Protecting the Record at Sentencing

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I. Introduction

By the time parties arrive at a sentencing hearing, often so much has been argued, and so much has been decided, that the prosecutor may think there is little left she can do to protect the record. That assumption is, just as often, wrong. Before a sentencing hearing, it is generally true that the probation department compiles a detailed presentence investigation report (PSR), the parties submit objections to that PSR and sentencing memoranda, judges resolve those objections and hold evidentiary hearings, and the parties brief the legal issues that could affect a defendant's exposure. But a prosecutors' job to ensure that there is no procedural or substantive infirmity continues through, and indeed may be most critical at, the sentencing hearing.

This article aims at giving prosecutors practical advice—based largely on examples of adverse appellate rulings—about potential missteps that could result in a remand and resentencing. The article contains three substantive sections. First, it discusses the issues and arguments that prosecutors must raise at the district court level and on appeal to obtain full appellate review. Second, it discusses notice requirements that prosecutors should ensure are provided by judges before sentencing. And third, it discusses the need to ensure that a judge makes an adequate record for the imposed sentence.

II. Protecting the record

A. Issues and arguments raised by prosecutor

For the most part, appellate courts do not consider issues raised for the first time on appeal.[1] But raising issues at a sentencing hearing—after sentencing memoranda and objections to the PSR have been submitted and without explicit invitation—may seem odd to prosecutors, particularly when some judges are not receptive to procedural niceties as they weigh the more challenging and consequential decision of whether (and for how long) to send a person to prison.[2] Preserving the record, however, in all but the most exceptional circumstances,[3] is necessary to obtain full appellate review or avoid an unnecessary remand—even if the district judge does not permit making a full record.[4] And any objection must have a

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[1] *See, e.g.*, Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal. This rule is not an absolute bar to raising new issues on appeal; the general rule is disregarded when we think it necessary to remedy an obvious injustice.") (citation omitted).

[2] United States v. Puentes, 803 F.3d 597, 601 (11th Cir. 2015) ("At the close of the hearing, counsel tried a third time, saying, 'Your Honor, respectfully, I need to make an *objection* to the restitution.' The court advised her to '[h]ave a seat.'") (alteration in original).

[3] United States v. Castillo, 430 F.3d 230, 242–43 (5th Cir. 2005) (noting that the "district court effectively called the prosecutor a liar, stated that he was 'rude' and 'thoughtless,' and found that he 'deliberately' and 'intentionally' attempted to harm the defendant" and reasoning that, "In light of the district court's evident anger, its unusual hostility toward the prosecutor (including its attacks on his personal integrity and truthfulness), its unwavering opinion that the prosecutor had maliciously endangered the defendant, and the prosecutor's protestations to the contrary, requiring a formal objection by the prosecutor—above and beyond his repeated protestations—would have been futile, would not have served the purposes behind requiring contemporaneous objections, and would have clearly 'exalt[ed] form over substance.'") (alteration in original).

[4] *See, e.g., Puentes*, 803 F.3d at 603 ("As we see it, the prosecutor tried repeatedly to raise an objection to the court's order on restitution. To the extent she failed to provide the legal basis for that objection, she did not have a full opportunity to do so—which means that no prejudice can result.").

sufficient degree of specificity to apprise the judge of its basis unless, of course, the judge silences the parties.[5]

Failing to object results in plain error review or, in certain circumstances, waiver. Plain error review was established by the Supreme Court in 1993.[6] It sets forth a four-part test for reversal under Rule 52(b) of the Federal Rules of Criminal Procedure, requiring an appellate court to find (1) an error (2) that is clear or obvious, (3) affects substantial rights, and (4) warrants discretionary relief.[7]

There are circumstances, however, when failing to raise an issue results in the government's full waiver of the argument on appeal. For instance, in 2008, the Supreme Court held that the government may not raise a sentencing issue on appeal unless it filed a notice of appeal or cross appeal.[8]

Another more common example occurs when the government fails to argue at the district court level or on appeal that a defendant waived a claim by not timely raising it.[9] Such an omission generally precludes

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[5] *See, e.g.,* United States v. Bostic, 371 F.3d 865, 870–72 (6th Cir. 2004) (concluding that the government failed to adequately preserve an objection to a downward departure even though prosecutor argued about an evidentiary matter related to it); United States v. Taylor, 800 F.3d 701, 715 (6th Cir. 2015) ("While the district court judge in this case did not make even a cursory mention of Taylor's age-recidivism argument, this Court cannot conclude that the sentencing was procedurally unreasonable. Taylor did not raise the objection with a sufficient degree of specificity under the circumstances to apprise the court of the true basis for his objection."); United States v. Hansley, 54 F.3d 709, 715 (11th Cir. 1995) (reasoning that a comment "made in the middle of a general statement" does not preserve a sentencing issue for appeal).

