)
  - b. As applied to state official, must government prove defendant violated disclosure duty imposed by state law: Weyhrauch v. United States, No.08-1196 (argued)
  - c. Is it unconstitutionally vague as applied to conduct not shown to be intended to achieve private gain? Skilling v. United States, No. 08-1094 (argued)
4. Is 18 U.S.C. §2339A(b)(1) (providing service, training, expert advice/assistance to designated foreign terrorist organizations) unconstitutionally vague? Holder v. Humanitarian Law Project, Nos. 08-1498, 09-89 (argued)
5. Applicability of SORNA (Sex Offender Registration and Notification Act) to conduct predating SORNA's enactment; Ex Post Facto Clause: Carr v. United States, No. 08-1301 (argued)
6. Is Second Amendment right to keep and bear arms incorporated against the states? McDonald v. City of Chicago, No. 08-1521 (argued)
7. Aggravated felony for immigration consequences (cancellation of removal) - does state drug possession conviction (federal misdemeanor) constitute aggravated felony because defendant could have been prosecuted as recidivist

- possessor (federal felony)? Carachuri-Rosendo v. Holder, No.09-60 (argued)
8. Application of mandatory minimum sentences to multiple charges under 18 U.S.C. §924( c) scope of the “except clause”:
    - a. Abbott v. United States, No. 09-479 - does “any other provision of law” include the predicate drug offense or crime of violence or an offense based on possession of same firearm
    - b. Gould v. United States, No.09-7073 - does “any other provision of law” include any other count of conviction
  9. Sixth Amendment effective assistance of counsel: Harrington v. Richter, No. 09-587 (failure to investigate or call expert to support theory of defense)
  10. Sixth Amendment right of confrontation: Michigan v. Bryant, No. 09-150 - scope of Crawford v. Washington, 541 U.S. 36 (2004), and, 547 U.S. 813 (2006); application to statements to police officers responding to report of person shot
  11. Equal Protection - Gender Discrimination: Flores-Villar v. United States, No. 09-5801 - do differences in requirements for derivative citizenship based on whether seeking citizenship through father or mother violate the Equal Protection Clause?

**B. Issues recently decided by Supreme Court**

1. Sixth Amendment - exclusion of public from jury selection: Presley v. Georgia, 130 S. Ct. 721 (2010)
2. Speedy Trial Act - automatic exclusion v. exclusion requiring findings: Bloate v. United States, 130 S. Ct. 1345 (2010)
3. Sixth Amendment ineffective assistance of counsel:
  - a. Padilla v. Kentucky, 130 S. Ct \_\_\_\_: erroneous advice concerning effect of conviction on immigration status
  - b. Porter v. McCollum, 130 S. Ct. 447 (2009): failure to investigate and present mitigation evidence in penalty phase of capital case

4. Sixth Amendment right to confrontation:
  - a. Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009)
  - b. Briscoe v. Virginia, 130 S. Ct. 1316 (2010): constitutionality of rule that defendant demand to question preparer of lab report (remand in light of Melendez-Diaz)
5. Eighth Amendment cruel and unusual punishment:
  - a. Graham v. Florida, 130 S. Ct. \_\_\_\_ (2010): life without parole for juvenile offender convicted of non-homicide crime violates 8th Amendment
6. Violent felonies/ Crimes of violence (ACCA and career offender): Johnson v. United States, 130 S. Ct. 1265 (2010) (Florida battery by offensive touching is not ACCA predicate under elemental clause requiring use, attempted use or threatened use of physical force)
7. Aggravated felony under 8 U.S.C. 1101(a)(43): Nijhawan v. Holder, 129 S. Ct. 2828 (2009) (whether fraud conviction constitutes aggravated felony is not a categorical determination but depends on circumstances of case)
8. 18 U.S.C. §924(c)(1) - firearm type is element of offense rather than sentencing factor: United States v. O'Brien, 130 S. Ct. \_\_\_\_ (2010).
9. Overbreadth of statutory criminalization of depictions of animal cruelty: United States v. Stevens, 130 S.Ct. \_\_\_\_ (2010).

### **C. Other Issues to Explore**

1. Mandatory Minimum Sentences:
  - a. Do they violate Sixth Amendment where based on findings by judge rather than jury? Challenge Harris v. United States, 536 U.S. 545 (2002), and McMillan v. Pennsylvania, 477 U.S. 79 (1986), based on Stevens and Thomas concurrences in United States v. O'Brien (decided 5-24-2010).

- b. Do they constitute cruel and unusual punishment (disproportionality analysis) or violate due process?
2. Mens rea for particular offenses:
- a. Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009), held that to establish the knowing use of the means of identification of another person required for aggravated identity theft, the government must prove that the defendant knew the means of identification belonged to another person.
  - b. Can this be applied in other contexts such as:
    - i. Knowledge of drug type and quantity
    - ii. Knowledge that firearm possessed was stolen
    - iii. Knowledge that stolen property was property of the United States in a prosecution under 18 U.S.C. § 641
    - iv. Knowledge of interstate commerce nexus in prosecution under 18 U.S.C. §922(g)(1) (felon in possession of firearm) or 18 U.S.C. §2421 (transporting individual in interstate commerce for purpose of prostitution)
    - v. Knowledge that victim was under age of 18 in prosecution under 18 U.S.C. § 2423(a) (transporting minor in interstate commerce with intent that minor engage in prostitution)
    - vi. Intent required under 18 U.S.C. §1038(a)(1) (engaging in conduct with intent to convey false/misleading information under circumstances where information may be reasonably believed and where information indicates activity taken or to be taken would violate certain laws)
3. Use of acquitted conduct at sentencing
4. Imposition of federal sentence consecutive to yet to be imposed state sentence
5. Scope of the exclusionary rule – Herring v. United States, 129 S. Ct. 695

(2009)

6. Search incident to arrest - Arizona v. Gant, 129 S. Ct. 2079 (2009)

**D. Other issues to consider**

1. Almendarez-Torres
2. Retroactivity of Booker
3. Interpretation and application of 18 U.S.C. §3582(c) (retroactive sentencing guideline amendments)
4. Watch for circuit splits
5. Read statutes carefully

## II. CAPTURING THE CATTLE OF GERYON: CRAFTING ARGUMENTS AIMED AT THE STANDARD OF REVIEW

### A. Standards of review have both legislative and common law origins. The focus is which court is in a better position, or has authority to make, certain decisions? Once the error is identified, how much deference does the court of appeals give the trial court?

