
The Federal Rules of Criminal Procedure: Application and Practice

**Office of the Federal Public Defender
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- I. **SCOPE OF PAPER.** This paper presents an overview of the Federal Rules of Criminal Procedure, and discusses the rules most frequently encountered in the typical case. Practice commentaries and cross-references to authorities outside the rules are generally placed in footnotes. In many instances, the rule or a portion of it will be quoted. In every instance, the reader should consult the full text of the rule, with notes and case-law interpretations, for the fullest understanding. A bibliography of source material for further research on the rules, and federal criminal practice manuals is provided in part III below.
- II. **THE FEDERAL RULES OF CRIMINAL PROCEDURE.** The following discussion of the Rules is current through the amendments effective December 1, 2008. Most of those changes implement the dictates of the Crime Victims' Rights Act,¹ including a new Rule 60 enumerating, and creating a mechanism for enforcing, various rights of victims. Rule 41 now contains expanded authority for magistrate judges to issue certain types of warrants. And Rule 45(c) received a technical amendment correcting the cross-reference to Rule 5 of the Civil Rules.

A. CURRENT RULES.

1. **Rule 1. Scope; Definitions.** The rules govern procedure in all criminal proceedings in the United States district courts and courts of appeals, and in the Supreme Court of the United States. Rule 1 also prescribes application of the rules in other courts and to other proceedings, and provides definitions of general application throughout the rules. These definitions, found in Rule 1(b), are essential to understanding the rules.
2. **Rule 2. Interpretation.** The rules “are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.” Rule 2.
3. **Rule 3. The Complaint.** “The complaint is a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.” Rule 3.
4. **Rule 4. Arrest Warrant or Summons on a Complaint.** “If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it.” Rule 4(a). The rule also details the prescribed form of a warrant or summons, as well as procedures for their execution and return. Rule 4(b), (c).

* This paper is researched, written, edited, and updated by the Office of the Federal Public Defender for the Western District of Texas, and is current as of the date on the cover page.

¹ 18 U.S.C. § 3771.

5. Rule 5. Initial Appearance.²

- a. **In General.** “A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.” Rule 5(a)(1)(A).³ Compliance with this rule is not required when the exception of Rule 5(a)(2)(A) is met (arrest under a warrant based on a complaint that charges only a violation of 18 U.S.C. § 1073, Flight to avoid prosecution or giving testimony).
- b. **Arrest Without a Warrant.** “If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)’s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.” Rule 5(b).⁴
- c. **Place of Initial Appearance; Transfer to Another District.** The rule prescribes procedures for arrests both within and without the district where the offense was allegedly committed. Rule 5(c). “Rule 5(c)(3)(D) . . . permit[s] the magistrate judge to accept a warrant by reliable electronic means” as an alternative to the original warrant or certified copy of the warrant.⁵
- d. **Procedure According to Grade of Offense.** The rule prescribes detailed procedures for a felony case, and a cross-reference to Rule 58(b)(2) for a misdemeanor case.
- e. **Video Teleconferencing.** “Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.” Rule 5(f).

² See Rule 46 (Release from Custody), and Title 18, Ch. 207, Release and Detention Pending Judicial Proceedings (18 U.S.C. §§ 3141–3156). Section 3154, Functions and powers relating to pretrial services, defines the pretrial services function of collecting, verifying, and reporting to the judicial officer information pertaining to the pretrial release of an individual. Typically, a pretrial services officer (or a probation officer performing pretrial services) will seek to interview an accused person before presentment to gather information pertinent to the pretrial release or detention decision. While information gained by pretrial services has limited confidentiality, it will be disclosed to the attorney for the accused and the attorney for the Government, and it will be provided to the probation office for preparation of any presentence report. Some of the information sought in the pretrial services interview may affect the recommended sentence under the United States Sentencing Guidelines.

³ A confession obtained during a period of unnecessary delay in taking an arrested person before a magistrate may be subject to suppression. *See* 18 U.S.C. § 3501; *Corley v. United States*, 129 S. Ct. 1558 (2009). The terms “federal judge,” “magistrate judge,” and “state or local judicial officer” are defined in Rule 1(b)(3), (5), (10).

⁴ A judicial determination of probable cause must be afforded “promptly” after a warrantless arrest. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). A probable cause determination provided within 48 hours of arrest will generally, although not necessarily, comply with *Gerstein*’s promptness requirement. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

⁵ FED. R. CRIM. P. 5 advisory committee’s note (2006 Amendment). “This amendment parallels similar changes to Rules 32.1(a)(5)(B)(i) and 41.” *Id.*

5.1. **Rule 5.1. Preliminary Hearing.**

a. **In General.**

“If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:

- (1) the defendant waives the hearing;
- (2) the defendant is indicted;
- (3) the government files an information under Rule 7(b) charging the defendant with a felony;
- (4) the government files an information charging the defendant with a misdemeanor;
or
- (5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.”

Rule 5.1(a).

- b. **Scheduling and Extending the Time.** “The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.” Rule 5.1(c). “With the defendant’s consent and upon a showing of good cause—taking into account the public interest in the prompt disposition of criminal cases—a magistrate judge may extend the time limits in Rule 5.1(c) one or more times. If the defendant does not consent, the magistrate judge may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.” Rule 5.1(d).
- c. **Hearing and Finding; Discharge.** “At the preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence on the ground that it was unlawfully acquired. If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings.” Rule 5.1(e). “If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.” Rule 5.1(f).
- d. **Producing a Statement.** “Rule 26.2(a)–(d) and (f) applies at any hearing under this rule, unless the magistrate judge for good cause rules otherwise in a particular case.” Rule 5.1(h)(1).

6. **Rule 6. The Grand Jury.**⁶ “A grand jury must have 16 to 23 members” Rule 6(a)(1).
- a. **Objections.** “Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.” Rule 6(b)(1). “A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror’s lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.” Rule 6(b)(2).⁷
 - b. **Secrecy.** Grand jury proceedings are subject to a general rule of secrecy. Rule 6(e)(2). The rule provides exceptions, permitting disclosure of proceedings “other than the grand jury’s deliberations or any grand juror’s vote” in specified circumstances. Rule 6(e)(3).
 - c. **Sealed Indictment.** “The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment’s existence except as necessary to issue or execute a warrant or summons.” Rule 6(e)(4).
 - d. **Indictment and Return.** “A grand jury may indict only if at least 12 jurors concur.” Rule 6(f).
 - e. **Term of Service.** “A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is

6 18 U.S.C. § 1504 criminalizes an attempt

to influence the action or decision of any grand or petit jury of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter

This section does not prohibit “the communication of a request to appear before the grand jury.”

7 The Supreme Court held in *United States v. Mechanik*, 475 U.S. 66 (1986), that a guilty verdict rendered harmless a Rule 6(d) violation which was raised only during trial, even though the defense used all diligence to discover the violation before trial. (Rule 6(d) governs who may be present while the grand jury is in session.) The Court “express[ed] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury’s charging decision and is brought to the attention of the trial court before the commencement of trial.” 475 U.S. at 72. The opinion distinguished *Vasquez v. Hillery*, 474 U.S. 254 (1986), a decision setting aside a final judgment of conviction because of racial discrimination in the composition of the grand jury, on the ground that result was “compelled by precedent directly applicable to the special problem of racial discrimination.” 475 U.S. at 70 n.1.

in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute." Rule 6(g).⁸

7. Rule 7. The Indictment and the Information.

- a. **Use of Indictment or Information.** "An offense (other than criminal contempt) must be prosecuted by an indictment if it is punishable: (A) by death; or (B) by imprisonment for more than one year." Rule 7(a)(1). "An offense punishable by imprisonment for one year or less may be prosecuted in accordance with Rule 58(b)(1)." Rule 7(a)(2).
- b. **Waiving Indictment.** "An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights—waives prosecution by indictment." Rule 7(b).
- c. **Nature and Contents.** "The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government.⁹ It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated." Rule 7(c)(1). To support a judgment of forfeiture, the indictment or information must "provide[] notice that the defendant has an interest in property that is subject to forfeiture in accordance with the applicable statute." Rule 7(c)(2).
- d. **Surplusage.** "Upon the defendant's motion, the court may strike surplusage from the indictment or information." Rule 7(d).

