# TENTH CIRCUIT STANDARDS OF REVIEW IN FEDERAL CRIMINAL AND HABEAS APPEALS

2008 TENTH CIRCUIT BENCH & BAR CONFERENCE

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**SCOPE OF ARTICLE:**

This article attempts to navigate the maze of varying standards for appellate review and preservation of error in criminal cases,with emphasis on appeals in the Tenth Circuit Court.It is important to note at the outset that the answer to the question of which standard is to be applied in a given review is often determinative of the outcome of that appeal.

The standards for appellate review in federal criminal cases has been generally divided in to three distinct categories:

1 Clear error ("clearly erroneous"),

2 Abuse of Discretion, and

3 De Novo review

The first two standards for reviewing federal criminal appeals, "clear error" and "abuse of discretion," generally relate to pure factual determinations and accord considerable deference to the trial court's determinations. The third, "De Novo"review, generally deals with review of trial court determinations involvingpurely legal issues or mixed questions of fact and law, and such trial court decisions are generally accorded no deference whatsoever.

Of course, as will be seen, there are exceptions, and any trial error, whether fact bound or pure questions of law may be of little import if such error is determined to be "harmless." Moreover, appellate review may be precluded where that error is not properly preserved or has been "waived" or "forfeited" in the trial court. To further complicate matters, even when an Appellant has failed to properly preserve an issue (i.e. failed to make timely, specific objection to same), such error may still be reviewedwhere same affects substantial rights, under a stricter, less-forgiving "plain error" standard. What follows is a rough roadmap of what is required to obtain, and the standard that may be applied in the review of federal criminal appeals in this

Circuit.

**CONTEMPORANEOUS OBJECTION RULE:**

Appellant must make a timely objection to evidence he or she wishes to exclude, stating the specific grounds for same, in order to preserve such error for appeal. Otherwise, such error will be considered to have been waived and will be reviewable only for "plain error," a much more stringent standard of review.Fed.R.Evid. 103(a)(1).*See:U.S. v. Vonn*, 535 U.S. 55 (2002); *Brown v. Sirmons*, 515 F.3d 1072 (10th Cir. 2008) ["because defense counsel did not object to most of the prosecutions comments, the (state court of criminal appeals properly) engaged in plain review of those, and rejected Mr. Brown's contentions"];*U.S. v. Cerno*, 529 F.3d 926 (10th Cir. 2008) ["because Cerno did not object to the introduction of the disputed evidence on (the basis that it was impermissible character evidence) before the district court, we review his appellate challenge only for plain error"]. *U.S. v. Lopez*, 443 F.3d 1280, 1284 (10th Cir. 2006) [motion to suppress not considered because the argument had not been raised in the trial court]; *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940) [claim prosecutor made improper statements to the jury reviewed for "plain error" because claim not raised at trial]; *U.S. v. Dazey*, 403 F.3d 1147, 1169-70 (10th Cir. 2005) [prosecutorial misconduct claim not preserved because defendant failed to object at trial]; *U.S. v. Stenzel*, 49 F.2d 968, 974 (10th Cir. 1995) [failure to seek trial judge's recusal when defense inquired into judge's conflict resulted in review for "plain error" only]; *U.S. v. Haney*, 318 F.3d 1161, 1164 (10th Cir. 2003) [defense counsel's failure to object to jury instruction at or before charge conference resulted in "plain error" review, and, making request for instruction just prior to jury retiring to deliberate does not preserve issue for appeal]; *U.S. v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003) [failure to raise claim of juror prejudice at trial results in

"plain error" review on appeal]; *U.S. v. Brooks*, 438 F.3d 1231, 1242 (10th Cir. 2006) [claim of ineffective assistance of counsel not reviewable on appeal because not raised at trial and factual record not sufficiently developed to afford trial court an opportunity to evaluate trial counsel's performance]; *U.S. v. Magleby*, 241 F.3d 1306, 1315 (10th Cir. 2001) [where appellant failed to make timely objection to the admission of evidence at trial, review would be limited to "plain error"].