1. None – De novo review of questions of law
2. Some – Abuse of discretion, mixed questions and everything else; due deference (somewhere between de novo and clearly erroneous)
3. A great deal – Clear error review of factual findings

### B. Overlays to standard of review issues:

1. ***Prejudice:***
  - a. Did the error affect the defendant’s substantial rights? Fed. R. Crim. P. 52. The same analysis applies to review for harmless error, Rule 52(a), and plain error, Rule 52(b) (with varying burden of proof).
  - b. Constitutional error – was the error harmless beyond a reasonable doubt? Chapman v. California, 386 U.S. 18 (1967).
  - c. Non-constitutional error – can the reviewing court conclude “with fair assurance” that “the judgment was not substantially swayed by the error.” Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).
  - d. True jurisdictional errors are never harmless.
  - e. Structural errors are never harmless. E.g., United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (denial of the Sixth Amendment right to counsel of choice is structural, also listing as structural denial of right to counsel, denial of right to self-representation, denial of right to public trial, defective reasonable doubt instruction, discrimination in selection of grand jury, jury exposed to pretrial publicity).
  - f. A few errors are never harmless based on congressional intent, such as

violations of the Speedy Trial Act. Zedner v. United States, 126 S. Ct. 1976, 1989-90 (2006).

2. ***Preservation:***

- a. Did the defendant argue the error in the district court? If not, plain error review under Rule 52(b) usually applies (addressed in more detail below). Plain error often (but not always) supplants other standards of review.
- b. Was the issue waived (as opposed to forfeited)? Was the error invited (a form of waiver)? If so, there is no right to appeal.
- c. Even if not argued, if the district court decided the issue the court of appeals has the discretion to review an issue that was “not pressed so long as it has been passed upon.” United States v. Williams, 504 U.S. 36, 41 (1992); see also Lebron v. Nat’l Passenger Corp., 513 U.S. 374, 379 (1995).
- d. When it is the appellee, the government need not preserve its arguments but in the unusual case of a government appeal, such as from the grant of a suppression motion, it must do so. In some instances, the government’s failure to make arguments below may be relevant even in a defendant’s appeal. E.g., United States v. Stall 581 F.3d 276 (6th Cir. 2009) (affirming one-day sentence on government appeal, citing government’s failure to argue specific grounds for guideline sentence in district court); United States v. Reider, 103 F.3d 99, 103 n.1 (10th Cir. 1996) (government waived waiver issue); United States v. Quiroz, 22 F.3d 489, 490-941 (2d Cir. 1994) (same, citing cases).

3. ***Clarity and completeness of the district court’s decision:***

- a. Is the decision well-reasoned?
- b. Did the court explain the precedent or legal rule on which it was relying? Is the rule controlling or persuasive?
- c. Did the court address all of the defendant’s arguments?
- d. Is it obvious what factual findings supported the decision; did the

district court explain its factual findings?

- e. Did the district court fail to make necessary factual findings?
- f. If the answer to any of the above is yes (more often e, sometimes c and d, and rarely a or b), do you want to ask for a remand for more factual findings or an explanation of the court's reasoning? However, many circuits will uphold the district court if any reasonable view of the evidence supports the district court's holding. E.g., United States v. Barnum, 564 F.3d 964, 972 (8th Cir. 2009).
  - i. Can you predict the outcome in the district court?
  - ii. Is there any claim to limit remand to the existing record, precluding the government from correcting the record? Usually not, for example, in remand of suppression motion but possibly for resentencing. Compare United States v. Matthews 278 F.3d 880, 885-86 (9th Cir. 2002) (en banc) (but for failure of proof after full inquiry into factual question at issue, in general, court will remand for resentencing on open record), and United States v. Montero-Montero, 370 F.3d 121, 124 (1st Cir. 2004) (remanding on open record where district court enhanced sentence sua sponte, distinguishing circumstances where government asks for enhancement but fails to introduce sufficient evidence to support it), with United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995) (government may not have second bite at the apple on remand for resentencing).
  - iii. If the court of appeals is unable to evaluate the district court's reasoning, it may choose to remand. E.g., United States v. Williams, 951 F.2d 1287, 1290 (D.C. Cir. 1991) ("The purpose of an appeal is to review the judgment of the district court, a function we cannot properly perform when we are left to guess at what it is we are reviewing.").
  - iv. The court of appeals may remand if the district court omits mention of a principal argument made by the defendant at sentencing that is not so weak as not to merit discussion. United States v. Villegas-Miranda, 579 F.3d 798, 801 (7th Cir. 2009).

C. **De Novo**

1. Consider:
  - a. Did the court select a legal rule?
  - b. Did it interpret an existing rule?
  - c. Did it apply a rule to historical facts?
  - d. Is it a case of first impression? Or is the law settled?
2. Sufficiency of the trial evidence is reviewed de novo. Question is whether no rational trier of fact could find guilt beyond a reasonable doubt on an element of the offense. Jackson v. Virginia, 443 U.S. 307 (1979). Insufficiency at trial is never harmless, precludes retrial and may always be plain.
3. Statutory interpretation is reviewed de novo. Not all challenges to interpretations of statutes are well settled: Abbott v. United States, No. 09-479, and Gould v. United States, No. 09-7073 (consolidated) (cert. granted 1/25/10) (whether the mandatory sentencing scheme of § 924(c)(1)(A) applies when defendant is also subject to greater mandatory minimum for underlying predicate or another count of conviction); Barber v. Thomas, No. 09-5201 (cert granted 11/30/09) (calculation of good time credits); United States v. Hayes, 129 S. Ct. 1079 (2009) (whether general assault and battery conviction qualifies as misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9)); Burgess v. United States, 553 U.S. 124 (2008) (comparing definitions of “felony” and “felony drug offense” in 21 U.S.C. §§ 802(13) and 802(44)).
4. Some important questions are reviewed de novo despite factual component, such as when there is a need for appellate courts “to maintain control of, and to clarify . . . legal principles.” Ornelas v. United States, 517 U.S. 690, 697 (1996) (reasonable suspicion and probable cause); Miller v. Fenton, 474 U.S. 104 (1985) (voluntariness of confession). In contrast, for example, whether a prosecutor’s race-neutral reasons for excluding jurors is pretextual under Batson is a question of fact, and depends on the demeanor of the attorney. Hernandez v. New York, 500 U.S. 352, 364-65 (1991).