⁸ See Title 18, Ch. 216, Special Grand Jury (18 U.S.C. §§ 3331–3334).

⁹ Following the constitutional principle announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a federal indictment must include any fact (other than the fact of a prior conviction) that raises the statutory maximum penalty. See *United States v. Cotton*, 535 U.S. 625 (2002) (under *Apprendi*, federal drug indictment must allege enhancing drug quantity). The Supreme Court has not extended this principle to facts that raise only the mandatory minimum penalty. *Harris v. United States*, 536 U.S. 545 (2002). The circuits are divided over whether the omission of an element from an indictment can constitute harmless error. See WAYNE R. LAFAYE ET AL., 5 CRIMINAL PROCEDURE § 19.3(a) at 263–76 (3d ed. 2007); compare *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004) (harmless error applies), with *United States v. Resendiz-Ponce*, 425 F.3d 729, 732–33 (9th Cir. 2005) (error is structural). The Supreme Court granted certiorari on that question in *Resendiz-Ponce*, but ultimately resolved the case on a different ground without reaching the standard-of-review issue. See 549 U.S. 102 (2007).

- e. **Amending an Information.** “Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.” Rule 7(e).
- f. **Bill of Particulars.** “The court may direct the government to file a bill of particulars. The defendant may move for a bill of particulars before or within 10 days after arraignment or at a later time if the court permits. The government may amend a bill of particulars subject to such conditions as justice requires.” Rule 7(f).
8. **Rule 8. Joinder of Offenses or Defendants.** Rule 8 provides:
- “(a) **Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.
- “(b) **Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.”¹⁰
- Note that there are three bases for joinder under subdivision (a) and two under subdivision (b), with only one common basis—“same act or transaction.” In a case with multiple defendants, subdivision (b) exclusively controls; subdivision (a) has no application.¹¹ The most significant difference between the subdivisions is that subdivision (a) permits joinder of offenses of “the same or similar character” while subdivision (b) does not.
9. **Rule 9. Arrest Warrant or Summons on an Indictment or Information.** The rule governs the issuance, form, execution or service, and return of warrants and summonses.
10. **Rule 10. Arraignment.** Rule 10 provides:

¹⁰ A misjoinder under Rule 8(b) is subject to harmless-error analysis. *United States v. Lane*, 474 U.S. 438 (1986). While a motion to sever under Rule 14 (relief from prejudicial joinder) requires the trial court to first determine whether joinder was proper under Rule 8, *United States v. Holloway*, 1 F.3d 307, 310 n.2 (5th Cir. 1993), it is better practice to specifically seek relief under all applicable rules. In the Fifth Circuit, “a defendant is not required to renew a severance objection at the close of the evidence to preserve the error.” *Id.* (citing *United States v. Stouffer*, 986 F.2d 916, 924 n.7 (5th Cir. 1993) (Rule 14 motion)). In *United States v. McCarter*, 316 F.3d 536 (5th Cir. 2002), the court found abuse of discretion in failure to sever drug count from felon in possession of a gun count. In *United States v. Singh*, 261 F.3d 530 (5th Cir. 2001), misjoinder of a charge of felon in possession of a gun with charges of harboring aliens was found to be reversible error even though Singh was acquitted of the gun charge.

¹¹ See *United States v. DeLeon*, 641 F.2d 330, 337 n.4 (5th Cir. Unit A Apr. 1981).

- “(a) **In General.** An arraignment must be conducted in open court and must consist of:
- (1) ensuring that the defendant has a copy of the indictment or information;
 - (2) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and then
 - (3) asking the defendant to plead to the indictment or information.
- “(b) **Waiving Appearance.** A defendant need not be present for the arraignment if:
- (1) the defendant has been charged by indictment or misdemeanor information;
 - (2) the defendant, in a written waiver signed by both the defendant and defense counsel, has waived appearance and has affirmed that the defendant received a copy of the indictment or information and that the plea is not guilty; and
 - (3) the court accepts the waiver.
- “(c) **Video Teleconferencing.** Video teleconferencing may be used to arraign a defendant if the defendant consents.”

11. **Rule 11. Pleas.** Federal criminal practice requires complete understanding of this rule, which governs all pleas.

- a. **Alternatives.** A defendant may plead not guilty, guilty, or, with the court’s consent, nolo contendere. Rule 11(a)(1). Federal rules recognize a conditional plea: “With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.” Rule 11(a)(2). Take note that such a plea requires (1) approval of the court and consent of the government, and (2) a *written* reservation of the right to appeal, based on a *specified* pretrial motion ruling.¹²
- b. **Nolo Contendere Plea.** “Before accepting a plea of nolo contendere, the court must consider the parties’ views and the public interest in the effective administration of justice.” Rule 11(a)(3).
- c. **Advice to Defendant.** Rule 11(b)(1) specifies in detail the matters that the court must explain to the defendant before accepting a plea of guilty or nolo contendere.
 - “(A) the government’s right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

¹² Counsel should expect that the courts of appeals will require strict compliance with the requisites for a conditional plea. *See United States v. Jessup*, 305 F.3d 300, 302 (5th Cir. 2002); *United States v. Wise*, 179 F.3d 184 (5th Cir. 1999). *But see United States v. Santiago*, 410 F.3d 193, 197–98 (5th Cir. 2005) (excusing lack of written agreement where record clearly showed that defendant intended to enter conditional plea and neither Government nor court opposed it).

- “(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- “(C) the right to a jury trial;
- “(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- “(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- “(F) the defendant’s waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- “(G) the nature of each charge to which the defendant is pleading;
- “(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;¹³
- “(I) any mandatory minimum penalty;
- “(J) any applicable forfeiture;
- “(K) the court’s authority to order restitution;¹⁴
- “(L) the court’s obligation to impose a special assessment;¹⁵
- “(M) in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);¹⁶ and
- “(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.”¹⁷

13 The maximum amounts and other incidents of fines are governed by 18 U.S.C. §§ 3571–3572. Imposition, modification, and revocation of supervised release are governed by 18 U.S.C. § 3583.

14 This is a reference to the restitution provisions of 18 U.S.C. §§ 3663–3664.

15 The special assessment is mandated by the Victims of Crime Act of 1984, codified at 18 U.S.C. § 3013.

16 Subdivision (b)(1)(M) reflects the advisory nature of the Sentencing Guidelines in the wake of *United States v. Booker*, 543 U.S. 220 (2005).

17 In adding this requirement to the plea advice, the Advisory Committee on the Criminal Rules “[took] no position on the underlying validity of such waivers.” FED. R. CRIM. P. 11 advisory committee’s note (1999 Amendments). In *United States v. Story*, the Fifth Circuit held that it would not enforce an appeal-waiver provision where the government did not affirmatively invoke, or seek to enforce, the provision. 439 F.3d 226, 229–31 (5th Cir. 2006).

- d. **Ensuring That a Plea Is Voluntary.** “Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).” Rule 11(b)(2).
- e. **Determining the Factual Basis for a Plea.** “Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.” Rule 11(b)(3).¹⁸
- f. **Plea Agreement Procedure.**¹⁹ “The court must not participate in [plea] discussions.” Rule 11(c)(1). “[T]he plea agreement may specify that an attorney for the government will:
 - “(A) not bring, or will move to dismiss, other charges;
 - “(B) recommend, or agree not to oppose the defendant’s request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or
 - “(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).”

¹⁸ This is typically done by having the prosecutor recite the factual basis, and calling upon the defendant to confirm or deny those facts. Alternatively, the defendant may be called upon to make a testimonial judicial confession to the offense.

Under U.S. Sentencing Guideline §1B1.2(a), “a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction” calls for use of the guideline applicable to the stipulated offense. “A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes.” *Id.*, comment. (n.1). *See also Braxton v. United States*, 500 U.S. 344 (1991) (to support use of the higher guideline range, the stipulation must establish every element of the more serious offense, including the culpable mental state).

Former Rule 11(f) was held not to require a district court to inquire into the factual basis for a stipulated forfeiture of assets contained in a plea agreement. *Libretti v. United States*, 516 U.S. 29 (1995).

¹⁹ Former Rule 11(e)(5) required pretrial notice to the court of the existence of a plea agreement. *See also United States v. Ellis*, 547 F.2d 863 (5th Cir. 1977). The current rule eliminates that requirement, but “few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists.” FED. R. CRIM. P. 11 advisory committee’s note (2002 Amendments).