This "contemporaneous objection rule" is intended to afford the trial court an opportunity to correct any error. *Turner v. Murray*, 476 U.S. 28, 37 (1986); *U.S. V. Gagnon*, 470 U.S. 522, 528-30 (1985) (per curiam).

The "contemporaneous objection" requirement applies to the prosecution, as well as the defense. *U.S. v. Lopez*, 443 F.3d 1280, 1284 (10th Cir. 2006) [government's argument on appeal regarding motion to suppress not considered because argument was not raised before trial court].

**OBJECTION MUST BE SPECIFIC:**

In order to properly preserve an issue for review one's objection must be specific (i.e. a simple "hearsay" objection may not suffice), and one's appeal must be based upon the same underlying reasoning as raised in Appellant's trial objection (i.e. a general "hearsay" objection may not preserve a *Crawford* Confrontation issue for appeal).F.R.Ev. 103 (a)(1) [requires that an opponent of the admission of evidence must make a "timely objection…stating the specific ground of objection, if the specific ground was not apparent from the context."];*U.S. v. Mendoza-Salgado*, 964 F.2d 993, 1008 (10th Cir. 1992) [requiring that Appellant state specific grounds for objection, if same is not apparent from the context]; *U.S. v. McVeigh*,153 F.3d 1166, 1201 (10th Cir. 1998) [general, continuing objection was not specific, resulting in "plain error" review].

**MUST ARGUE SAME GROUND ON APPEAL AS RAISED IN TRIAL COURT:**

Generally, appellant must argue the same grounds or reasoning for his or her objection on appeal as raised in the trial court. *U.S. v. Norman T.*,129 F.3d 1099, 1106 (10th Cir. 1977) [objection to victim's statements to doctor not preserved for review where reasoning for objection raised on appeal was not the same as that raised at trial].

**ISSUES MAY NOT BE RAISED FOR FIRST TIME IN REPLY BRIEF:**

Similarly, on appeal, issues may not be raised for the first time in a reply brief. *U.S. v. Abdenbi,* 361 F.3d 1282, 1288-89 (10th Cir. 2004) [claim not properly preserved where raised for the first time in reply brief].

**CANNOT APPEAL FROM A FAVORABLE RULING:**

Moreover, generally one may only appeal from an unfavorable ruling, otherwise it can be said that the Appellant received all the relief he or she requested.*Brown v. Sirmons,* 515 F.3d 1072 (10th Cir. 2008).Often the trial court will respond to a specific, timely objection, without expressly sustaining or overruling same. In such cases counsel must insure that the record adequately reflect an adverse ruling in order to adequately preserve the issue for appeal. For example, in *U.S. v. Taylor*, 514 F.3d 1092, at p. 1095(10th Cir. 2008) rather than ruling on defense counsel's objection to the prosecutor's inflammatory comments[1] in opening statement, the District Judge instructed the jury to: "Remember that what the lawyers tell you is no evidence." The Court of Appeals reviewedsame under the more stringent "plain error" standard, since counsel did not move for a

[1] In the prosecutor's opening he admonished jurors that a conviction would send a message to "end the cycle of violence" on Defendant's Indian Reservation. *U.S. v. Taylor*, 514 F.3d, at p. 1095.

mistrial (apparently satisfied with the court's instruction).*U.S. v. Taylor*, 514 F.3d, at p. 1099. The Court of Appeals noted that the defense's failure to "advance a contemporaneous objection to the district court's curative instruction" or "to make a motion for mistrial" deprived the district court of "information necessary to evaluate the need for further curative steps." *Id.*

**PROFFER OF EXCLUDED EVIDENCE:**

Where the proponent of excluded evidence wishes to preserve such issue for appeal, he or she must make a proffer of the excluded evidence or the appellate court will have nothing before it toreview. *U.S. v. Yarbrough*, 527 F,3d 1092 (10th Cir. 2008).*See:*F.R.Ev. 103(a)(2) Offer of Proof [provides that the trial court may "direct the making of an offer in question and answer form"].