D. **Abuse of Discretion**

1. Consider:
  - a. What are the limits on discretion? Are there legislative limits? “Discretionary choices are not left to a court’s “inclination, but to its judgment; and its judgment is to be guided by sound legal principles”” and “[w]hether discretion has been abused depends [ ] on the bounds of that discretion and the principles that guide its exercise.” United States v. Taylor, 487 U.S. 326, 336 (1988) (reviewing whether court abused its discretion in dismissing indictment under Speedy Trial Act with prejudice).
  - b. How settled are the standards, and how much flexibility or experimentation is permitted? For newly enacted statutes or rules, appellate standards for applying them may emerge slowly. Arguments for less deference can be supported by pointing out a less well-established rule. In contrast, courts typically review a well-established rule applicable to a wide variety of fact patterns with more deference.
  - c. Consider characterizations of the error: Did the district court believe itself to be bound by law when it was not? Did the court fail to recognize or apply the correct standard? Did the court consider impermissible factors or fail to consider required factors? Any of these errors could be legal in nature.
2. Errors of law and erroneous fact-finding are always an abuse of discretion.
3. Management of the trial and use of judicial resources at trial are almost always reviewed for abuse of discretion, including continuances, timing, limits on argument. One rationale is that those decisions rarely affect the basic fairness of the trial, so consider any argument that the error in your case did so.
4. Discovery and evidentiary questions are almost always reviewed for abuse of discretion. One rationale is that they apply in many situations and to a wide variety of fact patterns, suggesting they are closer to fact-based decisions. Consider any argument that the applicability of a rule is more limited in scope, supporting less deference.

E. ***Due Deference***

1. District court’s comparative advantage.

2. Gall v. United States, 552 U.S. 38, 59-60 (2007) (reasonableness incorporates abuse of discretion, which requires giving “due deference to the District Court’s reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence”). If the district court’s decision is not “reasoned,” a court of appeals owes it less deference.
3. In some cases, old standards of review for guidelines decisions survive Booker, giving due deference to district court’s applications of guidelines to facts. United States v. Henry, 557 F.3d 642, 644-45 (D.C. Cir. 2009); United States v. Richardson, 510 F.3d 622 (6th Cir. 2007).
4. Difficulties of characterization. E.g., United States v. Gardellini, 545 F.3d 1089, 1097 (D.C. Cir. 2008) (Williams, J., dissenting) (“There is (for me at least) some obscurity in the Supreme Court’s division of grounds for reversal into procedural and substantive categories. Compare Gall 128 S. Ct. at 598 (considering as a possible procedural error a district judge’s alleged failure ‘to give proper weight’ to a mandatory § 3553 factor) with id. at 601 (considering as a possible substantive error a district judge’s alleged giving of weight to an improper factor). But the distinction is irrelevant here.”) (emphasis in original).

F. ***Clear Error***

1. Consider:
  - a. Insufficiency, on each element of the offense. Also consider sufficiency of evidence for factual findings at sentencing, suppression, or other findings. Did the court consider the evidence and was there enough evidence to find the fact to be more likely than not true? Sufficiency is a legal question.
  - b. Review any district court factual findings made from the bench from memory, such as during a suppression hearing.
2. Even when witness credibility is at issue, there may be a basis to challenge reliance on one witness over another. E.g., United States v. Oquendo-Rivera, 586 F.3d 63, 67 (1st Cir. 2009) (“Because the district judge chose to believe one and not the other of two witnesses before him, it might seem that the choice of whom to credit resolves the matter. But the credibility of a story depends not only on the seeming sincerity of witnesses and their demeanor in

the courtroom but also on more objective criteria: for example, consistency (both internal to the testimony and with the physical evidence), probability, access of the witness to information, his bias or interest, and corroboration or unexplained contradiction of his testimony by undisputed testimony or empirical evidence.”).

3. Consider an argument that clearly erroneous factual findings may be challenged on appeal even if not preserved below, under Fed. R. Civ. P. 52(a)(5). See Hernandez v. New York, 500 U.S. 352, 365-66 (1991) (clearly erroneous standard under Civil Rule 52 should apply to factual findings on issues other than guilt, since no comparable criminal rule exists); Maine v. Taylor, 477 U.S. 131, 145 (1986) (considerations under Civil Rule 52 including “judicial efficiency, the expertise developed by trial judges, and the importance of first hand observation” are applicable in criminal cases); In re Sealed Case, 552 F.3d 841, 849-50 (D.C. Cir. 2009) (Edwards, J., joined by Silberman, J., concurring) (Civil Rule 52(a)(5) provides for clear error review of sufficiency of evidence supporting factual findings regardless of whether party requested or objected to them, and same standard should apply to findings made at sentencing).

### III. SLAYING THE FOUR-HEADED HYDRA: WINNING ON PLAIN-ERROR REVIEW

#### A. What is this beast of which we speak?

1. Fed. R. Crim. P. 52(b): “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”
  - a. Applies to *forfeited* errors.
2. Preserved, waived, invited, and forfeited error distinguished:

- a. *Preserved error*: the gold standard!

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

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

- b. *Waived error*: “[W]aiver is the intentional relinquishment or abandonment of a known right.” United States v. Olano, 507 U.S. 725, 733 (1993) (internal quotation marks and citation omitted).
  - i. Waiver *extinguishes* an error, see id.; therefore, “[w]aived errors are unreviewable.” United States v. Rodriguez, \_\_\_ F.3d \_\_\_, 2010 WL 1080935, at \*3 (5th Cir. Mar. 25, 2010) (citations omitted).
  - ii. CAUTION: Inherent in the notion of waiver is the idea that the party knows what he or she is giving up and intends to give it up. See, e.g., United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005) (“The touchstone of waiver is a knowing and intentional decision.”) (citations omitted). A classic example is where an objection is made, but then withdrawn. See, e.g., United States v. Arviso-Mata, 442 F.3d 382, 384 & n.7 (5th Cir.

2004) (discussing cases to this effect).

iii. BUT, “[a] district court’s legal determinations are not immunized from appellate review simply because a defendant, present at a hearing where a determination is made, mistakenly agrees with the court.” United States v. Jimenez, 258 F.3d 1120, 1124 (9th Cir. 2001).

iv. Courts should NOT find a waiver absent evidence that the defendant (or his counsel) *knew* about the specific legal requirement at issue and “considered objecting at the hearing, but for some tactical or other reason rejected the idea.” Id. (internal quotation marks and citation omitted).

(I) This means that, in the absence of any apparent strategic or tactical reason not to object, improvident statements such as “The PSR’s correct,” or “I have no problem with the PSR,” do *not* constitute waiver. See, e.g. United States v. Castaneda-Baltazar, 239 Fed. Appx. 900, 901-02 (5th Cir. 2007) (unpublished); Arviso-Mata, 442 F.3d at 384; Jaimes-Jaimes, 406 F.3d at 847-49; Jimenez, 258 F.3d at 1123-25.

(II) *The IAC gloss on this rule*: “[A]n argument should be deemed forfeited rather than waived if finding waiver from an ambiguous record would compel the conclusion that counsel necessarily would have been deficient to advise the defendant not to object.” Jaimes-Jaimes, 406 F.3d at 848 (citation omitted).

c. *Invited error*: Applies where “defendant (or his counsel) [ ] induced the error.” Rodriguez, 2010 WL 1080935, at \*3 (citation omitted).

i. Almost as bad as waived error: “Review of invited errors is almost similarly precluded: [invited] errors are reviewed only for manifest injustice.” Id. (citation omitted).

d. *Plain (forfeited) error*: If the error was neither preserved, nor waived or invited, then it was forfeited, and you must slay the plain-error Hydra!