Rule 11(c)(1).²⁰ “To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.” Rule 11(c)(3)(B). If the court rejects an 11(c)(1)(A) or (C) agreement, the court must give the defendant the opportunity to withdraw the plea. Rule 11(c)(5)(B). “The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.” Rule 11(f).²¹

g. **Withdrawing a Plea.** Rule 11(d) provides:

“(d) **Withdrawing a Guilty or Nolo Contendere Plea.** A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason;²² or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason²³ for requesting the withdrawal.”²⁴

h. **Finality of a Plea.** Rule 11(e) provides:

“(e) **Finality of a Guilty or Nolo Contendere Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.”

20 If the government violates the terms of a plea agreement that has been accepted by the court, a defendant may seek either (1) specific performance, which requires that the sentence be vacated and that the defendant be resentenced by a different judge; or (2) withdrawal of the guilty plea, and the opportunity to plead anew, which requires vacation of both the conviction and the sentence. *United States v. Munoz*, 408 F.3d 222, 226, 229 (5th Cir. 2005); *United States v. Palomo*, 998 F.2d 253, 256 (5th Cir. 1993); see also *Santobello v. New York*, 404 U.S. 257, 263 (1971).

21 The rules of inadmissibility may be waived by a defendant as part of a plea agreement. *United States v. Mezzanatto*, 513 U.S. 196 (1995).

22 “Rule 11(d)(1) is an absolute rule: a defendant has an absolute right to withdraw his or her guilty plea before the court accepts it.” *United States v. Arami*, 536 F.3d 479, 483 (5th Cir. 2008).

23 For “an illustrative list of factors for deciding whether a fair and just reason exists for withdrawal[.]” see *United States v. McElhane*y, 469 F.3d 382, 385 (5th Cir. 2006).

24 If a defendant seeks to plead guilty pursuant to an agreement, the court may accept the guilty plea and defer its decision whether to accept the agreement. *United States v. Hyde*, 520 U.S. 670, 677–80 (1997). In that situation, Rule 11(d)(2)(B) applies, rather than Rule 11(d)(1). See FED. R. CRIM. P. 11 advisory committee’s note (2002 Amendment ¶ 6).

- i. **Harmless Error.** A harmless error rule applies to any variance from plea procedures that “does not affect substantial rights.” Rule 11(h).²⁵

12. Rule 12. Pleadings and Pretrial Motions.

- a. Rule 12(b) describes motions that may be made before trial, and motions that must be made before trial. Those that must be made before trial are set out in Rule 12(b)(3):
- “(A) a motion alleging a defect in instituting the prosecution;²⁶
 - “(B) a motion alleging a defect in the indictment or 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;
 - “(C) a motion to suppress evidence;
 - “(D) a Rule 14 motion to sever charges or defendants; and
 - “(E) a Rule 16 motion for discovery.”
- b. **Motion Date.** “The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.” Rule 12(c).
- c. **Ruling on Motion.** “The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party’s right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.” Rule 12(d).
- d. **Waiver of a Defense, Objection, or Request.** “A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule

²⁵ See *United States v. Johnson*, 1 F.3d 296, 300–02 (5th Cir. 1993) (en banc) (all variances from Rule 11 procedure are subject to harmless-error analysis). Further, if defendant does not object to a Rule 11 violation, plain-error review also applies, and the reviewing court may consult the whole record to consider the effect of any error on substantial rights. *United States v. Vonn*, 535 U.S. 55, 59 (2002).

²⁶ The dismissal sanction of the Speedy Trial Act specifically requires a pretrial motion: “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 this section.” 18 U.S.C. § 3162(a)(2); *United States v. Bell*, 966 F.2d 914, 915 (5th Cir. 1992).

A limitations defense must be affirmatively asserted “at trial” in order to preserve it for appeal. *United States v. Solomon*, 29 F.3d 961, 964 (5th Cir. 1994). It may also be raised prior to trial.

In *United States v. Dixon*, 509 U.S. 688 (1993), the Supreme Court stated that a double jeopardy challenge may be raised before trial and must be raised no later than trial.

12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.” Rule 12(e).²⁷

- e. **Producing Statements at Suppression Hearing.** “Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.” Rule 12(h).
- 12.1. **Rule 12.1. Notice of Alibi.** The defendant must give notice of alibi upon the government’s written demand setting out certain particulars. Rule 12.1(a)(1). Upon compliance with such a demand, the defendant is entitled to certain reciprocal disclosure. Rule 12.1(b). As of December 1, 2008, the Rule prohibits disclosure of the address and telephone number of a witness who is a victim, unless the defendant “establishes a need” for that information. Rule 12.1(b)(1)(B)(i). And even then, the court may “fashion a reasonable procedure that allows preparation of the defense and also protects the victim’s interests[,]” in lieu of ordering disclosure of the victim’s address and telephone number. Rule 12.1(b)(1)(B). Both parties are under a continuing duty to disclose pertinent alibi witnesses. Rule 12.1(c). For failure to comply with the rule, the court may exclude the testimony of any undisclosed witness of a party, but shall not limit the right of the defendant to testify in defendant’s own behalf. Rule 12.1(e).
- 12.2. **Rule 12.2. Notice of an Insanity Defense; Mental Examination.**²⁸ Unlike Rule 12.1 on notice of alibi, which is triggered by the government’s demand, this rule places the responsibility on the defendant to give timely notice of an insanity defense. Rule 12.2(a) provides in full:

“A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.”

The rule also requires notice of expert evidence of a mental condition bearing either on guilt, or punishment in a capital case:

“If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within

²⁷ Untimely filing of a pretrial motion may result in its denial for that reason alone. *See United States v. Chavez-Valencia*, 116 F.3d 127, 131 (5th Cir. 1997). The Fifth Circuit has held that a defendant’s failure to raise a particular argument for the inapplicability of the *Leon* good-faith exception when moving to suppress the fruits of a search constituted a waiver of that specific argument. *United States v. Pope*, 467 F.3d 912 (5th Cir. 2006).

²⁸ *See also* 18 U.S.C. § 17 (substantive limits on the insanity defense); 18 U.S.C. §§ 4241–4247 (procedures in cases where sanity or competency is an issue); FED. R. EVID. 704(b) (precluding experts from offering an opinion as to whether a defendant had the mental state constituting an element of an offense or of a defense).

the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.”

- Rule 12.2(b). Under specified circumstances, the court may order the defendant to submit to a mental examination for competency, sanity, or mental condition. Rule 12.2(c)(1). The rule prescribes times for disclosure of the government’s examination, and the defendant’s examination, for a capital sentencing. Rule 12.2(c)(2), (3). The rule provides protection against use of defendant’s statements made in the course of an examination, subject to exceptions. Rule 12.2(c)(4). If defendant fails to give notice, or to submit to examination, or fails to disclose his expert’s report on capital sentencing, the court may exclude expert evidence. Rule 12.2(d).
- 2 .3. **Rule 12.3. Notice of a Public-Authority Defense.** “If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.” Rule 12.3(a)(1). The rule specifies the procedure for and content of the notice, the government’s response, procedures for disclosure of witnesses, and sanctions.²⁹
- 12.4. **Rule 12.4. Disclosure Statement.** This rule imposes disclosure obligations as to a nongovernmental corporate party or an organizational victim, to assist the judge in determining whether recusal is required because of a financial interest in the case.
13. **Rule 13. Joint Trial of Separate Cases.** “The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.” For joinder requirements, see Rule 8.
14. **Rule 14. Relief from Prejudicial Joinder.**
- “(a) **Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.
 - “(b) **Defendant’s Statements.** Before ruling on a defendant’s motion to sever, the court may order an attorney for the government to deliver to the court for in

²⁹ See also the Classified Information Procedures Act, Title 18, App. III.

camera inspection any defendant's statement that the government intends to use as evidence."³⁰

This discretionary relief must be distinguished from relief from misjoinder under Rule 8.³¹

15. **Rule 15. Depositions.** Depositions are not taken of right in criminal cases, but the court may order them because of "exceptional circumstances and in the interest of justice." Rule 15(a)(1).³² The rule specifies deposition procedures in full.³³

16. **Rule 16. Discovery and Inspection.**

- a. **Government's Disclosure.** The defendant is entitled to discovery of defendant's statement as defined and prior record; documents and objects as defined; reports of examinations and tests as defined; and expert testimony. Rule 16(a)(1)(A)–(G). *It is imperative to understand the precise definition of discoverable and non-discoverable items.* The predicate for discoverability of items shifts from one subdivision to the next. Documents and objects, as defined, are discoverable if they are "within the government's possession, custody, or control," and to the extent they "are material to preparing the defense" or "the government intends to use the item in its case-in-chief at trial," or "the item was obtained from or belongs to the defendant." Rule 16(a)(1)(E). Reports of examinations and tests, as defined, are discoverable if, in addition to other requirements, "the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial." Rule 16(a)(1)(F).

