

**Preservation Tips & Basic Appellate Procedure**  
FPD WDTX Federal Criminal Law Update 2020  
Prepared by AFPD Kristin Kimmelman – Sept. 14, 2020

## **Preservation Tips**

### **1. General principles**

- a. Proffer: make sure the evidence that was excluded (or whatever the harm) is in the record; be specific
- b. Object contemporaneously: goal is to give the district court notice and opportunity to correct the error; be specific
- c. Make sure evidence and discussions are in the record
  - i. Watch out for those bench and chambers conferences
- d. Get a clear ruling

### **2. Pretrial motions**

- a. File motions timely
  - i. Fed. R. Crim. P. 12(b) lists motions that must be filed before trial
    1. Untimely motions considered upon showing of good cause, such as learning basis for motion later<sup>1</sup> - *see* Fed. R. Crim. P. 12(b)(3)
  - ii. Local Rule CR-12 (W.D. Tex.) deadline for pretrial motions is within 14 days of arraignment unless court orders otherwise
- b. Set forth enough facts to get evidentiary hearing to resolve material factual disputes
- c. Argue all applicable theories

### **3. Unconditional guilty plea waives all nonjurisdictional issues except for constitutionality of the statute<sup>2</sup>**

- a. To preserve those issues, enter conditional plea or go to trial

### **4. Conditional guilty plea**

- a. Per Federal Rule of Criminal Procedure 11(a)(2), should be in writing, identify specific pretrial ruling for appeal, and have consent of court and government<sup>3</sup>

### **5. Bench trial with stipulated facts (to try to get acceptance of responsibility while still preserving issue for appeal)<sup>4</sup>**

- a. Make clear, in writing or orally, that:
  - i. government would not consent to conditional plea,
  - ii. stipulations agreed to in order to appeal specific pretrial ruling, and
  - iii. defendant does not admit guilt
- b. Best practice for stipulated facts to include evidence that should have been suppressed<sup>5</sup>

### **6. Trial**

- a. Contemporaneous objection: when evidence is admitted, (1) object timely or move to strike, and (2) state the specific ground<sup>6</sup>
  - i. Motions in limine preserves issue (without a later objection) *if* sufficiently specific, and definitively ruled on pretrial<sup>7</sup>
  - ii. Continuing objection can preserve error if court grants it, and it's clear what the objection covers<sup>8</sup>
  - iii. To preserve Rule 609 error, cannot take out the sting by fronting conviction<sup>9</sup>

- b. Jury instructions
    - i. Objection must be timely (before jury retires to deliberate), and sufficiently specific
    - ii. Proposed jury instructions insufficient; be sure objections are in the record
  - c. Motion for judgment of acquittal – Fed. R. Crim. P. 29
    - i. To preserve challenge to the sufficiency of the evidence, move for judgment of acquittal: (1) at close of government’s case, and (2) at close defense case
    - ii. A general motion preserves insufficiency of evidence to support verdict (but not venue)
      - 1. But a specific motion waives all other grounds<sup>10</sup>
    - iii. Can preserve with a post-verdict motion for judgment of acquittal within 14 days of verdict – Rule 29(c) (but no double jeopardy bar)<sup>11</sup>
7. **Guilty pleas**
- a. Use Fifth Circuit’s [Ander’s checklist](#) to ensure no Rule 11 error
8. **Presentence report**
- a. Prep for it: Mitigating issues? Imperfect duress? Health issues?
  - b. Attend the interview
  - c. Review the PSR with the client
    - i. Review Guidelines calculations and all facts (even those that don’t affect the Guidelines; they might affect client’s time in BOP custody or future cases)
    - ii. Review supervised release conditions, restitution, and fines
  - d. Review Guidelines calculations carefully and slowly
    - i. Refer to the Guidelines and case law; do not rely on memory
  - e. Object in writing to Guidelines calculations and factual issues
    - i. If rebutting facts in PSR, must present rebuttal evidence (counsel’s argument not enough)
    - ii. But unreliable statements in PSR insufficient
  - f. Review proposed supervised release conditions
    - i. Object stating basis – e.g., not reasonably related to 3553(a) factors or deprive liberty more than necessary
  - g. Review any fine or restitution
  - h. Consider asking for evidentiary hearing
9. **Sentencing**
- a. Identify mitigating factors under 3553(a) in written memo (or at least orally)
    - i. Can also raise disagreement with the guideline as basis for variance<sup>12</sup>
  - b. To preserve procedural errors, object at sentencing noting the procedural error (e.g., failing to consider 3553 factors, incorrect Guidelines, sentencing based on clearly erroneous facts, or failing to adequately explain sentence)<sup>13</sup>
    - i. If court gives an explanation, say something like “the objection stands”
  - c. To preserve substantive error (unreasonable sentence), argue for a lower sentence
    - i. A formal objection after sentence announced is no longer necessary<sup>14</sup>