B. Avoiding the need to slay the beast.

1. Of course, optimal procedure is to avoid the plain-error Hydra by preserving your objections below.
2. A full discourse on error preservation is beyond the scope of this paper. In general, though, as indicated by Fed. R. Crim. P. 51(b), error preservation is governed by the MOP rule:

## Move, Object, Proffer!

a. *Move:*

- i. Fed. R. Crim. P. 12: Certain motions “must be raised before trial,” Fed. R. 12(b)(3)(A)-(E), and before any deadline set by the court. See Fed. R. Crim. P. 12(c). “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.” Fed. R. Crim. P. 12(e). Notwithstanding the use of the word “waives,” the courts are divided on whether a defendant may get plain-error review of a claim not raised in a timely pretrial motion. Consult your local jurisdiction for details.
  - (I) “For good cause, the court may grant relief from waiver.” Fed. R. Crim. P. 12(e); *cf.*, e.g., United States v. Cathey, 591 F.2d 268, 271 n.1 (5th Cir. 1979) (under previous version of rule – requiring “cause shown” rather than “good cause” – there was “cause shown” for defendant’s late-filed motion to dismiss the indictment where the defendant did not receive the critical grand jury transcript until after the trial started, and he filed his motion at the earliest possible time).
- ii. Speedy Trial Act: “Failure 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 [the Speedy Trial Act].” 18 U.S.C. § 3162(a)(2).
- iii. Fed. R. Crim. P. 29: In order to preserve the issue of the

sufficiency of the evidence for the usual sort of appellate review, you must move for judgment of acquittal at the close of the government's evidence and at the close of all the evidence, with some very limited exceptions. See generally Fed. R. Crim. P. 29(a). A post-verdict motion, see Fed. R. Crim. P. 29(b) may sometimes patch up a failure to make the close-of-all-the-evidence motion<sup>1</sup> or possibly even a failure to make *any* motion during trial.<sup>2</sup>

- (I) A general motion of judgment of acquittal may suffice to preserve a sufficiency claim for appeal. See, e.g., Huff v. United States, 273 F.2d 56, 60 (5th Cir. 1959). BUT CAUTION: in 2002, the en banc Fifth Circuit held that “[w]here . . . a defendant asserts *specific grounds* for a specific element of a specific count for a Rule 29 motion, he waives all others for that specific count.” United States v. Herrera, 313 F.3d 882, 884 (5th Cir. 2002) (en banc) (emphasis in original; citations omitted). Although the Fifth Circuit was probably incorrect to use the word “waives” instead of the word “forfeits,” this rule means that, whenever you assert specific grounds for acquittal, you may be forfeiting the right to assert on appeal any other grounds for finding the evidence insufficient.
  
- (II) Failure to make appropriate motions for judgment of acquittal may forfeit the usual standard of review for claims of insufficiency of the evidence, in which case sufficiency claims will be reviewed only for a “manifest miscarriage of justice.” See, e.g., United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir. 1991). Such a miscarriage

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<sup>1</sup>See, e.g., United States v. Villarreal, 324 F.3d 319, 322 (5th Cir. 2003) (where defendant moved for judgment of acquittal at close of government's case-in-chief, but did not renew motion at the close of all the evidence, question of the sufficiency of the evidence was nevertheless preserved by defendant's timely post-verdict motion for judgment of acquittal).

<sup>2</sup>See, e.g., United States v. Allison, 616 F.2d 779, 784 (5th Cir. 1980) (even though defendant did not move for judgment of acquittal either at the close of the government's case-in-chief or at the conclusion of her case, question of the sufficiency of the evidence was nevertheless preserved by defendant's timely post-verdict motion for judgment of acquittal).

exists only if the record lacks any evidence pointing to guilt or if the evidence was so tenuous that a conviction would be “shocking.” See, e.g., United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988).

b. *Object:*

i. Generally: Fed. R. 51(b).

ii. Admission or exclusion of evidence: Fed. R. Evid. 103(a)(1).

(I) NOTE: A motion in limine will preserve evidentiary issues **only if** “the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial . . . .” Fed. R. Evid. 103(a)(2).

iii. Jury instructions: must object to instructions or failure to give a requested instruction before the jury retires. See Fed. R. Crim. P. 30.

iv. Did you object without realizing it? In some cases, the Fifth Circuit has held that where one party objects, the court presumes that the other parties have joined in the objection. See, e.g., United States v. Sanchez-Sotelo, 8 F.3d 202, 210 (5th Cir. 1993).

v. *Special helper for sentencing objections*: a written objection to the PSR will preserve error for appeal even if it is not orally renewed at sentencing. See United States v. Medina-Anicacio, 325 F.3d 638, 642 (5th Cir. 2003) (“Even if Medina’s counsel had not renewed the objection at the sentencing hearing, once a party raises an objection in writing , if he subsequently fails to lodge an oral, on-the-record objection, the error is nevertheless preserved for appeal.”).

c. *Proffer:*

i. “In case the ruling is one excluding evidence, the substance of the evidence [must be] made known to the court by offer or [must be] apparent from the context within which questions

were asked.” Fed. R. Evid. 103(a)(2).

- ii. At least the Fifth Circuit appears to have added a gloss to Rule 103(a)(2), requiring that, not only the substance of the evidence, but also the *relevancy of the evidence to the defense* and the *ground(s) for admissibility of the evidence*, have been made known to the court: “Although a *formal* offer of proof is not required to preserve error, the party must at least inform the trial court ‘what counsel intends to show by the evidence and why it should be admitted.’”<sup>3</sup>
3. *A word about specificity:* Suffice it to say, in applying the MOP rule, you must be reasonably specific about what you are grousing about, or you may end up not preserving anything for appellate review at all! See, e.g., United States v. Burton, 126 F.3d 666, 671-73 (5th Cir. 1997) (given that Fed. R. Evid. 801(d)(2)(E) contains at least four possible bases for an objection to proffered co-conspirators’ testimony, defendant’s objection to evidence “under 801.d2e” did not preserve for appeal the contention that the statements objected to were not “in furtherance of the conspiracy”).
- a. However, an objection that does not cite “chapter and verse” may still be sufficient, provided that it got the gist of your complaint across to the district court. See, e.g., United States v. Neal, 578 F.3d 270, 272-73 (5th Cir. 2009); United States v. Ocana, 204 F.3d 585, 589 (5th Cir. 2000).
  - b. Also, remember that, although new *claims* are subject to plain-error review on appeal, you should be able to make new *arguments* in support of previously raised claims without any appellate penalty. As the Supreme Court has said, the “traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” Lebron v. Nat’l Railroad Passenger Corp., 513 U.S. 374, 379

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<sup>3</sup> United States v. Clements, 73 F.3d 1330, 1336 (5th Cir. 1996) (emphasis in original) (quoting United States v. Ballis, 28 F.3d 1399, 1406 (5th Cir. 1994)). In Clements, the Fifth Circuit applied this rule to hold that the district court did not abuse its discretion in excluding evidence of defendant’s poor CheckFax credit rating as hearsay, where “[d]efense counsel . . . made no attempt to inform the district court that [defendant’s] testimony about his CheckFax rating was being sought to prove something other than the truth of his rating.” Clements, *id.*

(1995) (internal quotation marks and citations omitted). And, in Illinois v. Gates, 462 U.S. 213 (1983), the Supreme Court noted the long pedigree of this rule as applied to cases before that Court:

In Dewey v. Des Moines, 173 U.S. 193, 197-198 (1899), the fullest treatment of the subject, the Court said that “[i]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court’s] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed.”

