

**PLAIN-ERROR REVIEW FROM TOP TO BOTTOM  
OR  
SLAYING THE FOUR-HEADED HYDRA**

**BY**

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## **INTRODUCTION:**

**In Greek mythology, one of the labors of Hercules was to slay the multi-headed beast called the Hydra. Prevailing on plain-error review is like fighting an four-headed Hydra. This presentation is designed to help you cut off all four heads of the plain-error Hydra and to prevail on plain-error review.**

### **I. What is this beast of which we speak?**

A. Fed. R. Crim. P. 52(b): “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

1. Applies to *forfeited* errors.

B. Preserved, waived, invited, and forfeited error distinguished:

1. *Preserved error*: the gold standard!

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

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. If the party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

2. *Waived error*: “[W]aiver is the intentional relinquishment or abandonment of a known right.” United States v. Olano, 507 U.S. 725, 733 (1993) (internal quotation marks and citation omitted).

a. Waiver *extinguishes* an error, see id.; therefore, “[w]aived errors are unreviewable.” United States v. Rodriguez, 602 F.3d 346, 350 (5th Cir. 2010) (citations omitted).

b. CAUTION: Inherent in the notion of waiver is the idea that the party knows what he or she is giving up and intends to give it up. See, e.g., United States v. Jaimes-Jaimes, 406 F.3d 845, 848 (7th Cir. 2005)

(“The touchstone of waiver is a knowing and intentional decision.”) (citations omitted). A classic example is where an objection is made, but then withdrawn. See, e.g., United States v. Arviso-Mata, 442 F.3d 382, 384 & n.7 (5th Cir. 2004) (discussing cases to this effect).

- c. BUT, “[a] district court’s legal determinations are not immunized from appellate review simply because a defendant, present at a hearing where a determination is made, mistakenly agrees with the court.” United States v. Jimenez, 258 F.3d 1120, 1124 (9th Cir. 2001).
  - d. Courts should NOT find a waiver absent evidence that the defendant (or his counsel) *knew* about the specific legal requirement at issue and “considered objecting at the hearing, but for some tactical or other reason rejected the idea.” Id. (internal quotation marks and citation omitted); see, e.g., United States v. Andino-Ortega, 608 F.3d 305, 308 (5th Cir. 2010) (not waived when attorney agreed that enhancement was appropriate but “did so on the basis of a misunderstanding of this court’s precedent”).
    - This means that, in the absence of any apparent strategic or tactical reason not to object, improvident statements such as “The PSR’s correct,” or “I have no problem with the PSR,” do *not* constitute waiver. See, e.g. United States v. Castaneda-Baltazar, 239 Fed. Appx. 900, 901–02 (5th Cir. 2007) (unpublished); Arviso-Mata, 442 F.3d at 384; Jaimes-Jaimes, 406 F.3d at 847–49; Jimenez, 258 F.3d at 1123–25.
    - ***The IAC gloss on this rule:*** “[A]n argument should be deemed forfeited rather than waived if finding waiver from an ambiguous record would compel the conclusion that counsel necessarily would have been deficient to advise the defendant not to object.” Jaimes-Jaimes, 406 F.3d at 848 (citation omitted).
3. ***Invited error:*** Applies when “defendant (or his counsel) [ ] induced the error.” Rodriguez, 605 F.3d at 351.
    - a. Almost as bad as waived error: “Review of invited errors is almost similarly precluded: [invited] errors are reviewed only for manifest injustice.” Id. at 350–51 (citation omitted).

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

## **II. Avoiding the need to slay the beast.**

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

### **Move, Object, Proffer!**

#### **1. Move:**

- a. **Fed. R. Crim. P. 12:** Certain motions “must be raised by pretrial motion,” Fed. R. 12(b)(3)(A)-(E), before any deadline set by the court. See Fed. R. Crim. P. 12(c). “If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely.” Fed. R. Crim. P. 12(c)(3).
  - But even if the motion is untimely, “a court may consider the defense, objection, or request if the party shows good cause.” Fed. R. Crim. P. 12(c)(3).
  - If a defendant fails to raise a claim in a timely pretrial motion and raises it for the first time on appeal, the claim is generally subject to plain-error review. See United States v. Soto, 794 F.3d 635, 647–56 (6th Cir. 2015) (interpreting new language in Rule 12, effective Dec. 1, 2014, and holding that “appellate courts are not to presume that a defendant’s failure to file a timely pretrial motion is a waiver”).
- b. **Speedy Trial Act:** “Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under [the Speedy Trial Act].” 18 U.S.C. § 3162(a)(2).