"Upon a defendant's request, the government must give the defendant a written summary of any testimony the government intends to use in its case-in-chief at trial under Federal Rules of Evidence 702, 703, or 705. The summary must describe the

30 One ground for severance is use of a nontestifying codefendant's confession that implicates the defendant. *Lilly v. Virginia*, 527 U.S. 116 (1999); *Gray v. Maryland*, 523 U.S. 185 (1998); *Bruton v. United States*, 391 U.S. 123 (1968).

31 For application of Rule 14, and appellate review of refusal to sever, see *Zafiro v. United States*, 506 U.S. 534 (1993); *United States v. Bremers*, 195 F.3d 221, 228 (5th Cir. 1999).

32 "District courts have broad discretion to grant or refuse a Rule 15(a) motion[.]" *United States v. Lucas*, 516 F.3d 316, 348 (5th Cir.) (quotation marks omitted), *cert. denied*, 129 S. Ct. 116 (2008). And "[e]ven if extraordinary circumstances are present, the proposed deposition [also] must be material[.]" *Id.*

33 In the Western District of Texas, the possibility of deposition practice in a criminal case comes up most often in prosecutions for illegal transportation of aliens under 8 U.S.C. § 1324, when the material witnesses are detained. See 18 U.S.C. § 3144 (Release or detention of a material witness). Counsel should be alert to constitutional issues arising from the right of confrontation. See *United States v. Tirado-Tirado*, 563 F.3d 117 (5th Cir. 2009); *United States v. Aguilar-Tamayo*, 300 F.3d 562 (5th Cir. 2002); *United States v. Allie*, 978 F.2d 1401 (5th Cir. 1992); *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987).

witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Rule 11(a)(1)(G).³⁴

Except as specifically provided, Rule 16 does not authorize discovery of government reports, memoranda or other internal documents, nor does it authorize discovery of government witnesses’ statements, except as provided in 18 U.S.C. § 3500 (Jencks Act). Rule 16(a)(2). (See also Rules 12(h) and 26.2.) Except as provided in Rules 6, 12(h), 16(a)(1), and 26.2, the rules do not apply to discovery of grand jury proceedings. Rule 16(a)(3).

- b. **Reciprocal Discovery.** If the defendant requests discovery under subdivision (a)(1)(E), (F), or (G)—documents and objects, reports of examinations and tests, or expert testimony—the government is entitled, upon compliance and request, to reciprocal discovery of such items. Rule 16(b)(1). Certain items are excluded from reciprocal discovery. Rule 16(b)(2).
 - c. **Continuing Duty to Disclose.** The parties are under a continuing duty to disclose, in compliance with rule, before and during trial. Rule 16(c).
 - d. **Regulation of Discovery.** The court may enter protective orders denying, restricting, or deferring discovery, and the court may impose sanctions, including exclusion of evidence, for failure to comply with the rule. Rule 16(d).³⁵
17. **Rule 17. Subpoena.**³⁶ This rule governs content and issuance of a subpoena, application by a defendant unable to pay, subpoena duces tecum (including advance production), subpoenas for personal or confidential victim information, service, and contempt. Take note that a defendant unable to pay is entitled to apply to the court *ex parte* for issuance of witness subpoenas at no cost to him. Rule 17(b).³⁷ “No party may

³⁴ Several rules of evidence include similar discovery obligations. *See* FED. R. EVID. 404(b), 412(c), 413(b), 414(b), 609(b), 807, 902(11), 902(12), 1006. Rule 404(b), for example, conditions admissibility of evidence of other crimes, wrongs, or acts upon the government’s compliance with the accused’s request for “reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.” A request for notice under Rule 404(b) should be made in every case. It may be made by letter to the prosecutor with a copy to the clerk, or in the form of a legal instrument, addressed to the prosecutor rather than to the court, but filed with the clerk and served on the prosecutor. In any event, the request must be documented to facilitate opposing admission of Rule 404(b) evidence if reasonable notice was not given.

³⁵ The Sixth Amendment Compulsory Process Clause does not create an absolute bar to precluding the testimony of a defense witness as a sanction for violating a discovery rule. *Taylor v. Illinois*, 484 U.S. 400 (1988).

³⁶ 28 U.S.C. § 1825 permits counsel appointed under the Criminal Justice Act to make an affidavit of defense witnesses’ appearance, *pursuant to court-approved subpoenas*, which will provide a basis for a clerk’s certificate authorizing payment of witness fees by the United States marshal.

³⁷ *See United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973).

subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.” Rule 17(h).

- 17.1. **Rule 17.1. Pretrial Conference.** “On its own, or on a party’s motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. When a conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference. The government may not use any statement made during the conference by the defendant or the defendant’s attorney unless it is in writing and is signed by the defendant and the defendant’s attorney.”
18. **Rule 18. Place of Prosecution and Trial.** “Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.”
19. **Rule 19.** [Reserved]
20. **Rule 20. Transfer for Plea and Sentence.** This rule provides for a plea of guilty or nolo contendere in the district in which a defendant is arrested, held, or present, rather than the district in which the charge is pending. It requires written approval of the United States attorney for each district affected. Take note that this procedure is only for a plea of guilty or nolo contendere; a plea of not guilty will result in return of the case to the originating district. “The defendant’s statement that the defendant wished to plead guilty or nolo contendere is not, in any civil or criminal proceeding, admissible against the defendant.” Rule 20(c).
21. **Rule 21. Transfer for Trial.** This rule, rather than Rule 20, governs interdistrict transfer for trial. The court may transfer a proceeding to another district upon motion of the defendant if it “is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.” Rule 21(a). The court may also transfer the proceeding, or one or more counts, upon defendant’s motion “for the convenience of the parties and witnesses and in the interest of justice.” Rule 21(b).
22. **Rule 22. Time of Motion to Transfer.** The rule was abrogated; the substance of it was transferred to Rule 21(d).
23. **Rule 23. Jury or Nonjury Trial.** “If the defendant is entitled to a jury trial,³⁸ the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves.” Rule 23(a).³⁹ Juries must be of 12

³⁸ A person charged in a single proceeding with multiple petty offenses is not entitled to a jury trial just because the aggregate imprisonment may exceed six months. *Lewis v. United States*, 518 U.S. 322 (1996).

³⁹ Although “it is not necessary that the district court orally examine the defendant to determine if the waiver was intelligently made[.]” that is “[t]he better practice[.]” *United States v. Igbinosun*, 528 F.3d 387, 390 & n.4 (5th Cir.) (internal quotation marks omitted), *cert. denied*,

persons, except that the parties may stipulate in writing, before verdict, to a jury of fewer than 12, or to verdict by a jury of fewer than 12 “if the court finds it necessary to excuse a juror for good cause after the trial begins.” Rule 23(b)(2). Even absent such stipulation, “[a]fter the jury has retired to deliberate, the court may permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror.” Rule 23(b)(3). “In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.” Rule 23(c).

24. Rule 24. Trial Jurors.

- a. **Examination.** “The court may examine prospective jurors or may permit the attorneys for the parties to do so.” Rule 24(a)(1). If the court examines the jurors, it must permit the parties to supplement the examination. Rule 24(a)(2).
- b. **Peremptory Challenges.**⁴⁰ Peremptory challenges are allocated as follows: in a case when the government seeks the death penalty, 20 per side; in a non-capital felony, 6 to the government and 10 to the defendant or defendants jointly; in a misdemeanor, 3 per side. Rule 24(b).⁴¹ If there are multiple defendants, the court may

129 S. Ct. 725 (2008). For the suggested procedure, see FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 1.09 (5th ed. 2007) (available at <http://www.fjc.gov>).