## Basic Appellate Procedure

1. **Notice of appeal** – file within 14 days of entry of judgment, Fed. R. App. P. 4
2. **[Notice of appearance](#)** – file within 14 days of filing notice of appeal
3. **Transcripts**
  - a. File [transcript request form](#) with district court and Fifth Circuit (the second page of the form has instructions)
  - b. Review transcripts for redactions
    - i. [Transcript redaction request](#) must be filed within 21 days
  - c. Identify any possible missing transcripts or exhibits
  - d. Consider whether need to seal or redact transcript (which will be public after 90 days)
4. **Communicate with client**
  - a. Locate client through [BOP Find an Inmate](#) or U.S. Marshals
  - b. Opening letter explaining appellate process
  - c. This [BOP website](#) with counselor emails can help arrange phone calls
    - i. If still having trouble, reach out to BOP regional counsel for that facility; *see* pages 53-54 of this [March 2019 BOP Legal Resource Guide](#)
5. **Briefing notice**
  - a. Issued by Fifth Circuit once electronic record on appeal ready
  - b. Sets briefing deadline of 40 days for opening brief
  - c. Includes caption to use for brief and motions
6. **Common motions** – contact me for samples
  - a. Motion to view (to see documents sealed in district court)
  - b. Motion to seal (to seal Fifth Circuit brief, record excerpts, or entire case if necessary)
  - c. Motion to supplement record (to add to the record, typically an exhibit omitted by the district court)
  - d. Motion to withdraw appeal (if client decides he/she wants to withdraw; must include client’s written request)
  - e. Extension requests – *see* 5<sup>th</sup> Cir. R. 31.4.3
    - i. Letter request for 1-30 day extensions from original deadline (if client’s release date more than 24 days out)
    - ii. Motion required for longer extensions (or if release date soon)
  - f. Contact AUSA paralegals for non-opposition:
    - i. [Susan.Oneal@usdoj.gov](mailto:Susan.Oneal@usdoj.gov), [Amber.Glascock@usdoj.gov](mailto:Amber.Glascock@usdoj.gov), [Norma.Olivas2@usdoj.gov](mailto:Norma.Olivas2@usdoj.gov)
  - g. Include certificate of compliance (also for briefs)
    - i. *See* Fed. R. App. P. 32(g), [Form 6](#)
7. **Opening brief**
  - a. Use brief template from “Utilities” function of ECF
  - b. *See* Fed. R. App. P. 28, 32
8. **Anders brief**
  - a. Resources: 5C’s [Anders Checklist](#) and [Anders Guide](#)
  - b. Send client copies of the brief and motion; ideally speak to client as well

- c. If the client does not read English, explain to client in a language (s)he understands: (1) the substance of the brief; (2) the client’s right to oppose it or seek new counsel; and (3) the likelihood that the brief could result in dismissal of the appeal<sup>15</sup>
    - i. Include that information in the certificate of service
  - d. Client typically has 30 days to respond
    - i. During coronatimes, 5C [ordered](#) deadlines for pro se filers extended by 30 days
- 9. Oral argument**
- a. Typically tentatively calendared 60 days in advance, and calendared for a specific day 30 days in advance
  - b. Preparation: moot (FPD office can assist), [listen to arguments](#), research panel’s decisions
  - c. Can find out panel a week before argument on [website](#)
- 10. If lose**
- a. Notify client of decision and of:
    - i. Petition for rehearing deadline (and whether you intend to file one)
      - 1. 14 days from entry of judgment – Fed. R. App. P. 40(a)(1)
    - ii. Petition for writ of certiorari deadline (and deadline to inform you of client’s desire to file one)
      - 1. Typically 90 days from entry of judgment – Sup. Ct. R. 13.1
      - 2. But during coronatimes, extended to 150 days – [Miscellaneous Order, 589 U.S. \\_\\_\\_ \(Mar. 19, 2020\)](#)
  - b. If client wants a cert petition but filing one would be futile, file motion suggesting futility asking to be withdrawn
    - i. This allows the client to file WOC on own
    - ii. See [Sup. Ct. R. 10](#); [5<sup>th</sup> Cir. CJA Plan § 6, ¶ 4 \(rev. Apr. 2009\)](#)