c. Fed. R. Crim. P. 29: In order to preserve the issue of the sufficiency of the evidence for the usual sort of appellate review, you must move for judgment of acquittal at the close of the government's evidence and at the close of all the evidence, with some very limited exceptions. See generally Fed. R. Crim. P. 29(a). But a post-verdict motion filed within 14 days will also preserve the issue for appeal. See Fed. R. Crim. P. 29(c)(3); see also United States v. Allison, 616 F.2d 779, 784 (5th Cir. 1980) (even though defendant did not move for judgment of acquittal either at the close of the government's case in chief or at the conclusion of her case, question of the sufficiency of the evidence was nevertheless preserved by defendant's timely post-verdict motion for judgment of acquittal).

- A general motion of judgment of acquittal may suffice to preserve a sufficiency claim for appeal. See, e.g., Huff v. United States, 273 F.2d 56, 60 (5th Cir. 1959). BUT CAUTION: When a Rule 29 motion has been made on specific grounds, “all grounds not specified in the motion are waived.” United States v. Chance, 306 F.3d 356, 369 (6th Cir. 2002); See also United States v. Herrera, 313 F.3d 882, 884 (5th Cir. 2002) (en banc); United States v. Belardo-Quinones, 71 F.3d 941, 945 (1st Cir. 1995). Although the Sixth Circuit was probably incorrect to use the word “waived” instead of the word “forfeited,” this rule means that, whenever you assert specific grounds for acquittal, you may be forfeiting the right to assert on appeal any other grounds for finding the evidence insufficient.
- Failure to make appropriate motions for judgment of acquittal may forfeit the usual standard of review for claims of insufficiency of the evidence, in which case sufficiency claims will be reviewed only for a “manifest miscarriage of justice.” See, e.g., United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir. 1991).
- Such a miscarriage of justice has been described as existing only if the record is devoid of evidence pointing to guilt or if the evidence was so tenuous that a conviction would be “shocking.” See, e.g., United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988); United States v. Roberge, 565 F.3d 1005, 1008–09 (6th Cir. 2009); United States v. Edwards, 526 F.3d 747, 756 (11th Cir. 2008).

- But some circuits describe the standard as “plain error resulting in manifest injustice,” such that no reasonable factfinder could have found the defendant guilty beyond a reasonable doubt. United States v. Kimler, 335 F.3d 1132, 1141 (10th Cir. 2003) (internal quotations and citation omitted); United States v. Londondio, 420 F.3d 777, 786 (8th Cir. 2005).

2. ***Object:***

- a. Generally: Fed. R. Crim. P. 51(b).
- b. Admission or exclusion of evidence: Fed. R. Evid. 103(a)(1).
  - NOTE: A motion in limine will preserve evidentiary issues only if “the court rules definitively on the record—either at or before trial . . . .” Fed. R. Evid. 103(b).
- c. Did you object without realizing it? In some cases, when one party makes an evidentiary objection the court will presume that the other parties have joined in the objection. See, e.g. United States v. Sanchez-Sotelo, 8 F.3d 202, 210 (5th Cir. 1993).
- d. Jury instructions: must object to instructions or failure to give a requested instruction before the jury retires. See Fed. R. Crim. P. 30.
- e. ***Special helper for sentencing objections:*** a written objection to the PSR will preserve error for appeal even if it is not orally renewed at sentencing. See United States v. Gomez-Alvarez, 781 F.3d 787, 791 (5th Cir. 2015) (once a party raises an objection in writing, even if he subsequently fails to lodge an oral, on-the-record objection, the error is nevertheless preserved for appeal); see also United States v. Aguilera-Aguila, 435 Fed. Appx. 260, 262 (4th Cir. 2011) (same). But see Swanson v. United States, 692 F.3d 708, 717 (7th Cir. 2012) (court held that defendant had preserved sentencing objection because, in addition to filing written objections, he raised it—albeit in a confusing manner—at the sentencing hearing).