[6] United States v. Olano, 507 U.S. 725, 732–738 (1993).

[7] 28 MOORE'S FEDERAL PRACTICE § 652.04[1] (Daniel R. Coquillette, et al. eds, 3d ed. 2021).

[8] Greenlaw v. United States, 554 U.S. 237, 248 (2008) ("Even if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill.").

[9] *See, e.g.*, United States v. Quiroz, 22 F.3d 489, 491 (2d Cir. 1994) (collecting authority for waiving waiver on appeal); United States v. Nastri, 633 F. App'x 57, 58 n.2 (2d Cir. 2016) (not precedential) (noting that the government's reference to the plain-error standard for addressing a newly

the government from raising waiver on appeal, whether it is in the context of sentencing or another stage of a criminal case.[10] On appeal, the government must unequivocally press the waiver argument, distinguished from mere forfeiture (defined by the Supreme Court as "the failure to make the timely assertion of a right").[11] That is, it must argue that even plain error should not apply and that the defendant fully waived the issue, foreclosing review.[12] For instance, when a defendant intentionally withdraws an objection of a sentencing enhancement, he is normally precluded from challenging that enhancement on appeal—but only if the government argues that the issue was waived rather than forfeited.[13]

There are other examples of the government's waiving waiver. If, for instance, without an objection from the government, a district judge informs the defendant that he has the right to appeal his sentence, when in fact he waived that right in his plea agreement, the government is at risk of foregoing its right to draw on that plea waiver if it does not timely correct the district court's misstatement.[14] The

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raised claim by the defendant is not sufficient to avoid waiving waiver); United States v. Gibbs, 626 F.3d 344, 351 (6th Cir. 2010) (finding that the government waived an argument by taking a certain position on remand following initial appeal).

[10] United States v. Leichtnam, 948 F.2d 370, 380–81 (7th Cir. 1991) (noting that the defendant likely waived a challenge to an evidentiary ruling but the government waived making any waiver argument on appeal).

[11] United States v. Tichenor, 683 F.3d 358, 363 (7th Cir. 2012) (quoting *Olano*, 507 U.S. at 733), overruled on other grounds by United States v. Hurlburt, 835 F.3d 715 (7th Cir. 2012).

[12] *Tichenor*, 683 F.3d at 363 (quoting United States v. Harris, 230 F.3d 1054, 1058–59 (7th Cir. 2000)) (observing that when an issue is waived, the appellate court cannot review it at all "because a valid waiver leaves no error for us to correct on appeal.").

[13] *Id.* ("[E]ven if [the defendant] had waived all grounds for challenging the application of the career offender guideline, the government has waived the waiver argument.").

[14] United States v. Buchanan, 59 F.3d 914, 917–18 (9th Cir. 1995) (finding waiver unenforceable where district court informed a defendant of his right to appeal); *accord* United States v. Felix, 561 F.3d 1036, 1041 (9th Cir. 2009) ("[T]he government waived its waiver argument because the sentencing judge on two occasions told Felix that he could appeal his sentence and the government failed to object. On both occasions, the district judge indicated that Felix retained his right to appeal his sentence. The judge further stated

same is true with other sentencing issues—for example, when the government fails to object to a defendant's belated challenge to the filing of a prior felony information and, instead, "remain[s] silent and participat[es] in an extensive hearing," it "waive[s] its waiver argument."[15] And as an example of how the "waiving waiver" doctrine applies on appeal, in one case, the government lost the chance to argue the issue when it failed to raise it in its opening appellate brief after it had notice that it could so.[16]

B. Notice requirements

Prosecutors should also ensure that district judges do not run afoul of Rule 32 of the Federal Rules of Criminal Procedure and other applicable law regarding procedure. One set of common avoidable issues arises from a district court's failure to give adequate notice to defendants before imposing a sentence. Prosecutors can cure these defects by reminding district judges of the requirements and, if necessary, agreeing to a reasonable continuance.