⁴⁰ In *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), the Court held that the defendant’s exercise of peremptory challenges was not denied or impaired when the defendant chose to use a peremptory challenge to remove a juror who should have been excused upon a challenge for cause.

⁴¹ In a line of cases starting with *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court has held that the purposeful use of peremptory challenges to strike potential jurors of a cognizable racial group may be challenged under the Equal Protection Clause. A defendant who raises a *Batson* challenge need not be of the same racial group as the excluded juror. *Powers v. Ohio*, 499 U.S. 400, 408–09 (1991). The use of peremptory challenges to strike potential jurors on the basis of sex also violates the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

Either the defense or the prosecution has standing to raise a *Batson* challenge. *Georgia v. McCollum*, 505 U.S. 42, 56 (1992). “[T]o be timely, a *Batson* objection must be made before the venire is dismissed and before the trial commences.” *United States v. Krout*, 66 F.3d 1420, 1428 (5th Cir. 1995). A party can make a prima facie case of purposeful discrimination in the use of peremptory challenges by showing that the opposing party has struck a protected group, coupled with facts and circumstances raising an inference that the other party struck venire members on account of their race or sex. Once the objecting party makes that showing, the burden shifts to the opposing party to come forward with a neutral explanation for those challenges. See generally *Johnson v. California*, 545 U.S. 162 (2005). Failure to dispute all of the opposing party’s explanations for a strike waives the *Batson* challenge. *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993). A defendant may complain under *Batson* of a codefendant’s discriminatory strikes. *United States v. Huey*, 76 F.3d 638 (5th Cir. 1996) (reversing convictions of both defendants for one defendant’s violation of the jurors’ equal-protection rights).

In recent terms, the Supreme Court has reversed holdings of no *Batson* error. See *Snyder v.*

allow additional peremptory challenges, and may allow the defendants to exercise them separately or jointly. *Id.*

- c. **Alternate Jurors.** The court may direct that not more than 6 alternate jurors be empanelled. Rule 24(c)(1). The court may retain alternate jurors for possible replacement of a juror. Rule 24(c)(3).
25. **Rule 25. Judge’s Disability.** This rule prescribes procedures during trial upon the death, sickness, or other disability of the judge; and post-verdict upon the *absence*, death, sickness, or other disability of the judge.
26. **Rule 26. Taking Testimony.** “In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077.”
- 26.1. **Rule 26.1. Foreign Law Determination.** “A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.”
- 26.2. **Rule 26.2. Producing a Witness’s Statement.**⁴² This rule governs production of the statement of a witness other than the defendant after testimony on direct examination. The rule also requires that there be a motion by a party who did not call the witness, and that the statement of the witness “is in [the witness’s] possession and . . . relates to the subject matter of the witness’s testimony.” Rule 26.2(a). There is a provision for excising non-pertinent matter, and for appellate review of any excision. Rule 26.2(c). The court may grant a recess to a party for time to examine a produced statement and prepare for its use. Rule 26.2(d). The rule provides sanctions for noncompliance, including the striking of testimony, or if it is the government that elects not to comply, declaring a mistrial “if justice so requires.” Rule 26.2(e). The rule defines “statement” as follows:
- “(f) **“Statement” Defined.** As used in this rule, a witness’s “statement” means:
- (1) a written statement that the witness makes and signs, or otherwise adopts or approves;
 - (2) a substantially verbatim, contemporaneously recorded recital of the witness’s oral statement that is contained in any recording or any transcription of a recording; or
 - (3) the witness’s statement to a grand jury, however taken or recorded, or a transcription of such a statement.”

Rule 26.2(f).

Louisiana, 128 S. Ct. 1203 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (state court’s findings as to nonpretextual nature of peremptory strikes to exclude black venire members was shown wrong by clear and convincing evidence).

⁴² See also 18 U.S.C. § 3500 (Jencks Act), which applies to government witnesses and prospective government witnesses.

Subdivision (g) (defining the scope of the rule) recognizes that the disclosure requirements apply “at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:” Rule 5.1(h) (preliminary hearing); Rule 32(i)(2) (sentencing); Rule 32.1(e) (hearing to revoke or modify probation or supervised release); Rule 46(j) (detention hearing); and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. § 2255.

- 26.3. **Rule 26.3. Mistrial.** “Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.”⁴³
27. **Rule 27. Proving an Official Record.** “A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.”⁴⁴
28. **Rule 28. Interpreters.** The court may appoint and direct compensation of an interpreter.
29. **Rule 29. Motion for a Judgment of Acquittal.** “After the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government’s evidence, the defendant may offer evidence without having reserved the right to do so.” Rule 29(a).⁴⁵ “The court may reserve

43 In the Fifth Circuit, a defendant who does not make timely explicit objection to a sua sponte declaration of mistrial will be deemed to have consented to it. *United States v. Palmer*, 122 F.3d 215, 218 (5th Cir. 1997) (no discussion of Rule 26.3).

44 *See, e.g.*, FED. R. CIV. P. 44; FED. R. EVID. 803, 902.

45 A motion for judgment of acquittal must be made in order to preserve for appeal the issue of sufficiency of the evidence. In the absence of a motion, sufficiency will be reviewable only to the standard of “plain error.” *United States v. Pierre*, 958 F.2d 1304, 1310 (5th Cir. 1992) (en banc). Review is then “limited to determining whether there was a manifest miscarriage of justice, that is, whether the record is devoid of evidence pointing to guilt.” *United States v. Delgado*, 256 F.3d 264, 274 (5th Cir. 2001) (internal quotation marks and citation omitted). When “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, 884–85 (5th Cir. 2002) (en banc).

If a defendant presents evidence after his motion at the conclusion of the government’s case is denied, that motion is deemed waived. To preserve the issue of sufficiency of the evidence for appellate review, the motion must be renewed at the conclusion of all the evidence. The issue will then be reviewed on the basis of the entire record, not just the government’s case. *See, e.g.*, *United States v. Casilla*, 20 F.3d 600, 605 (5th Cir. 1994). While testimony by a codefendant does not in itself result in a waiver, *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974), there can be exceptions. In one instance, a defendant who presented no evidence of his own, but requested a jury charge on the strength of a codefendant’s defensive evidence, and relied upon that evidence in jury argument, was deemed to have waived his Rule 29 motion made at the

decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.” Rule 29(b). “A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.” Rule 29(c)(1).⁴⁶ The rule provides for conditional ruling on a motion for new trial. Rule 29(d).

29.1. **Rule 29.1. Closing Argument.** “Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.”

30. **Rule 30. Jury Instructions.**⁴⁷

“(a) **In General.** Any party may request in writing that the court instruct the jury on the law as specified in the request. The request must be made at the close of the evidence or at any earlier time that the court reasonably sets. When the request is made, the requesting party must furnish a copy to every other party.

“(b) **Ruling on a Request.** The court must inform the parties before closing arguments how it intends to rule on the requested instructions.

“(c) **Time for Giving Instructions.** The court may instruct the jury before or after the arguments are completed, or at both times.

“(d) **Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury’s hearing and, on request, out of the jury’s presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).”⁴⁸

conclusion of the government’s evidence. *United States v. Cardenas Alvarado*, 806 F.2d 566, 570 & n.2 (5th Cir. 1986). If a trial court erroneously defers ruling on a motion for judgment of acquittal after the close of the government’s case-in-chief, then review is limited to the evidence presented in the government’s case. *Casilla*, 20 F.3d at 606.

⁴⁶ The district court has no authority to grant a motion for judgment of acquittal filed outside the Rule 29(c) time limit. *Carlisle v. United States*, 517 U.S. 416 (1996). In *Smith v. Massachusetts*, 543 U.S. 462 (2005), the Supreme Court held that a facially unqualified mid-trial judgment of acquittal was final, and therefore could not be reversed by trial judge upon weighing evidence introduced in the defense’s case on the remaining counts.

⁴⁷ For caselaw on what matters must be submitted to the jury, see note under Rule 7 above.