- f. Where a district court cuts off an objection, it will be deemed to have sufficiently preserved error for appellate review. See, e.g., United States v. Salazar, 743 F.3d 445, 449-50 (5th Cir. 2014); United States v. Mendiola, 42 F.3d 259, 261 n.2 (5th Cir. 1995); United States v. Bernal, 814 F.2d 175, 182-83 (5th Cir. 1987).
  - g.
3. ***Proffer:***
- a. “[I]f the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.” Fed. R. Evid. 103(a)(2).
  - b. So what is the “substance” of the evidence? Although a formal offer of proof is generally not required, “the record must show the equivalent: grounds for admissibility, the proponent must inform the court and opposing counsel what he expects to prove by the excluded evidence, and he must demonstrate the significance of the excluded evidence.” United States v. Moore, 425 F.3d 1061, 1068 (7th Cir. 2005); see also United States v. Clements, 73 F.3d 1330, 1336 (5th Cir. 1996).

C. ***A word about specificity.*** Suffice it to say, in applying the MOP rule, you must be reasonably specific about what you are grousing about, or you may end up not preserving anything for appellate review at all! See, e.g., United States v. Burton, 126 F.3d 666, 671-73 (5th Cir. 1997) (given that Fed. R. Evid. 801(d)(2)(E) contains at least four possible bases for an objection to proffered co-conspirators’ testimony, defendant’s objection to evidence “under 801.d2e” did not preserve for appeal the contention that the statements objected to were not “in furtherance of the conspiracy”).

1. However, an objection that does not cite “chapter and verse” may still be sufficient, provided that it got the gist of your complaint across to the district court. See, e.g., United States v. Neal, 578 F.3d 270, 272-73 (5th Cir. 2009); United States v. Ocana, 204 F.3d 585, 589 (5th Cir. 2000). That is because one of the purposes of the contemporaneous objection rule is to allow the district court the opportunity to rule on the objection in the first instance, thus conserving judicial resources. United States v. Stewart, 256 F.3d 231, 239 (4th Cir. 2001).

2. Also, remember that, although new *claims* are subject to plain-error review on appeal, you should be able to make new *arguments* in support of previously raised claims without any appellate penalty. As the Supreme Court has said, the “traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” Lebron v. Nat'l Railroad Passenger Corp., 513 U.S. 374, 379 (1995) (internal quotation marks and citations omitted). And, in Illinois v. Gates, 462 U.S. 213 (1983), the Supreme Court noted the long pedigree of this rule as applied to cases before that Court:

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

Gates, 462 U.S. at 219–20 (footnote omitted); see also Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992); Thompson v. Runnels, 705 F.3d 1089, 1098 (9th Cir. 2013); United States v. Billups, 536 F.3d 574, 578 (7th Cir. 2008); United States v. Pallares-Galan, 359 F.3d 1088, 1095 (9th Cir. 2004).

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

- A. Before you take on the plain-error Hydra, consider whether the error at issue might be one that, although unobjected-to below, is essentially immune from the plain-error rule.
  1. ***Jurisdictional defects.*** A jurisdictional defect, which is a defect in the court’s subject matter jurisdiction, can be raised for the first time on appeal

because it “strips the court of its power to act and makes its judgment void.” United States v. Brown, 752 F.3d 1344, 1349 (11th Cir. 2014) (internal citations omitted).

- a. An example of a jurisdictional defect is when an “indictment affirmatively alleges conduct that does not constitute a crime at all because that conduct falls outside the sweep of the charging statute.” Id. at 1352. But see United States v. Cotton, 535 U.S. 625, 627–28 (2002) (holding that the failure of an indictment to allege a crime, because it omits an element, does not deprive the district court of jurisdiction).
2. ***Sentence in excess of the statutory maximum.*** See, e.g., United States v. Oswalt, 771 F.3d 849, 850 (5th Cir. 2014) (“When a defendant argues that his sentence exceeds the statutory maximum, we review the issue de novo, regardless of whether the defendant properly preserved the objection to his sentence.”) (footnote omitted).

### ***B. Confronting the plain-error Hydra:***

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

1. ***There must be error.***
  - a. “Deviation from a legal rule is ‘error’ unless the rule has been waived.” Olano, 507 U.S. at 732-33.
  - b. “Even in the context of plain error, [this Court] consider[s] the ‘error’ prong de novo.” United States v. Anderson, 559 F.3d 348, 354 (5th Cir. 2009) (citing United States v. Garza-Lopez, 410 F.3d 268, 272-73 (5th Cir. 2005)).
2. ***The error must be plain.***
  - a. “‘Plain’ is synonymous with ‘clear’ or, equivalently, ‘obvious.’” Olano, 507 U.S. at 734 (citations omitted). More recently, the Court has elaborated that this requirement means that the error is not “subject

to reasonable dispute.” Puckett v. United States, 129 S. Ct. 1423, 1429 (2009) (citation omitted).