There are recurring examples resulting in remands. For instance, district courts have sometimes failed to provide adequate notice to defendants before imposing a condition of supervised release that is not on the list of mandatory or discretionary conditions in the Sentencing Guidelines (Guidelines); this omission has led the government to concede error and agree to remand.[17]

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that should the case come back after appeal, he would give it prompt consideration.") (footnote omitted).

[15] United States v. Boudreau, 564 F.3d 431, 435 (6th Cir. 2009).

[16] *See, e.g.,* United States v. Prado, 743 F.3d 248, 251 (7th Cir. 2014) (collecting authority and holding, "Prado's forfeiture is absolved by the government's failure to recognize the forfeiture and by responding to Prado's argument"). *But see* United States v. Cone, 714 F.3d 197, 216 n.12 (4th Cir. 2013) ("Because the government never had the opportunity to address an appellate challenge to its closing arguments, the dissent's assertion that the government has 'waived waiver' is misplaced and a conclusion of pure speculation. Had [the defendant] raised an independent challenge to the government's closing remarks, the government could have asserted the waiver bar in response, but was never put on notice to do so.").

[17] *See, e.g.,* United States v. Wise, 391 F.3d 1027, 1033 & n. 12 (9th Cir. 2004) ("Where a condition of supervised release is not on the list of mandatory or

Another common issue related to lack of notice occurs when a district judge departs (rather than varies) from the Guidelines. The distinction between departures and variances is subtle but important not only for purposes of appellate review but also for notice requirements. An upward departure can only be imposed under a particular Guidelines provision and must, therefore, satisfy the relevant criteria for that provision.[18] An upward variance, by contrast, "is not hemmed in by the language of a particular guideline. Instead, it is a product of the sentencing court's weighing of the myriad factors enumerated in 18 U.S.C. § 3553(a)."[19] The appellate review for an upward variance is deferential—for abuse of discretion—and asks only if there was any relevant factor warranting a variance, mindful that the district court is in the best position to conduct the "fact-intensive sentencing determination."[20] Because the distinction is potentially consequential on appeal, it is important to ensure the district court is clear at a sentencing hearing on whether it is upwardly departing or varying from the Guidelines, particularly if the prosecutor asks for both,[21] though the record could, at times, be defensible even if the district court is less than clear.[22] Importantly,

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discretionary conditions in the sentencing guidelines, notice is required before it is imposed.") (collecting authority from other Courts of Appeals).

[18] *See, e.g.,* United States v. Heindenstrom, 946 F.3d 57, 62 (1st Cir. 2019).

[19] *Id.* at 63.

[20] *Id.*

[21] *See, e.g.,* United States v. Brown, 578 F.3d 221, 226 (3d Cir. 2009) (vacating sentence and remanding in part because the court's ruling "leaves us unable to determine whether the court intended to grant an upward departure or a variance"); United States v. Fisher, 597 F. App'x 685, 686–87 (3d Cir. 2015) (not precedential) (stating that the "threshold question is whether the District Court imposed an upward variance or improperly imposed an upward departure").

[22] *See, e.g.,* United States v. Borek, 831 F. App'x 727, 728 (5th Cir. 2020) (not precedential) ("It is not apparent from the record whether the district court imposed an upward variance or an upward departure. In any event, this court has held that the specific characterization as a departure or variance is irrelevant if an imposed sentence is 'reasonable under the totality of the relevant statutory factors.'"); United States v. Bentley, 756 F. App'x 957, 963 (11th Cir. 2018) (not precedential) ("To determine whether the district court applied an upward departure or a variance, we consider whether the district court cited to a specific guideline departure provision and whether the court's

nothing prevents a district court from imposing both[23] or even drawing on some of the same aggravating factors.[24]

The distinction is also consequential for determining whether advance notice is necessary before the sentence is imposed. Generally, a defendant must receive adequate opportunity to address the risk of a potential upward departure;[25] failure to do so could result in vacatur of the sentence.[26] The Supreme Court held in 2008 that the notice—which can be provided in a PSR or prehearing submissions—is

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rationale was based on the § 3553(a) factors and its finding that the guidelines were inadequate.").

[23] *See, e.g.,* United States v. Thomas, 293 F. App'x 971, 973 (3d Cir. 2008) (not precedential) (affirming court's upward departures and upward variance); United States v. Bullock, 773 F. App'x 146, 147 (4th Cir. 2019) (not precedential) ("The district court did not abuse its discretion in concluding that these circumstances justified an upward departure under U.S. Sentencing Guidelines Manual § 4A1.3, p.s. (2016), and an upward variance from the post departure advisory Guidelines range.").