⁴⁸ Objections to the charge made at an informal, off-the-record charge conference do not satisfy the rule. *United States v. Marbury*, 732 F.2d 390, 403 n.20 (5th Cir. 1984). A trial objection to the lack of a nexus requirement in an obstruction-of-justice instruction sufficiently preserved the objection even though it did not mirror the instruction proposed on appeal. *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

31. **Rule 31. Jury Verdict.** The verdict must be unanimous, and the jury must return it to a judge in open court. Rule 31(a). If there are multiple defendants or multiple counts, the jury may return partial verdicts. Rule 31(b). A defendant may be found guilty of a lesser offense or an attempt as specified. Rule 31(c). “After a verdict is returned but before the jury is discharged, the court must on a party’s request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.” Rule 31(d).
32. **Rule 32. Sentencing and Judgment.**⁴⁹
- a. **Time of Sentencing.** “The court must impose sentence without unnecessary delay,” but “[t]he court may, for good cause, change any time limits prescribed in this rule.” Rule 32(b).
- b. **Presentence Investigation.**
- (1) **When Made.** “The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless: (i) 18 U.S.C. § 3593(c) or another statute requires otherwise;⁵⁰ or (ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.” Rule 32(c)(1)(A). “If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.” Rule 32(c)(1)(B).
- (2) **Interviewing the Defendant.** “The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant’s attorney notice and a reasonable opportunity to attend the interview.” Rule 32(c)(2).⁵¹ According to the Advisory Committee, “interview” includes “any

49 Federal guideline sentencing was transformed by *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (federal sentencing guidelines are “effectively advisory”; court must “consider” the guideline range, but may “tailor the sentence in light of other statutory concerns as well”). See also *Rita v. United States*, 127 S. Ct. 2456 (2007); *Gall v. United States*, 128 S. Ct. 586 (2007); and *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

50 Under the Federal Death Penalty Act of 1994, “when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592.” 18 U.S.C. § 3593(c).

51 Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the rule reflects case law which has indicated that requests for counsel to be present should be honored. See, e.g., *United States v. Herrera-Figueroa*, 918 F.2d 1430, 1437 (9th Cir. 1990) (court relied on its supervisory power to hold that probation officers must honor request for counsel’s presence); *United States v. Tisdale*, 952 F.2d 934, 940 (6th Cir. 1992) (court agreed with rule requiring probation officers to honor defendant’s request for attorney or request from attorney not to interview defendant in

communication initiated by the probation officer when he or she is asking the defendant to provide information which will be used in preparation of the presentence investigation [report],” but not “[s]pontaneous or unplanned encounters.” Rule 32 advisory committee’s note (1994 Amendments).

- (3) **Presentence Report.** The rule prescribes in detail what must be included in, and excluded from, the presentence report. Rule 32(d).
 - (4) **Disclosing the Report and Recommendation.** “Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.” Rule 32(e)(1). The probation officer must disclose the report at least 35 days before sentencing unless the defendant waives the minimum period. Rule 32(e)(2). “By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer’s recommendation on the sentence.” Rule 32(e)(3).
 - (5) **Objecting to the Report.** Subdivision (f) of the rule governs the time for objections to the report, serving objections, and the probation officer’s action on objections.⁵² “At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.” Rule 32(g).
 - (6) **Notice of Possible Departure from the Sentencing Guidelines.** “Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party’s prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.” Rule 32(h).⁵³
- c. **Sentencing.**⁵⁴ Rule 32(i) provides:

“(1) **In General.** At sentencing, the court:

absence of counsel).

⁵² See *United States v. Chung*, 261 F.3d 536 (5th Cir. 2001) (district court was free to disregard “supplemental objections” that were untimely filed and distinct from the original objections).

⁵³ Rule 32(h)’s notice requirement applies only to Guidelines departures, not to variances from the Guidelines range based on 18 U.S.C. § 3553(a). *Irizarry v. United States*, 128 S. Ct. 2198 (2008).

⁵⁴ In the federal criminal system, a guilty plea does not waive the privilege against self-incrimination in the sentencing phase of the case. Therefore, in determining facts that bear on the circumstances and details of the crime, the sentencing judge may not draw an adverse inference from the defendant’s silence at sentencing. *Mitchell v. United States*, 526 U.S. 314 (1999).

- (A) must verify that the defendant and the defendant’s attorney have read and discussed the presentence report and any addendum to the report;
- (B) must give to the defendant and an attorney for the government a written summary of—or summarize in camera—any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;
- (C) must allow the parties’ attorneys to comment on the probation officer’s determinations and other matters relating to an appropriate sentence; and
- (D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

“(2) **Introducing Evidence; Producing a Statement.** The court may permit the parties to introduce evidence on the objections.⁵⁵ If a witness testifies at sentencing, Rule 26.2(a)–(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness’s statement, the court must not consider that witness’s testimony.

“(3) **Court Determinations.** At sentencing, the court:

- (A) may accept any undisputed portion of the presentence report as a finding of fact;
- (B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing;⁵⁶ and
- (C) must append a copy of the court’s determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

“(4) **Opportunity to Speak.**

- (A) By a Party. Before imposing sentence, the court must:

⁵⁵ The rule speaks in terms of the court’s discretion, but the U.S. Sentencing Commission’s *Guidelines Manual* specifically provides that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. See U.S.S.G. §6A1.3(a), p.s.; Rule 32(c)(1) advisory committee’s note (1994 Amendment).

⁵⁶ The Fifth Circuit has held that the district court may satisfy Rule 32 through “implicit findings” by adopting the presentence report, if the report is clear on the disputed issue. *United States v. Duncan*, 191 F.3d 569, 575 (5th Cir. 1999); *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994). Counsel should therefore stress to the district court any incompleteness of the presentence report on a disputed issue.

- (i) provide the defendant’s attorney an opportunity to speak on the defendant’s behalf;
 - (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence;⁵⁷ and
 - (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant’s attorney.
- (B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard. Whether or not the victim is present, a victim’s right to address the court may be exercised by the following persons if present:
- (i) a parent or legal guardian, if the victim is younger than 18 years or is incompetent; or
 - (ii) one or more family members or relatives the court designates, if the victim is deceased or incapacitated.
- (C) In Camera Proceedings. Upon a party’s motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).”

d. **Defendant’s Right to Appeal.** The rule prescribes the court’s advice of the defendant’s right to appeal, and the clerk’s obligation to file a notice of appeal upon the defendant’s request. Rule 32(j).

32.1. **Rule 32.1. Revoking or Modifying Probation or Supervised Release.** This rule prescribes procedures and rights pertaining to revocation or modification of probation and supervised release. The person must be afforded “an opportunity to make a statement and present any information in mitigation.” Rule 32.1(b)(2)(E), (c)(1).⁵⁸

⁵⁷ Denial of a defendant’s right to allocute is subject to plain-error analysis. *United States v. Reyna*, 358 F.3d 344, 353 (5th Cir. 2004) (en banc); cf. *United States v. Vasquez*, 216 F.3d 456, 458 (5th Cir. 2000) (failure to give *defense counsel* opportunity to speak before sentencing not plain error). A violation of Rule 32(i)’s allocution right is presumed to have affected a defendant’s substantial rights unless the sentence imposed is at the bottom of the guideline range or the statutory minimum. See *United States v. Magwood*, 445 F.3d 826 (5th Cir. 2006) (but court of appeals declined to exercise its discretion to correct error because appellant gave no information that would have been provided to district court in allocution).

⁵⁸ The Fifth Circuit has held that a warrant issued on an application for revocation of supervised release does not have to be supported by oath or affirmation. *United States v. Garcia-Avalino*, 444 F.3d 444, 445–47 (5th Cir. 2006). However, the Ninth Circuit has held otherwise, in a case that generated a vigorous dissent from a denial of *en banc* rehearing. *United States v. Vargas-Amaya*, 389 F.3d 901, 904 (9th Cir. 2004) (panel op.); 408 F.3d 1227 (9th Cir. 2005) (dissent from denial of rehearing). Given this circuit split, counsel may wish to consider preserving this issue for further review.

32.2. **Rule 32.2. Criminal Forfeiture.** Rule 32.2 consolidates a number of procedural rules governing forfeiture of assets in a criminal case.

33. **Rule 33. New Trial.** The rule provides:

“(a) **Defendant’s Motion.** Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.⁵⁹

“(b) **Time to File.**

(1) **Newly Discovered Evidence.** Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) **Other Grounds.** Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.”⁶⁰

34. **Rule 34. Arresting Judgment.** The rule provides:

“(a) **In General.** Upon the defendant’s motion or on its own, the court must arrest judgment if:

- (1) the indictment or information does not charge an offense; or
- (2) the court does not have jurisdiction of the charged offense.