## Resources

- Timothy Crooks & Judy Madewell, Preserving Error: Making Sure You Get Your Second Chance on Appeal (Oct. 27, 2016), <https://mow.fd.org/sites/mow.fd.org/files/training/DFCC2016/Crooks/Preserving%20Error%20--%20October%202016.pdf>
- 5C website: <http://www.ca5.uscourts.gov/>
  - o 5C Clerk’s Office – (504) 310-7700; [contact list](#)
  - o Case Budgeting Attorney Margaret Alverson – 504-310-7799, [margaret\\_alverson@ca5.uscourts.gov](mailto:margaret_alverson@ca5.uscourts.gov), <http://www.lb5.uscourts.gov/CJA2/CaseBudgeting/>
  - o [5C Practitioners Guide](#)
- Our office – 210-472-6700 (San Antonio)
  - o Mary Perfecto, Secretary to the Defender
  - o Monica Saenz, Legal Assistant
  - o Appellate attorneys: Judy Madewell (First Assistant & Appellate Chief), Brad Bogan, Kristin Davidson (in Austin), Kristin Kimmelman ([Kristin\\_Kimmelman@fd.org](mailto:Kristin_Kimmelman@fd.org)), Laura Spindler

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<sup>1</sup> See *United States v. Tello*, 924 F.3d 782 (5th Cir. 2019) (considering suppression motion filed mid-trial).

<sup>2</sup> See *Class v. United States*, 138 S. Ct. 798 (2018); *United States v. Coil*, 442 F.3d 912, 914 (5th Cir. 2006); *United States v. Torres*, 740 F. App'x 54, 55 (5th Cir. 2018).

<sup>3</sup> But the Fifth Circuit relaxes these requirements if the record is clear that defendant intended to enter a conditional guilty plea and to appeal a particular pretrial ruling, and neither government nor district court opposed such a plea. *United States v. Wise*, 179 F.3d 199 (5th Cir. 1999).

<sup>4</sup> “[A] defendant who proceeds to trial on an admission or a stipulation of the facts necessary for conviction *while expressly reserving the right to appeal from an adverse suppression ruling* will not be deemed to have waived the suppression issue, nor will the admission or stipulation render the suppression issue harmless, and that defendant remains eligible for an AOR reduction.” *United States v. Najera*, 915 F.3d 997, 1004 (5th Cir. 2019). But the government can refuse to move for the third point of acceptance of responsibility based on the pretrial litigation being the substantive equivalent of a trial. *United States v. Longoria*, 958 F.3d 372, 379 (5th Cir. 2020) (finding a Guidelines amendment did not abrogate previous circuit law; recognizing circuit split on this issue).

<sup>5</sup> In *United States v. Aguilar*, the Fifth Circuit considered whether the suppression issue was moot because the stipulated facts at the bench trial did not include the cell phone evidence that Aguilar sought to suppress. \_\_\_ F.3d \_\_\_, No. 19-40554, 2020 WL 5229687, at \*2 (5th Cir. Sept. 2, 2020). Because the agreement to stipulate was conditioned on appealing the suppression ruling, and the court reassured Aguilar he could appeal the issue, the Fifth Circuit found the issue was not moot. *Id.*

<sup>6</sup> Fed. R. Evid. 103(a)(1)(A); see Fed. R. Crim. P. 51(b).

<sup>7</sup> *United States v. Lucas*, 849 F.3d 638 (5th Cir. 2017).

<sup>8</sup> *United States v. Sanchez-Hernandez*, 507 F.3d 326 (5th Cir. 2007); *United States v. Fortenberry*, 919 F.2d 923 (5th Cir. 1990).

<sup>9</sup> *Luce v. United States*, 469 U.S. 38 (1984); *Ohler v. United States*, 529 U.S. 753 (2000).

<sup>10</sup> *United States v. Herrera*, 313 F.3d 882 (5th Cir. 2002) (en banc).

<sup>11</sup> *United States v. Villarreal*, 324 F.3d 319 (5th Cir. 2003).

<sup>12</sup> See *United States v. Mondragon-Santiago*, 564 F.3d 357, 367 (5th Cir. 2009) (recognizing district courts can disagree with the Guidelines, citing *Kimbrough* and *Rita*).

<sup>13</sup> See, e.g., *id.* at 361 (applying plain error review to procedural challenge on lack of explanation of the sentence because Mondragon only objected to reasonableness of the sentence and did not ask the district court to explain its reason for the sentence).

<sup>14</sup> *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020).

<sup>15</sup> See *United States v. Moreno-Torres*, 768 F.3d 439 (5th Cir. 2014).