[24] *See, e.g.,* United States v. Sanders, 501 F. App'x 455, 460 (6th Cir. 2012) (not precedential) (collecting authority across circuits rejecting the double-counting argument, explaining that the "very same factors that influence a district court to impose an upward departure in a defendant's criminal history category might be evaluated differently in imposing an upward variance under 18 U.S.C. § 3553(a)."); *see also* United States v. Edmonds, 920 F.3d 1212, 1214–15 (8th Cir. 2019) (affirming an 80-month sentence despite a 41- to 51-month initial Guidelines range after a 15-month upward departure based on defendant's criminal history and an 18-month upward variance based on the same conduct).

[25] *See*, *e.g.*, United States v. Contractor, 926 F.2d 128, 131 (2d Cir. 1991) ("The obligation of the district court, prior to sentencing with upward departure, is to assure itself that the defendant has received notice and has thus had adequate opportunity to defend against that risk."); *see also* United States v. Reed, 744 F. App'x 16, 17–18 (2d Cir. 2018) (not precedential) (observing that "[a]lthough the district court generally used the term 'departure' rather than 'variance,'" it actually varied from the Guidelines, and in any event, sufficient notice of possible departure had been given by the PSR and the government's submissions).

[26] *See, e.g.,* United States v. Diaz, 285 F.3d 92, 98 (1st Cir. 2002) (vacating sentence and remanding because the district court departed based on a Guidelines provision of which defendant had no prior notice).

required only for an upward departure, not an upward variance.[27] Nevertheless, notice may still be required before a court can vary upward if the district court considers information or issues that may surprise the defendant and not allow him to meaningfully dispute them.[28] And while the issue most often arises when a district court departs *upward*, the government is entitled to notice of a possible downward departure.[29]

Finally, and relatedly, prosecutors should ensure that defendants receive their PSRs at least 35 days before sentencing.[30] Defendants can waive that requirement, which may often be in their interest, if they are eager to proceed expeditiously to sentencing.[31] If a defendant does not waive the requirement and the judge proceeds to sentencing, an appellate court can reverse for abuse of discretion.[32]

C. Making an adequate record

Regardless of what sentence a district court imposes, it must explain its reasoning. Title 18, section 3553(c) requires that district courts state their reasons for sentences, and courts of appeals have routinely

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[27] United States v. Irizarry, 553 U.S. 708, 712–16 (2008); *see also* Burns v. United States, 501 U.S. 129, 138 (1991); *accord* United States v. Reiss, 186 F.3d 149, 156 (2d Cir. 1999).

[28] United States v. Fleming, 894 F.3d 764, 770–72 (6th Cir. 2018) (vacating sentence and remanding for lack of adequate notice that certain information would be considered by the district court).

[29] *See, e.g.,* United States v. Evans, 352 F.3d 65, 72 (2d Cir. 2003) (vacating sentence, observing, "That the Government had no notice of the downward departures is also troublesome. As to Neal, no notice of a downward departure on *any* ground was provided by the court, the defense, or the PSR. As to Donald, the record's silence renders it impossible to determine whether the grounds on which Donald moved for a downward departure are the same grounds on which the court actually departed. On remand, we direct the district court to provide clear notice to both parties of any contemplated departure.").

[30] FED. R. CRIM. P. 32(e)(2); *see e.g.,* United States v. Casas, 425 F.3d 23, 59 (1st Cir. 2005) (reversing for violation of Rule 32(e)(2), noting that the violation was not harmless in part because the case was complex and involved voluminous evidence).

[31] *Casas*, 425 F.3d at 59.

[32] *See, e.g., id.*

reversed when judges fail to abide by the requirement.[33] In practice, the district court's justification must be particularly compelling when imposing an upward variance or departure; it must either analyze the Guidelines provision that warrants the upward departure or, if it upwardly varies, explain why the applicable Guidelines range is insufficient. Failing to do so will often result in a reversible procedural error.[34]

District courts must also make appropriate factual findings, resolving any factual disputes on issues that are material to sentencing. If there are no disputes at sentencing about the facts set

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[33] *See, e.g.,* United States v. Greer, 285 F.3d 158, 177–78 (2d Cir. 2002) ("Because we find the District Court's remarks ambiguous, we remand for clarification as to whether the court in fact sentenced the defendants within their applicable ranges or downwardly departed to arrive at their sentences. If the District Court did not depart downward, it should provide a statement of reasons for imposing the defendants' sentences at a particular point within their applicable ranges, which exceed 24 months, as required by § 3553(c)(1).") (citation omitted)).