Gates, 462 U.S. at 219-20 (footnote omitted).

**C. Help, Mr. Wizard! I didn’t move/object/proffer! What now?**

1. Before you take on the plain-error Hydra, consider whether the error at issue might be one that, although unobjected-to below, is essentially immune from the plain-error rule.
  - a. Jurisdictional defects.
  - b. Sentence in excess of the statutory maximum. See, e.g., United States v. Vera, 542 F.3d 457, 459 (5th Cir. 2008) (“[R]egardless of whether Vera properly preserved an objection to his sentence, ‘because a sentence which exceeds the statutory maximum is an illegal sentence, and therefore constitutes plain error, our review of the issue presented in this appeal will be *de novo*.’”) (quoting United States v. Sias, 227 F.3d 244, 246 (5th Cir. 2008)).
2. *Confronting the plain-error Hydra:*

Well, despite your best efforts to the contrary, you must meet the plain-error Hydra head-on (so to speak). To prevail on plain-error review, you must satisfy four distinct prongs:

- a. *There must be error.*
  - i. “Deviation from a legal rule is ‘error’ unless the rule has been waived.” Olano, 507 U.S. at 732-33.
  
- b. *The error must be plain.*
  - i. “‘Plain’ is synonymous with ‘clear’ or, equivalently, ‘obvious.’” Olano, 507 U.S. at 734 (citations omitted). More recently, the Court has elaborated that this requirement means that the error is not “subject to reasonable dispute.” Puckett v. United States, 129 S. Ct. 1423, 1429 (2009) (citation omitted).
  
  - ii. The Supreme Court in Olano declined to decide whether the error had to be plain at the time of trial/sentencing, or merely at the time of appeal. See Olano, 507 U.S. at 734. However, in a later case, the Supreme Court held that “in a case . . . where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be ‘plain’ at the time of appellate consideration.” Johnson v. United States, 520 U.S. 461, 468 (1997). Some courts appear to have extended Johnson to cover any case where the relevant law is clear at the time of appeal, regardless of whether it represents a reversal of the law at the time of trial/sentencing.
  
  - iii. Can an error be plain if your court of appeals hasn’t spoken and/or the other circuits are divided on the question?
    - (I) Some courts have said no. See, e.g., United States v. Miranda-Lopez, 532 F.3d 1034, 1040-41 (9th Cir. 2008); United States v. Salinas, 480 F.3d 750, 759 (5th Cir. 2007); United States v. Bennett, 469 F.3d 46, 50-51 (1st Cir. 2006); United States v. Alli-Balogun, 72 F.3d 9, 12 (2d Cir. 1995) (“we do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuits is split”).
  
    - (II) Other courts, however, have declined to follow such categorical rules. See, e.g., In re Sealed Case, 573 F.3d

844, 851 (D.C. Cir. 2009) (“Even absent binding case law, however, an error can be plain if it violates an ‘absolutely clear’ legal norm, ‘for example, because of the clarity of a statutory provision.’”) (citation omitted) & id. at 851-52 (rejecting argument that circuit split defeats showing of plainness); United States v. Spruill, 292 F.3d 207, 215 n.10 (5th Cir. 2002)(noting that “[t]he fact that the particular factual and legal scenario here presented does not appear to have been addressed in any other reported opinion does not preclude the asserted error in this respect from being sufficiently clear or plain to authorize vacation of the conviction on direct appeal.”); United States v. Evans, 155 F.3d 245, 252 (3d Cir. 1998) (“Neither the absence of circuit precedent nor the lack of consideration of the issue by another court prevents the clearly erroneous application of statutory law from being plain error.”).

- iv Note that some courts have expressed the view that questions of fact can never constitute plain error. See United States v. Saro, 24 F.3d 283, 291 (D.C. Cir. 1994) (collecting cases so holding in the sentencing context). The D. C. Circuit has, however, adopted a more nuanced approach, holding that “at least when [factual] findings are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial, factual errors can indeed be obvious.” Id.
  - (I) Of course, some things that are called factual questions – e.g., whether a defendant deserves a mitigating role reduction – are often mixed questions of law and fact, and should not be considered to fall under this rule when they involve the district court’s application of settled legal principles to undisputed predicate facts.
  - (II) Argue that the sufficiency of the record evidence to support a factual determination is a **legal** question not subject to this rule.
- v. DISTURBING TREND: In a series of recent cases, the Fifth

Circuit – sometimes after conducting the analysis and actually finding error! – has found that the analysis was so convoluted or difficult that any error could not be said to be “plain.” See United States v. Henao-Melo, 591 F.3d 798, 806 (5th Cir. 2009); United States v. Jasso, 587 F.3d 706, 707, 710, 713 (5th Cir. 2009); United States v. Rodriguez-Parra, 581 F.3d 227, 231 (5th Cir. 2009); United States v. Ellis, 564 F.3d 370, 377 (5th Cir. 2009).

- c. *The error must have affected the defendant’s substantial rights.*
- i. The appellant has the burden of showing that the plain error “affect[ed] substantial rights,” which normally, although not necessarily always, requires a showing the error prejudiced the defendant, see Olano, 507 U.S. at 734-35 – i.e., a showing that the error “affected the outcome of the district court proceedings.” Olano, 507 U.S. at 734 (citations omitted).
  - ii. To make this showing, however, appellant need only show a **reasonable probability** of a different outcome but for the error. See United States v. Dominguez Benitez, 542 U.S. 74, 83 & n.9 (2004) (to establish an effect on substantial rights for purposes of plain-error review, defendant must normally show a reasonable probability that, but for the error, the outcome of the proceeding would have been different). And, “the reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different.” Id. at 83 n.9 (citation omitted).
  - iii. POSSIBLE EXCEPTIONS: In Olano, the Court suggested that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.” Olano, 507 U.S. at 735.
    - (I) Based upon the Court’s citation of Arizona v. Fulminante, 499 U.S. 279, 310 (1991), in connection therewith, the first “special category” alluded to in Olano

seems to refer to the rare category of “structural errors” that, upon proper objection, can never be harmless. See Olano, 507 U.S. at 735. But, the Supreme Court recently noted that “[t]his Court has several times declined to resolve whether ‘structural’ errors . . . automatically satisfy the third prong of the plain-error test,” Puckett, 129 S. Ct. at 1432 (citations omitted; and, in Puckett, the Court once again declined to decide that question, after finding that the error at issue there was not a “structural error”). See id.