“(b) **Time to File.** The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.”

35. **Rule 35. Correcting or Reducing a Sentence.** The rule provides:

“(a) **Correcting Clear Error.** Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.”⁶¹

⁵⁹ A district court may not grant a new trial on a ground not raised in a defendant’s Rule 33 motion. *United States v. Nguyen*, 507 F.3d 836 (5th Cir. 2007).

⁶⁰ Rule 33’s 7-day time limit is not jurisdictional; it is an “inflexible claim-processing rule,” and is therefore forfeitable when not properly invoked. *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam) (when government did not raise defense of untimeliness until after district court had reached merits, defense was forfeited).

⁶¹ Rule 35(a) “does not authorize re-sentencing when the basis for doing so is that the district court has changed its mind about the appropriateness of the sentence[.]” nor does it permit the court “to withdraw a reasonable sentence and impose what is, in its view, a more reasonable one.”

“(b) **Reducing a Sentence for Substantial Assistance.**

(1) ***In General.*** Upon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.⁶²

(2) ***Later Motion.*** Upon the government’s motion made more than one year after sentencing, the court may reduce a sentence if the defendant’s substantial assistance involved:

- (A) information not known to the defendant until one year or more after sentencing;
- (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
- (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant’s presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

“(c) **‘Sentencing’ Defined.** As used in this rule, ‘sentencing’ means the oral announcement of the sentence.”

36. **Rule 36. Clerical Error.** “After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.”

37. **Rule 37.** [Reserved]

38. **Rule 38. Staying a Sentence or a Disability.**

39. **Rule 39.** [Reserved]

United States v. Ross, 557 F.3d 237, 241, 243 (5th Cir. 2009). *See also United States v. Lopez*, 26 F.3d 512 (5th Cir. 1994) (per curiam).

⁶² Rule 35(b)(1) was amended in 2007 to conform to *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory. Prior to the amendment, the rule only permitted a court to reduce a sentence for substantial assistance if doing so would “accord[] with the Sentencing Commission’s guidelines and policy statements.”

40. **Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District.** Until recently, Rule 40 referred only to persons arrested for failing to appear in another district. An amendment effective December 1, 2006 fills a “perceived gap” in the coverage of the rule by “expressly cover[ing] not only failure to appear, but also violation of any other condition of release.”⁶³
41. **Rule 41. Search and Seizure.**⁶⁴ This rule governs search warrant procedures. It includes scope and definitions, authority to issue a warrant, persons or property subject to search or seizure, obtaining a warrant, issuing a warrant, and executing and returning a warrant. Rule 41(a)–(f). A December 1, 2008, amendment expanded magistrate judges’ authority to issue certain types of warrants.
42. **Rule 42. Criminal Contempt.**⁶⁵
43. **Rule 43. Defendant’s Presence.** This rule states the general requirement that the defendant be present at initial appearance, arraignment, plea, every trial stage, and sentencing. Rule 43(a). The rule sets out situations in which the presence of the defendant is not required: (1) when an initial appearance or an arraignment may be conducted by video conferencing under Rules 5 or 10; (2) when a defendant organization appears by counsel; (2) *in absentia* misdemeanor proceedings permitted by the court with the written consent of the defendant; (3) a conference or hearing on a question of law; and (4) a correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c) (modification of an imposed term of imprisonment).⁶⁶ Rule 43(b). The rule also states the circumstances under which continued presence is not required: voluntary absence after commencement of trial; in a noncapital case, voluntary absence during sentencing; or disruptive defendant. Rule 43(c).

63 FED. R. CRIM. P. 40 advisory committee’s note (2006 Amendment).

64 *See also* Title 18, ch. 205, Searches and Seizures (18 U.S.C. §§ 3101–3118). The Supreme Court held in *United States v. Grubbs* that an “anticipatory” search warrant is not categorically unconstitutional under the Fourth Amendment, and that the condition precedent to the proper execution of the warrant need not be included in the warrant itself. 547 U.S. 90 (2006).

65 *See also* 18 U.S.C. §§ 401, 402, 3285, 3691–92; 28 U.S.C. § 1826 (Recalcitrant witnesses).

66 Proceedings under 18 U.S.C. § 3582(c) include reductions based on retroactively lowered sentencing ranges, such as the guidelines for crack cocaine. *See* U.S.S.G. §1B1.10, p.s. (eff. March 3, 2008).

44. **Rule 44. Right to and Appointment of Counsel.**⁶⁷ The rule enunciates a right to appointed counsel, unless waived. A portion of this rule requires the court to make inquiry and advice in cases of joint representation. Rule 44(c).
45. **Rule 45. Computing and Extending Time.** Rule 45(c) was amended December 1, 2007, “to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served.” The amendment “parallels the change in Federal Rule of Civil Procedure 6(e).”⁶⁸
46. **Rule 46. Release from Custody; Supervising Detention.**
47. **Rule 47. Motions and Supporting Affidavits.** In addition to prescribing form and contents of a motion, and the procedures for affidavits, the rule includes a time requirement: “A party must serve a written motion—other than one that the court may hear ex parte—and any hearing notice at least 5 days before the hearing date, unless a rule or court order sets a different period. For good cause, the court may set a different period upon ex parte application.” Rule 47(c).
48. **Rule 48. Dismissal.** The government may with leave of court file a dismissal of an indictment, information, or a complaint, but it may not do so during trial without the defendant’s consent. Rule 48(a). “The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial.” Rule 48(b).⁶⁹
49. **Rule 49. Serving and Filing Papers.**
- 49.1. **Rule 49.1. Privacy Protection for Filings Made with the Court.** Rule 49.1 was adopted to comply with the provisions of the E-Government Act of 2002.⁷⁰ The rule requires redaction of certain personal data identifiers in electronic and paper filings, includes a list of exemptions from the redaction requirement, and prescribes procedures for filings made under seal and for obtaining protective orders.⁷¹

67 On the general subject of the rule, see also the Criminal Justice Act, 18 U.S.C. § 3006A, and GUIDELINES FOR ADMINISTRATION OF THE CRIMINAL JUSTICE ACT, reprinted in 7 *Guide to Judiciary Policies and Procedures*, available in the clerk’s office and in the federal public defender’s office, or on CJA Panel Attorney Support page of the defender office’s website at <http://txw.fd.org/fpdcja.htm>.

68 FED. R. CRIM. P. 45 advisory committee’s note (2007 Amendment).

69 See also U.S. CONST. amend. VI; 18 U.S.C. §§ 3161–3174 (Speedy Trial Act); *United States v. Loud Hawk*, 474 U.S. 302 (1986); *Barker v. Wingo*, 407 U.S. 514 (1972).

70 Pub. L. No. 107-347, § 205(c)(3), 116 Stat. 2899, 2914–15 (2002) (codified at 44 U.S.C. § 3501, note).

71 Counsel should also refer to any similar requirements and procedures found in local rules or standing orders. See, e.g., Amended Privacy Policy and Public Access to Electronic Files (W.D.

50. **Rule 50. Prompt Disposition.** “Scheduling preference must be given to criminal proceedings as far as practicable.”

51. **Rule 51. Preserving Claimed Error.** The rule provides:

“(a) **Exceptions Unnecessary.** Exceptions to rulings or orders of the court are unnecessary.

“(b) **Preserving a Claim of Error.** A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party’s objection to the court’s action and the grounds for that objection.⁷² If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.”⁷³

52. **Rule 52. Harmless and Plain Error.** The rule provides:

Tex. Oct. 29, 2004), available at http://www.txwd.uscourts.gov/rules/stdord/district/paef_order.pdf.

⁷² *United States v. Polasek*, 162 F.3d 878, 883 (5th Cir. 1998); *United States v. Waldrip*, 981 F.2d 799, 804 (5th Cir. 1993) (“A loosely formulated and imprecise objection will not preserve error.”).