[34] *See, e.g.*, United States v. Mends, 412 F. App'x 370, 374 (2d Cir. 2011) (not precedential) (vacating and remanding for re-sentencing because "the district court in effect granted a substantial upward departure or variance, but with no explanation of its reasons for doing so"); United States v. Rivera-Gonzalez, 809 F.3d 706, 712 (1st Cir. 2016) ("[T]here is no question that the defendant's underlying criminal conduct was significant. Yet here, we have a sentence that varies greatly and that not only lacks an express explanation for the variance, but also was imposed after the District Court appeared to question the fairness of just such a sentence. In such circumstance, we cannot say that the District Court has offered an adequate explanation for the sentence imposed."); United States v. Hirliman, 503 F.3d 212, 216 (2d Cir. 2007) ("The plain fact is that, with regard to Donald, the district judge, although accepting the PSR calculations, once again failed to give notice of a possible deviation and provided no explanation whatsoever for his decision to impose a non-Guidelines sentence. When the prosecutor asked for an explanation, he simply replied 'I'll write you a letter.'"); United States v. Chan, 677 F. App'x 730, 733 (2d Cir. 2017) (not precedential) (vacating sentence where "the district court did not offer any insight into its rationale for imposing a sentence that exceeded the applicable Guidelines sentence by 36 months and exceeded the sentence requested by the government by 21 months") (cleaned up).

forth in the PSR, the prosecutor should encourage the district court to accept those undisputed portions of the PSR as its finding of fact. [35]

Finally, a district court must explain all the components of its sentence, not just the term of incarceration. One common and avoidable misstep occurs when a district court imposes a special condition of supervised release without adequate support in the record.[36] Another example occurs when the conditions imposed in a written judgment deviate from those pronounced orally.[37] The oral pronouncement ordinarily controls.[38] Therefore, prosecutors should ensure that district courts articulate any appropriate conditions at sentencing hearings.

In short, if the government seeks a sentence above an applicable Guidelines range, the prosecutor should ensure that (1) the defendant received notice in advance of sentencing; (2) the district court specifies whether it is imposing an upward variance or upward departure; and (3) the record adequately supports the court's justification for all facets of the sentence, not just the term of incarceration.

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[35] *See* FED. R. CRIM. P. 32(i)(3)(A)–(B) (providing that the sentencing judge "may accept any undisputed portion of the presentence report as a finding of fact" and "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"). *But see* United States v. Rizzo, 349 F.3d 94, 99 (2d Cir. 2003) ("[I]f a defendant fails to challenge factual matters contained in the presentence report at the time of sentencing, the defendant waives the right to contest them on appeal.").

[36] United States v. Eaglin, 913 F.3d 88, 101 (2d Cir. 2019) (remanding for resentencing where the special condition of supervised release was not, inter alia, "reasonably related to the relevant sentencing factors"); United States v. Betts, 886 F.3d 198, 202 (2d Cir. 2018) (same) (banning alcohol use was not related to the relevant sentencing factors because "[n]either defendant's underlying crime nor any of the conduct contributing to his violations of supervised release involved the use of alcohol").

[37] *See, e.g.,* United States v. Hooker, 806 F. App'x 24, 26 (2d Cir. 2020) (not precedential) (modifying judgment to conform with oral pronouncement where the government conceded error).

[38] *See* United States v. Young, 910 F.3d 665, 670 (2d Cir. 2018) ("Insofar as there is a variance between the written and oral conditions, the District Court's oral pronouncement controls.").

III. Conclusion

A prosecutor's job does not end with submitting a sentencing memorandum and objections to a PSR. She must carefully guard the record before a sentencing hearing, through final judgment, and on appeal to avoid waiver, unnecessary remands, and more importantly, to protect a defendant's and the government's procedural rights.

About the Authors

Spektor and **Gerdes** served together in the Eastern District of New York's Business and Securities Fraud Unit, which focuses on investigating and prosecuting white-collar criminal offenses committed by individuals and corporations. Recently, Spektor left the Department and entered private practice. They previously served in the Office's Organized Crime and Gangs and General Crimes Units. They have participated in dozens of sentencing hearings and briefed and argued Second Circuit appeals involving sentencing issues. The authors are grateful to Ofir Hadari, law school student and intern at the U.S. Attorney's Office, for her research and ideas.