- (A) Could claims that a district court failed to adequately explain its sentence fall into this category? CIRCUIT SPLIT: compare, e.g., In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008), and United States v. Lewis, 424 F.3d 239, 247 (2d Cir. 2005) (both yes), with, e.g., United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009) (no).
  
- (II) Where it is difficult to measure the harm attendant to a particular error, but that error seems as though it *should* make a difference in the proceedings, there may be a good argument for presumed prejudice under the second special category in Olano. The Third and Fifth Circuits have adopted such a presumption where a defendant is deprived of his right to allocution. See United States v. Reyna, 358 F.3d 344, 351-52 (5th Cir. 2004) (en banc); United States v. Adams, 252 F.3d 276, 287 (3d Cir. 2001). The Third Circuit has also applied a presumption of prejudice to errors that change the Guideline imprisonment range. See United States v. Knight, 266 F.3d 203, 207-10 (3d Cir. 2001); see also, e.g., United States v. Syme, 276 F.3d 131, 158 (3d Cir. 2002) (applying rule of Knight). And, the Sixth Circuit applied a presumption of prejudice to Booker error. See United States v. Barnett, 398 F.3d 516, 527-29 (6th Cir. 2005)

iv. *Special problem with Sentencing Guidelines errors:*

- (I) A perennial problem that we have faced in the Fifth Circuit is that court's refusal to find an effect on substantial rights where, even when a Guideline calculation error is corrected, the sentence actually imposed still falls within the correct range. See, e.g., United States v. Wheeler, 322 F.3d 823, 828 (5th Cir. 2003); United States v. Leonard, 157 F.3d 343, 346 (5th Cir. 1998).
  - (II) Of course, in circuits that have a rule like the Third Circuit's in Knight (see Knight, 266 F.3d at 208-09, for a list of those circuits), prejudice, and hence an effect on substantial rights, is presumed.
  - (III) For those practicing in the Fifth Circuit or in circuits with a rule like the Fifth Circuit's, be aware that the Fifth Circuit has lately taken a more nuanced approach to overlapping Guideline ranges and will now sometimes find a Guideline error to satisfy the third-prong of plain-error review, even though the sentence actually imposed also falls within the correct Guideline range. See United States v. Price, 516 F.3d 285, 289-90 (5th Cir. 2008).
- d. *Fourth prong: Impugns the fairness, integrity, or public reputation of judicial proceedings.*
- i. Finally, even if all of the first three factors are satisfied, "the Court of Appeals has authority to order correction but is not required to do so." Olano, 507 U.S. at 735. It should exercise its discretion to correct the plain forfeited error if failure to correct the error would result in a "miscarriage of justice" or, put another way, "if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Olano, 507 U.S. at 736 (citation omitted).
  - ii. "The fourth prong is meant to be applied on a case-specific and fact-intensive basis," Puckett, 129 S. Ct. at 1433, because "a 'per se approach to plain-error review is flawed.'" Id. (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985)).

- iii. The parameters of the fourth prong are not well-defined.
  - (I) The Supreme Court has indicated that a procedural trial error may fail to meet the fourth prong where the evidence of guilt is “overwhelming” and/or “essentially uncontroverted.” See United States v. Cotton, 535 U.S. 625, 632-34 (2002); Johnson v. United States, 520 U.S. 461, 469-70 (1997). Likewise, in Puckett, where the error in question was the government’s breach of a plea agreement recommendation to recommend a sentencing reduction for acceptance of responsibility, the Supreme Court held that to reverse for this breach “would have been so ludicrous as itself to compromise the public reputation of judicial proceedings,” given that defendant had obviously forfeited his right to acceptance of responsibility by committing other crimes while in pretrial detention for the first. Puckett, 129 S. Ct. at 1433.
  - (II) Given the lack of guidance on this prong, it is difficult to state definitively what will, or won’t, work to meet your burden on the fourth prong. Here are some suggestions:
    - (A) If you have a trial error, you have to show that the evidence against your client is not so overwhelming as to make reversal a pointless gesture. Query how much this inquiry is already subsumed within the third-prong inquiry.
    - (B) Is the right one that in some way specially promotes the fairness, integrity, or public reputation of the judicial proceedings? Allocution is a good example of this concept: the general public would be shocked that a defendant could be sentenced without being allowed to speak first on his own behalf. See, e.g., Adams, 252 F.3d at 288-89; but see Reyna, 358 F.3d at 352-53 (violation of allocution right did not violate fourth prong of plain-error review under unique facts of case).

(1) Look for good rhetoric in the jurisprudence about the importance of the right that was violated in your client's case.

(C) It would seem that *any* sentencing error that met the first three prongs would automatically satisfy the fourth prong, since (one would think) any amount of excess imprisonment would impugn the fairness, integrity, and public reputation of judicial proceedings. Cf. Glover v. United States, 531 U.S. 198, 203-04 (2001) (holding that, for purposes of establishing prejudice in a claim of ineffective assistance of counsel in connection with a Guidelines sentencing, “any amount of actual jail time has Sixth Amendment significance” and suffices to constitute prejudice justifying post-conviction relief). Be aware, however, that in the wake of Puckett, the Fifth Circuit has sent signals that small increases in sentences may not satisfy the fourth prong. See United States v. John, 597 F.3d 263, 285-89 (5th Cir. 2010) & id. at 290-92 (Smith, J., dissenting).

(D) In the end, this prong is all about: (1) Is it unfair to your client? or (2) Does it make the system look bad? Since we are focused on these things each and every day, simply unleash your inner defense attorney on these issues, and you will surely come up with something to argue.

**D. CONCLUSION:** Remember, if an error was not objected to below, aggressive litigation of a plain-error issue may be the client's last, best chance for relief. Cf. Saro, 24 F.3d at 287 (“reversal for ‘plain error’ is designed largely to protect defendants from the defaults of counsel”). So, go forth and litigate!

#### IV. CLEANING THE AUGEAN STABLES: AVOIDING THE ANDERS BRIEF

##### A. The “Anders brief”

1. The “Anders brief” is the brief filed when counsel is seeking to withdraw from a case because he/she can find no non-frivolous issue to raise on appeal. Each circuit has local rules detailing its procedures for the motion and brief.
2. The process can be viewed as inconsistent with the duty of zealous representation since it requires detailing why your client has nothing to raise on appeal. While sometimes unavoidable, there are options to review before taking that unpleasant plunge.