- b. Whether a legal question was settled or unsettled at the time of trial/sentencing, an error is “plain” as long as it was plain at the time of appellate review. See Henderson v. United States, 133 S. Ct. 1121, 1127–29 (2013); see also Johnson v. United States, 520 U.S. 461, 468 (1997).
- c. Can an error be plain if your court of appeals hasn’t spoken and/or the other circuits are divided on the question?
  - Some courts have said no. See, e.g., United States v. Miranda-Lopez, 532 F.3d 1034, 1040–41 (9th Cir. 2008); United States v. Salinas, 480 F.3d 750, 759 (5th Cir. 2007); United States v. Bennett, 469 F.3d 46, 50-51 (1st Cir. 2006); United States v. Alli-Balogun, 72 F.3d 9, 12 (2d Cir. 1995) (“we do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuit courts is split”).
  - Other courts, however, have declined to follow such categorical rules. See, e.g., In re Sealed Case, 573 F.3d 844, 851 (D.C. Cir. 2009) (“Even absent binding case law, however, an error can be plain if it violates an ‘absolutely clear’ legal norm, ‘for example, because of the clarity of a statutory provision.’”) (citation omitted) & id. at 851–52 (rejecting argument that circuit split defeats showing of plainness); United States v. Spruill, 292 F.3d 207, 215 n.10 (5th Cir. 2002)(noting that “[t]he fact that the particular factual and legal scenario here presented does not appear to have been addressed in any other reported opinion does not preclude the asserted error in this respect from being sufficiently clear or plain to authorize vacation of the conviction on direct appeal.”); United States v. Evans, 155 F.3d 245, 252 (3d Cir. 1998) (“Neither the absence of circuit precedent nor the lack of consideration of the issue by another court prevents the clearly erroneous application of statutory law from being plain error.”).

- d. Note that some courts have expressed the view that questions of fact can never constitute plain error. See United States v. Saro, 24 F.3d 283, 291 (D.C. Cir. 1994) (collecting cases so holding in the sentencing context); see also United States v. Lopez, 923 F.2d 47, 50 (5<sup>th</sup> Cir. 1991) (“Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.”) The D. C. Circuit has adopted a more nuanced approach, holding that “at least when [factual] findings are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial, factual errors can indeed be obvious.” Saro, 24 F.3d at 291.
  - Recently, however, Justice Sotomayor, joined by Justice Breyer, stated that “precedent holding that factual errors are never cognizable on plain-error review” is misguided. Carlton v. United States, 135 S. Ct. 2399 (2015) (Sotomayor, J., statement respecting denial of certiorari).
- e. DISTURBING TREND: In a series of cases, the Fifth Circuit – sometimes after conducting the analysis and actually finding error! – has found that the analysis was so convoluted or difficult that any error could not be said to be “plain.” See United States v. Henao-Melo, 591 F.3d 798, 806 (5th Cir. 2009); United States v. Rodriguez-Parra, 581 F.3d 227, 231 (5th Cir. 2009); United States v. Ellis, 564 F.3d 370, 377 (5th Cir. 2009); United States v. Narez-Garcia, \_\_\_\_ F.3d \_\_\_, 2016 WL 1274034 (5th Cir. Mar. 31, 2016) (majority holds error not clear or obvious because of confusing state law; dissent would hold that error is plain based on clear state statutory language).

### ***3. The error must have affected the defendant’s substantial rights.***

- a. The appellant has the burden of showing that the plain error “affect[ed] substantial rights,” which normally, although not necessarily always, requires a showing the error prejudiced the defendant, see Olano, 507 U.S. at 734–35—i.e., a showing that the error “affected the outcome of the district court proceedings.” Olano, 507 U.S. at 734 (citations omitted).
- b. To make this showing, however, appellant need only show a ***reasonable probability*** of a different outcome but for the error. See

United States v. Dominguez Benitez, 542 U.S. 74, 83 & n.9 (2004) (to establish an effect on substantial rights for purposes of plain-error review, defendant must normally show a reasonable probability that, but for the error, the outcome of the proceeding would have been different). And, “the reasonable-probability standard is not the same as, and should not be confused with, a requirement that the defendant prove by a preponderance of the evidence that but for error things would have been different.” Id. at 83 n.9 (citation omitted).