⁷³ See FED. R. EVID. 103(a)(1) (requiring a “timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context”). A 2000 amendment added this language: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” FED. R. EVID. 103(a). Counsel must be mindful of several caveats when relying on this amendment. First, the ruling must be on the record, and it must be “definitive.” If there is doubt as to whether a ruling is definitive, counsel bears the obligation of obtaining a clarification. Second, the court may change a ruling, or a party may violate a ruling. In these circumstances, a fresh objection would be required. Third, a ruling admitting or excluding evidence is reviewed on the basis of the facts and circumstances before the court at the time of the ruling. See *United States v. Fortenberry*, 919 F.2d 923, 924 (5th Cir. 1990) (cautioning district courts against granting and counsel against accepting pretrial continuing objections). If those facts or circumstances change, counsel must make a new, timely objection, offer of proof, or motion to strike, in order to predicate an appeal on those changes. Fourth, if evidence is admitted subject to a later foundation, it is opposing counsel’s responsibility to move to strike if that foundation is not established. Fifth, the amendment is not intended to affect the rule of *Luce v. United States*, 469 U.S. 38 (1984) (to preserve a claim of error predicated upon the court’s admission of a criminal defendant’s prior conviction, the defendant must testify at trial). For a fuller discussion of these and other considerations arising from the amendment, see FED. R. EVID. 103 advisory committee’s note (2000 Amendment).

Be aware also of *Ohler v. United States*, 529 U.S. 753 (2000) (defendant who preemptively introduces evidence of a prior conviction on direct examination may not challenge on appeal the court’s ruling that the conviction was admissible).

“(a) **Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”⁷⁴

“(b) **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”⁷⁵

53. **Rule 53. Courtroom Photographing and Broadcasting Prohibited.** “Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”
54. **Rule 54.** All of Former Rule 54, Application and Exception, was transferred to Rule 1.
55. **Rule 55. Records.**
56. **Rule 56. When Court Is Open.**
57. **Rule 57. District Court Rules.** This rule governs the adoption of local rules by the district courts, provides a limitation on their enforcement, authorizes regulation of procedure when there is no controlling law, and prescribes effective date and required notice for local rules.
58. **Rule 58. Petty Offenses and Other Misdemeanors.** This rule governs the trial of petty offense and other misdemeanor cases before a district judge or a magistrate judge, and an appeal of such a case.
59. **Rule 59.** This rule defines the procedure for a district judge to review a decision by a magistrate judge. It explicitly states, as to both dispositive and nondispositive matters, that failure to object in compliance with the rule waives the issue. As a matter of discretion, however, the district judge “retains authority to review any magistrate judge’s decision or recommendation whether or not objections are timely filed.” FED. R. CRIM. P. 59 advisory committee’s note (2005 Adoption).⁷⁶

74 See also 28 U.S.C. § 2111 (Harmless error). Harmless error is reviewed to different standards depending on the mode of review. On direct review of claimed constitutional error, the *Chapman* standard (harmless beyond a reasonable doubt) applies. On collateral review, the *Kotteakos* standard (substantial and injurious effect or influence in determining the jury’s verdict) applies. *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Gochicoa v. Johnson*, 238 F.3d 279, 290 (5th Cir. 2000); *Lowery v. Collins*, 996 F.2d 770 (5th Cir. 1993).

75 “Plain error” is (1) deviation from a legal rule that has not been waived, (2) producing an error that is “plain,” “clear,” or “obvious,” and (3) that affected the outcome of the proceedings. *United States v. Olano*, 507 U.S. 725 (1993). If the first three parts of *Olano* are satisfied, the appellate court “must then determine whether the forfeited error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings before it may exercise its discretion to correct the error.” *Johnson v. United States*, 520 U.S. 461, 469–70 (1997) (internal quotation marks omitted) (citing *Olano*).

76 See also 28 U.S.C. § 636, concerning the jurisdiction and powers of magistrate judges.

60. **Rule 60. Victims' Rights.** Many of the December 1, 2008, changes implementing the Crime Victims' Rights Act (18 U.S.C. § 3771) are found in the new Rule 60.⁷⁷ The rule requires the Government to “use its best efforts” to notify victims “of any public court proceedings involving the crime.” Rule 60(a)(1). It also modifies FED. R. EVID. 615 (The Rule) to prohibit excluding a crime victim from public court proceedings, “unless the court determines by clear and convincing evidence that the victim’s testimony would be materially altered if the victim heard other testimony at that proceeding.” Rule 60(a)(2). And subsection (a)(3) grants victims the right “to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.” Subsection (b) provides for enforcement of these rights.

61. **Rule 61. Title.** “These rules may be known and cited as the Federal Rules of Criminal Procedure.”

B. AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE. The Advisory Committee has proposed a second package of amendments implementing the Crime Victims' Rights Act, concerning pretrial release, public order defenses, and transfer of trial (Rule 5, 12.3, and 21). Other proposed amendments would authorize depositions of witnesses outside the United States in limited circumstances (Rule 15), and codify case law concerning the applicability of 18 U.S.C. § 3143(a) to release decisions in probation and supervised release revocation proceedings, as well the burden of proof (Rule 32.1). Information about these amendments may be found at <http://www.uscourts.gov/rules/proposed0810.html>.

III. BIBLIOGRAPHY. The following publications may be useful in dealing with the Federal Rules of Criminal Procedure, and issues arising under the rules.

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- B. WAYNE R. LAFAVE, *Search and Seizure* (West 4th ed. 2004 & Supp. 2008–2009).
- C. ——— ET AL., *Criminal Procedure* (West 3d ed. 2007 & Supp. 2008–2009).
- D. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, Slip Opinion Service. A free subscription service providing same-day delivery of opinions by e-mail is available at the court’s Website, <http://www.ca5.uscourts.gov>.
- E. DAVID J. GOTTLIEB & PHYLIS S. BAMBERGER, EDs., *Practice Under the Federal Sentencing Guidelines* (New York: Aspen Publishers, Inc., 4th ed. 2001 & Supp. 2008).
- F. BAR ASS’N OF THE FIFTH FEDERAL CIRCUIT, *Fifth Circuit Reporter* (West, monthly). This publication provides a capsule summary of cases recently decided, cases pending en banc consideration, cases argued and pending, and cases pending on petition for rehearing. It is the only published source for much of this information. A subscription to the *Fifth Circuit*

⁷⁷ A “victim” is “a person directly and proximately harmed as a result of the commission of” the offense, and includes legal guardians or other representatives “[i]n the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased[.]” 18 U.S.C. § 3771(e) (incorporated by reference in FED. R. CRIM. P. 1(b)(11)).

Reporter is included in the annual dues of \$60. Membership information is available from the association's website, <http://baffc.org/index.html>.

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- J. FEDERAL DEFENDERS OF SAN DIEGO, INC., *Defending a Federal Criminal Case* (2001 ed.). This is an excellent federal criminal practice manual by the Federal Defenders of San Diego, Inc., 225 Broadway, Suite 900, San Diego, CA 92101-5030; (619) 234-8467.
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- O. KIRBY D. BEHRE & A. JEFF IFRAH, *Federal Sentencing for Business Crimes* (Newark: Lexis, 2002).
- P. U.S. DEPARTMENT OF JUSTICE, *Handbook on the Anti-Drug Abuse Act of 1986* (Mar. 1987). For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.
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- X. HENRY J. BEMPORAD, *An Introduction to Federal Sentencing* (11th ed. 2009). Available at <http://txw.fd.org/fdpubs.htm>.
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- Z. NANCY HOLLANDER & BARBARA E. BERGMAN, *Everytrial Criminal Defense Resource Book* (West 2008).
- AA. OFFICE OF THE FEDERAL PUBLIC DEFENDER, WESTERN DISTRICT OF TEXAS. Website at <http://txw.fd.org>. This Website includes federal criminal defense publications and research links, a page that tracks criminal cases on review by the U.S. Supreme Court, capsule summaries of selected recent Fifth Circuit opinions, and employment opportunities. The site's Publications page includes a link to the most current version of this paper.
- BB. OFFICE OF DEFENDER SERVICES TRAINING BRANCH, ADMINISTRATIVE OFFICE OF THE U.S. COURTS. The Training Branch's Website provides many useful materials for attorneys appointed under the Criminal Justice Act. See <http://www.fd.org>.
- CC. FIFTH CIRCUIT BLOG. A weblog of summaries and analysis of recent Fifth Circuit opinions in criminal cases, as well as discussion of other legal issues of particular significance for practitioners in the Fifth Circuit. See <http://circuit5.blogspot.com>.