##### B. Avoiding the Anders brief

1. Look for any non-frivolous issue to raise on appeal. Remember, you’re only looking for an *arguable* issue. You don’t need a likelihood of success.
2. Review the record thoroughly.
  - a. Begin with the district court docket.
  - b. Order all transcripts of all proceedings and review them for issues, whether preserved or not.
  - c. Review the charging documents and any motions filed by either party.
  - d. Read the PSR
3. General areas to keep in mind during review:
  - a. **Pretrial:**
    - i. Suppression (evidence and statements)
    - ii. Government failure to disclose/provide information in timely fashion or other misconduct
    - iii. Deficiencies in the grand jury process

- iv. Deficiencies in the indictment (e.g., jurisdiction, statute of limitations, multiplicity/duplicity)
  - v. Speedy trial violations (statutory and constitutional)
  - vi. Severance/joinder.
- b. **Trial:**
- i. Jury selection (e.g., erroneous denial of cause challenges, Batson issues)
  - ii. Evidentiary issues (e.g., right to confrontation, hearsay, other bad acts; relevance and balancing of relevance and unfair prejudice, expert testimony)
  - iii. Jury instructions
  - iv. Prosecutorial misconduct in questioning or closing argument
  - v. Jury deliberations
  - vi. Sufficiency of the evidence
  - vii. Procedural irregularities
- c. **Change of plea:** compliance with constitutional and Fed. R. Crim. P. 11 requirements<sup>4</sup>
- d. **Sentencing:**
- i. Accuracy of guidelines calculations

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<sup>4</sup> Do not overlook plea proceedings. In United States v. Gandia-Maysonet, 227 F.3d 1 (1st Cir.2000), United States v. Bierd, 217 F.3d 15 (1st Cir. 2000), and United States v. Savinon-Acosta, 232 F.3d 265 (1st Cir. 2000), counsel filed Anders briefs, and the court directed further briefing. In these cases, the court found nonfrivolous scienter, voluntariness and Rule 11 issues. In Gandia-Maysonet, the court found plain error, vacated and remanded. In Bierd and Savinon-Acosta, the judgments were affirmed.

- ii. Adequacy of consideration of 18 U.S.C. §3553(a) factors
- iii. Adequacy of explanation of sentence
- iv. Departures/variances - judicial recognition of availability
- v. Reasonableness of sentence

C. **Talk** with your client and with trial counsel for their perceptions of the proceedings and any appellate issues they see. See *Penson v. Ohio*, 488 U.S.75, 82, n,5 (1988). Talk with other attorneys about potential issues.

D. **Research** the law. **Think** creatively.

1. Consider issues/positions that have been previously rejected by courts but may be ripe for reconsideration in light of changes in related areas or simply because there is an argument that the issue was wrongly decided and should be reconsidered for reasons you can articulate.
2. Check dissenting opinions for issues to raise
3. Look for circuit splits
4. Are there challenges to adverse case law generally governing an issue that have not been rejected and could be presented in your case (e.g., challenge to decision based on Sixth Amendment based on different theory of law such as due process or challenge based on distinguishing statute in your case from statute in another case) ?
  - *If, after completing your review and research, you’ve found a non-frivolous issue to raise on appeal DO IT and ignore the rest of this outline.*
  - *If after completing your review and research, you have not found a non-frivolous issue to raise on appeal, continue to read.*

D. **Communicate** your lack of success to your client.

1. Prepare a written document outlining the transcripts and documents you’ve read, the issues you’ve considered and researched, the case law you’ve found

and why you believe that case law establishes that you have no non-frivolous issue to raise on appeal.

2. Send that document to your client along with a letter summarizing and explaining its contents. If you can, visit after he/she has had time to read the materials you've sent. If you can't visit, arrange for a telephone call.
3. Discuss the document with your client, explaining the following:
  - a. Why there are no issues to raise on appeal;
  - b. That the client can move to dismiss the appeal, which will leave the judgment and sentence intact;
  - c. That since you have not been able to find an issue to raise on appeal, if client decides not to withdraw the appeal, you will have to move to withdraw.
  - d. Explain the requirements of your local Anders rule; you will have to file a brief with the court setting out essentially what you've just discussed with the client -- why there are no issues -- and that the client will then have an opportunity to file his/her own brief.
4. Listen to the response. Your client may complain of ineffective assistance of counsel at trial or assert that he/she has new evidence. Explain that generally such issues require establishing facts not on the record and cannot be raised on direct appeal. Explain the requirements for a motion for a new trial based on newly discovered evidence or a motion for postconviction relief pursuant to 28 U.S.C. §2255, and the fact that those issues may not be raised on his/her direct appeal.

#### **E. The Final Avoidance Step**

- If your client agrees to dismiss the appeal:
  1. Obtain a signed statement from the client setting forth his/her agreement to that action.
  2. Check your circuit rules for the form of a motion to dismiss the appeal, which generally requires attaching that statement.

- If your client does not agree to dismiss the appeal, your efforts to get that agreement have prepared the basis for your *Anders* brief.
3. **Preparation of the motion to withdraw from the case and *Anders* brief**
- a. Read your circuit’s local rule governing withdrawal in criminal cases and the relevant Supreme Court cases:
    - i. Anders v. California, 486 U.S. 738 (1967)
    - ii. McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429 (1988)
    - iii. Penson v. Ohio, 488 U.S. 75 (1988)
    - iv. Smith v. Robbins, 528 U.S. 259 (2000)
  - b. Check for circuit case law
4. Most local rules require the following if the motion to withdraw is based on the frivolousness of the appeal:
- a. A brief following the procedure described in Anders v. California
  - b. Review of all relevant transcripts as well as the presentence investigation report before filing the brief
  - c. Service of the brief and motion on the defendant with advice that the defendant has 30 days to file a brief in support of reversal or modification of the judgment
  - d. Proof of service of the motion on the defendant and certification that counsel has advised the defendant of his/her right to file a separate brief
5. Check Fed. R. App. P. and your circuit rules for form and content requirements. There may be some variation from the usual argument section.

**F. A Discussion of *Anders* Case Law**

- 1. There is a disconnect between an Anders brief and counsel’s Sixth

Amendment and ethical obligations to advocate vigorously on behalf of a client.<sup>5</sup> So, how detailed must an Anders brief be?