- c. POSSIBLE EXCEPTIONS: In Olano, the Court suggested that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.” Olano, 507 U.S. at 735.
  - Based upon the Court’s citation of Arizona v. Fulminante, 499 U.S. 279, 310 (1991), in connection therewith, the first “special category” alluded to in Olano seems to refer to the rare category of “structural errors” that, upon proper objection, can never be harmless. See Olano, 507 U.S. at 735. But, the Supreme Court has since noted that “[t]his Court has several times declined to resolve whether ‘structural’ errors . . . automatically satisfy the third prong of the plain-error test,” Puckett, 129 S. Ct. at 1432 (citations omitted; and, in Puckett, the Court once again declined to decide that question, after finding that the error at issue there was not a “structural error). See id.
  - Could claims that a district court failed to adequately explain its sentence fall into this category? CIRCUIT SPLIT: compare, e.g., In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008), and United States v. Lewis, 424 F.3d 239, 247 (2d Cir. 2005) (both yes), with, e.g., United States v. Mondragon-Santiago, 564 F.3d 357 (5th Cir. 2009), and United States v. Lynn, 592 F.3d 572, 580 n.5 (4th Cir. 2010) (both no).
  - Where it is difficult to measure the harm attendant to a particular error, but that error seems as though it **should** make a difference in the proceedings, there may be a good argument for presumed prejudice under the second special category in Olano. The Third

and Fifth Circuits have adopted such a presumption where a defendant is deprived of his right to allocution. See United States v. Reyna, 358 F.3d 344, 351–52 (5th Cir. 2004) (en banc); United States v. Adams, 252 F.3d 276, 287 (3d Cir. 2001). The Third Circuit and Tenth Circuits have also applied a presumption of prejudice to errors that change the Guideline imprisonment range. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 207–10 (3d Cir. 2001); see also, e.g., United States v. Langford, 516 F.3d 205, 216–17 (3d Cir. 2008) (applying rule of Knight). And, the Sixth Circuit applied a presumption of prejudice to Booker error. See United States v. Barnett, 398 F.3d 516, 527-29 (6th Cir. 2005)

*d. Special problem with Sentencing Guidelines errors:*

- A perennial problem in the Fifth Circuit is the Court’s refusal to find an effect on substantial rights where, even when a Guideline calculation error is corrected, the sentence actually imposed still falls within the correct range. See, e.g., United States v. Wheeler, 322 F.3d 823, 828 (5th Cir. 2003); United States v. Leonard, 157 F.3d 343, 346 (5th Cir. 1998). Compare and contrast, e.g., United States v. Garrett, 528 F.3d 525, 530 (7th Cir. 2008) (concluding that sentencing error seriously affects substantial rights).
- The Supreme Court recently held that the Fifth Circuit’s position was wrong and that in general it will be sufficient to show prejudice based on the fact that the district court relied upon an incorrect Guidelines range. Molina-Martinez v. United States, 136 S. Ct. 1338, 1345, 1349 (2016) (**TIM!**)

*4. The error impugns the fairness, integrity, or public reputation of judicial proceedings.*

- a. Finally, even if all of the first three factors are satisfied, “the Court of Appeals has authority to order correction but is not required to do so.” Olano, 507 U.S. at 735. It should exercise its discretion to correct the plain forfeited error if failure to correct the error would result in a “miscarriage of justice” or, put another way, “if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” Olano, 507 U.S. at 736 (citation omitted).