2. Anders itself held that a letter from counsel stating that he was “of the opinion that there is no merit to the appeal” and had explained his views to his client, was insufficient to provide constitutionally sufficient assistance of counsel. A request to withdraw on the basis that the case is wholly frivolous<sup>6</sup> requires that a motion to withdraw be accompanied by a brief referring to anything in the record that might arguably support the appeal. It does not, in express terms, require discussing, in detail with case citations, why any arguments would be frivolous. The purpose of the brief is to provide constitutionally adequate assistance of counsel while assisting the court in determining whether counsel’s assessment of frivolousness is well founded and correct.
3. In McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429 (1988), the Supreme Court addressed a Wisconsin procedure requiring a discussion of why the issues presented in an Anders brief lack merit. Appointed counsel argued that the discussion requirement violated the Sixth Amendment, since it essentially forced counsel to advocate against his/her client. The Court upheld the Wisconsin procedure, which it described as requiring “that the attorney cite the principal cases and statutes and the facts in the record that support the conclusion that the appeal is meritless . . . [and] also requires a brief statement of why these citations lead the attorney to believe the appeal lacks merit.” (486 U.S. at 440). In the Court’s view, the discussion of the basis for the conclusion of lack of merit evidenced counsel’s diligence in reviewing and evaluating potential issues.
4. In Smith v. Robbins, 528 U.S. 259 (2000), the Court addressed the California procedure established in 1979 in which counsel who believes an appeal would be frivolous files a brief summarizing the procedural and factual history of the case with record citations and attests that counsel has reviewed the record,

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<sup>5</sup> In United States v. Forgione, 487 F.2d 364 (1st Cir. 1974), and United States v. Loudd, 544 F.2d 1113 (1st Cir. 1976), the court chastised counsel for filing briefs raising issues the court viewed as frivolous, but stated in Forgione: “We recognize, we hope fully, the right, indeed the duty, of counsel to resolve all issues of any possible doubt in favor of his client, and to be a vigorous, sometimes even abrasive advocate.”

<sup>6</sup> In McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 439, n.10 (1988) the Court defined the term wholly frivolous or without merit as lacking any basis in law or fact.

explained his evaluation to his client, provided the client with a copy of the brief and informed the client of his right to file a pro se supplemental brief. Counsel requests that the court independently examine the record for arguable issues and need not explicitly state that review has led to the conclusion that an appeal would be frivolous or request leave to withdraw. The court must then review the record and determine whether there is an arguable issue requiring briefing. In a 5-4 decision, the Court concluded that this procedure was constitutionally adequate.

5. The First Circuit has not defined the elements of an Anders brief in terms of the extent of argument/discussion required beyond the requirements set out in Local Rule 46.6. An argument that sets out any potential issue, together with the facts relevant to that issue, the standard of review to be employed (e.g., de novo, abuse of discretion, clear error, plain error, degree of deference) and the governing case law with an explanation of how it applies should be sufficient to demonstrate the conscientious examination standard of Anders.
6. The Ninth and Eleventh Circuits have discussed the defendant's constitutional right to a counsel who acts as an active advocate rather than amicus curiae and have rejected Anders briefs that do not present the strongest arguments in favor of the defendant supported by record citations and applicable legal authority. See United States v. Griffy, 895 F.2d 561, 562 (9th Cir. 1990); United States v. Aldana-Ortiz, 6 F.3d 601 (9th Cir. 1993); United States v. Blackwell, 767 F.2d 1486 (11th Cir. 1985). See also United States v. Skurdal, 341 F.3d 931 (9th Cir. 2003); United States v. Murillo-Contreras, 134 F.3d 380 (9th Cir. 1998) (unpublished table decision); United States v. Hernandez-Espinoza, 2010 WL 1915263 (11th Cir. 2010); United States v. Massengill, 319 Fed. Appx. 879 (11th Cir. 2009) (unpublished); United States v. Edwards, 822 F.2d 1012 (11th Cir. 1987).
7. Other circuits have specified that counsel explain /discuss the basis for counsel's conclusion that none of the issues are nonfrivolous. See, e.g., United States v. Edwards, 777 F.2d 364,366 (7th Cir. 1985) (Anders brief should, inter alia, "explain why [counsel] nevertheless believes that none of these [potential error] arguments is nonfrivolous."); United States v. Fernandez, 174 F.3d 900 (7th Cir. 1999) (Anders brief inadequate); United States v. Tabb, 125 F.3d 583 (7th Cir. 1997) (inadequate discussion in Anders brief); United States v. Palmer, 600 F.3d 897 (7th Cir. 2010); United States v. Rush, 190 Fed. Appx. 505 (7th Cir. 2006) (unpublished); United States v. Youla, 241 F.3d 296 (3d Cir. 2001) (detailing appellate counsel's deficiencies and rejecting the

Anders brief); United States v. Marvin, 211 F.3d 778 (3d Cir.2000); United States v. Wilcox, 2010 WL 1220812 (3d Cir. 2010); United States v. Burnett, 2010 WL 1677237 (3d Cir. 2010); United States v. Whitley, 503 F.3d 74 (2d Cir. 2007); United States v. Hill, 499 F.3d 152 (2d Cir. 2007); United States v. Arrous, 320 F.3d 355 (2d Cir. 2003); United States v. Burnett, 989 F.2d 100 (2d Cir. 1993).

8. Other circuits have been less specific about their criteria. See, e.g., United States v. Poindexter, 492 F.3d 262 (4th Cir. 2007); United States v. Jennings, 2010 WL 1745310 (4<sup>th</sup> Cir. 2010); United States v. Castro, 339 Fed. Appx. 378 (5th Cir. 2009) (unpublished); United States v. Rosales-Martinez, 349 Fed. Appx. 924 (5th Cir. 2009) (unpublished); United States v. Davis, 530 F.3d 318 (5th Cir. 2008); United States v. Cortez, 48 Fed. Appx. 480 (5th Cir. 2002) (unpublished); United States v. Huerta, 105 F.3d 656 (5th Cir. 1996); United States v. Sublett, 189 Fed. Appx. 413 (6th Cir. 2006) (unpublished); United States v. Dixon, 134 Fed. Appx. 57 (6th Cir. 2005); United States v. Maddox, 69 Fed. Appx. 663 (6th Cir. 2003) (unpublished); United States v. Badger, 27 Fed. Appx. 479 (6th Cir. 2001) (unpublished); United States v. Hernandez-Florez, 288 Fed. Appx. 307 (8th Cir. 2008) (unpublished); United States v. Stanley, 270 Fed. Appx. 454 (8th Cir. 2008); United States v. Weston, 267 Fed. Appx. 476 (8th Cir. 2008) (unpublished); United States v. Starr, 259 Fed. Appx. 904 (8th Cir. 2008) (unpublished); United States v. Davis, 508 F.3d 461 (8th Cir. 2007); United States v. Martin, 2010 WL 1999068 (10th Cir. 2010); United States v. Rascon-Otero, 2010 WL 1745277 (10th Cir. 2010); United States v. Calderon, 428 F.3d 928 (10th Cir. 2005); United States v. Lowe, 2003 WL 622097944 (D.C.Cir. 2003); United States v. Rashad, 331 F.3d 908 (D.C.Cir. 2003).