- b. “The fourth prong is meant to be applied on a case-specific and fact-intensive basis,” Puckett, 129 S. Ct. at 1433, because “a ‘per se approach to plain-error review is flawed.’” Id. (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985)).
- c. The parameters of the fourth prong are not well-defined.
  - The Supreme Court has indicated that a procedural trial error may fail to meet the fourth prong where the evidence of guilt is “overwhelming” and/or “essentially uncontested.” See United States v. Cotton, 535 U.S. 625, 632-34 (2002); Johnson v. United States, 520 U.S. 461, 469-70 (1997). Likewise, in Puckett, where the error in question was the government’s breach of a plea agreement to recommend a sentencing reduction for acceptance of responsibility, the Supreme Court held that to reverse for this breach “would have been so ludicrous as itself to compromise the public reputation of judicial proceedings,” given that defendant had obviously forfeited his right to acceptance of responsibility by committing other crimes while in pretrial detention for the first. Puckett, 129 S. Ct. at 1433.
  - Given the lack of guidance on this prong, it is difficult to state definitively what will, or won’t, work to meet your burden on the fourth prong.
  - Commentators have noted the same thing: see, e.g., Dustin D. Berger, Moving Toward Law: Refocusing the Federal Courts’ Plain Error Doctrine in Criminal Cases, 67 U. Miami L. Rev. 521, 537, 547 (2013); Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Advoc. 179, 181, 245, 288-90 (2012); Larry Cunningham, Appellate Review of Unpreserved Question in Criminal Cases: An Attempt to Define the “Interest of Justice”, 11 J. App. Prac. & Process 285, 297 (2010).
- d. Here are some suggestions:
  - Where the error in this case is particularly obvious, the Fifth Circuit has identified this as a factor in favor of exercising fourth-prong

discretion. See United States v. Martinez-Cruz, 539 Fed. Appx. 560, 564 (5th Cir. 2013); United States v. Hernandez, 690 F.3d 613, 622 (5th Cir. 2012).

- If you have a trial error, you have to show that the evidence against your client is not so overwhelming as to make reversal a pointless gesture. Query how much this inquiry is already subsumed within the third-prong inquiry.
  - Is the right one that in some way specially promotes the fairness, integrity, or public reputation of the judicial proceedings? Allocution is a good example of this concept: the general public would be shocked that a defendant could be sentenced without being allowed to speak first on his own behalf. See, e.g., Adams, 252 F.3d at 288–89; but see Reyna, 358 F.3d at 352–53 (violation of allocution right did not violate fourth prong of plain-error review under unique facts of case).
  - Look for good rhetoric in the jurisprudence about the importance of the right that was violated in your client’s case.
- e. It would seem that any sentencing error that met the first three prongs would automatically satisfy the fourth prong, since (one would think) any amount of excess imprisonment would impugn the fairness, integrity, and public reputation of judicial proceedings. Cf. Glover v. United States, 531 U.S. 198, 203–04 (2001) (holding that, for purposes of establishing prejudice in a claim of ineffective assistance of counsel in connection with a Guidelines sentencing, “any amount of actual jail time has Sixth Amendment significance” and suffices to constitute prejudice justifying post-conviction relief).
- And some courts take that view with regard to sentencing error. See, e.g., United States v. Portillo-Mendoza, 273 F.3d 1224, 1228 (9th Cir. 2001) (exercising discretion because “[i]t is axiomatic that a defendant’s sentence should comport with the crime for which he was convicted and reflect the appropriate enhancements and departures set out in the Sentencing Guidelines.”); United States v. Avila, 557 F.3d 809, 822 (7th Cir. 2009) (“A sentence based on an incorrect Guidelines range constitutes an error affecting substantial rights and can thus constitute plain error, which requires us to

remand unless we have reason to believe that the error did not affect the district court’s selection of a particular sentence.”) (internal citation omitted).

- The Ninth Circuit has “regularly deemed the fourth prong of the plain error standard to have been satisfied where, as here, the sentencing court committed a legal error that may have increased the length of a defendant’s sentence.”” United States v. Joseph, 716 F.3d 1273, 1281 (9th Cir. 2013) (quoting United States v. Tapia, 665 F.3d 1059, 1063 (9th Cir. 2011) (listing cases)). In so holding, that court has noted that the possible injustice of excess imprisonment can be easily remedied by the relatively “simply task” of resentencing, which has the added virtue of properly allowing the district court to exercise the sentencing function in the first instance:

It is easy to see why prejudicial sentencing errors undermine the “fairness, integrity, and public reputation of judicial proceedings;” such errors impose a longer sentence than might have been imposed had the court not plainly erred. Defendants like [petitioner here] may be kept in jail for a number of years on account of a plain error by a court, rather than because their wrongful conduct warranted that period of incarceration. Moreover, there is little reason not to correct plain sentencing errors when doing so is so simple a task. In the context of convictions, it is the potential costs of error correction—undoing a jury verdict or an entire trial, or letting a guilty defendant go free—that have led courts on occasion to decline to “notice” plain errors where the evidence of guilt was overwhelming. In the sentencing context, however, these costs are not present. Reversing a sentence does not require that a defendant be released or retried, but simply allows a district court to exercise properly its authority to impose a legally appropriate sentence. Nor does reversing a sentence require a district court to revisit an issue the outcome of which is abundantly clear. Rather, it allows a sentencing court to make, for the first time, a discretionary determination necessary to arrive at an appropriate sentence. Under these circumstances a failure to exercise our discretion in order to allow a district court to correct an obvious

sentencing error that satisfies the three prongs of the plain error test would in itself undermine the “fairness, integrity, and public reputation of judicial proceedings.”

United States v. Castillo-Casiano, 198 F.3d 787, 792 (9th Cir. 1999) (internal citations omitted), amended, 204 F.3d 1267 (9th Cir. 2000); see also Joseph, 716 F.3d at 1281 (quoting Tapia, 665 F.3d at 1063); Tapia, 665 F.3d at 1063 (quoting Castillo-Casiano, 198 F.3d at 792). Other circuits also have typically reversed in such cases, endorsing a similar view of fourth-prong discretion.<sup>1</sup> See United States v. John, 597 F.3d 263, 287 & n.109 (noting that, in Sentencing Guidelines context, “other circuits have generally concluded that sentencing error that was likely to have been caused by selection of an incorrect sentencing range seriously affects the fairness, integrity, or public reputation of judicial proceedings when the sentence imposed is significantly above the correctly calculated Guidelines range,” and citing those circuits’ cases).

- Indeed, the Third and Tenth Circuits apply a presumption that an error like this satisfies the fourth prong. See United States v. Sabillon-Umana, 772 F.3d 1328, 1333-34 (10th Cir. 2014); United States v. Knight, 266 F.3d 203, 206 n.7 (3d Cir. 2001).

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<sup>1</sup> See, e.g., United States v. McCoy, 508 F.3d 74, 80 (1st Cir. 2007) (exercising discretion to correct conceded mathematical error that resulted in a sentence almost one year above the proper guideline maximum); United States v. Keigue, 318 F.3d 437, 445 (2d Cir. 2003) (exercising discretion to correct because, “[t]o allow an oversight like the one described above to remain uncorrected and increase the length of a defendant’s sentence would seriously undermine the public’s confidence in the judicial process”); United States v. Knight, 266 F.3d 203, 210 (3d Cir. 2001) (exercising discretion because “imposition of a sentence selected from the wrong range is likely to impair a defendant’s right to a fair sentence”); United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996) (“[S]entencing a defendant at the wrong guideline range seriously affects the fairness, integrity, and public reputation of the judicial proceedings. If we do not correct his error, [defendant] will serve a term of imprisonment three years longer than required by the sentencing guidelines.”); United States v. Davis, 397 F.3d 340, 349-50 (6th Cir. 2005) (exercising discretion to correct error that resulted in sentence 3 to 9 months longer than one under correct version of Guidelines); United States v. Avila, 557 F.3d 809, 822-23 (7th Cir. 2009) (explaining that sentence based on incorrect Guideline range required court to remand unless there was reason to believe that error did not affect district court’s selection of particular sentence); United States v. Meacham, 567 F.3d 1184, 1190-91 (10th Cir. 2009) (explaining that “a sentence based on an incorrect Guidelines range requires us to remand unless the error ‘did not affect the district court’s selection of a particular sentence’”) (internal citation omitted).

- f. But other courts don't take this view. So what factors do these courts consider in deciding to exercise their discretion to correct sentencing error that meets the first three plain-error prongs?
    - The fourth prong "is dependent upon the degree of the error and the particular facts of the case." United States v. John, 597 F.3d 263, 288 (5th Cir. 2010). See also United States v. Brown, 316 F.3d 1151, 1161–62 (10th Cir. 2003) (noting that "[a] review of federal appellate decisions considering whether to correct unobjected-to sentencing errors reveal that the key concern has been whether a correct application of the sentencing laws would likely significantly reduce the length of the sentence.").
  - g. In the end, don't forget to argue what this prong is all about: (1) Is it unfair to your client? or (2) Does it make the system look bad? Since we are focused on these things each and every day, simply unleash your inner defense attorney on these issues, and you will surely come up with something to argue.
- IV. CONCLUSION: Remember, if an error was not objected to below, aggressive litigation of a plain-error issue may be the client's last, best chance for relief. Cf. Saro, 24 F.3d at 287 ("reversal for 'plain error' is designed largely to protect defendants from the defaults of counsel"). So, go forth and litigate!