**EXCEPTIONS TO THE "CONTEMPORANEOUS OBJECTION RULE":**

There is no requirement of a contemporaneous objection with respect to "jurisdictional" issues. *U.S. v. Cotton*, 535 U.S. 625, 630 (2002) [issue of subject matter jurisdiction is preserved regardless whether same is raised in trial court]; *U.S.v. Siviglia*, 686 F.2d 832, 835 (10th Cir. 1981).

The requirement of a contemporaneous objection has also been relaxed to prevent "manifest injustice." *U.S. v. Al-Hamdi*, 356 F.3d 564, 568 n. 4 (4th Cir. 2004), or where one is challenging a statute as unconstitutionally vague. *U.S. v. Easter*, 981F.2d 1549, 1557 (10 Cir. 1992) [challenging the definition of "cocaine base" as unconstitutionally vague considered for the first time on appeal]. Moreover, where an intervening U.S. Supreme Court decision changes the law while one's appeal is pending. *Hamling v. U.S.*, 418 U.S. 87, 102 (1974); *U.S. v. Nove*y, 922 F.2d 624, 629 (10 Cir. 1991), *overruled on other grounds by U.S. v. Flowers*, 441 F.2d 900 (10 Cir. 2006).

**CERTAIN OBJECTIONS/DEFENSES MUST BE RAISED PRIOR TO TRIAL:**

Some objections are not considered timely unless raised prior to trial. For example, motions to suppress evidence, F.R.Cr.P. 12(b)(3)[2]; *U.S. v. Brooks,* 438 F.3d 1231, 1240 (10th Cir. 2006); discovery, F.R.Cr.P. 12(b)(3), requests for severance, F.R.Cr.P 12(b); *U.S. v. Apperson,* 441 F.3d 1162, 1191 (10th Cir. 2006), and defects in the indictment, F.R.Cr.P. 12(b)(3)(B). However, claims that an indictment fails to state an offense may be raised at any time. *U.S. v. Hathaway,* 318 F.3d 1001, 1010 (10th Cir. 2003).

**MOTIONS *IN LIMINE*:**

A pretrial motion *in limine* attempting to exclude evidence or testimony will generally not preserve that claim for appellate review, unless same is renewed at trial when the evidence or testimony is offered. *U.S. v. Nichols,* 169 F.3d 1255, 1266 (10th Cir. 1999). However, the Tenth Circuit has established a three-part test to determine when a party need not renew a motion *in limine* at trial to preserve the issue for appeal:

1) The issue must have been fully presented to the district court prior to trial,
2) The issue must be one that can be decided prior to trial, and
3) The district court must have issued a definitive ruling on the motion.

*See: U.S. v. Harrison,* 296 F.3d 994, 1002 (10th Cir. 2002).

**PLAIN ERROR:**

As set out above, where no timely objection is made, a trial court's ruling may still be reviewed

[2] Again, the grounds on appeal must be the same as those raised on appeal. *U.S. v. Lopez,*433 F.3d 1280, 1284 (10th Cir. 2006).

for "plain error." F.R.Ev. 103(d) [providing that the trial court may "take…notice of plain errors affecting substantial rights although they were not brought to the attention of the court."]. However, the "plain error" standard presents a heavy burden for an appellant, one that is not easily satisfied. *U.S. v. Toro-Pelaez,* 107 F.3d 819, 827 (10th Cir. 1997).

"Plain error" occurs when there is (1) error, (2) that is plain, which (3) affects the defendant's substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *U.S. v. Taylor*, 514 F.3d 1092, 1100 (10th Cir. 2008). An "error" is any mistake in the interpretation or application of a statute, guideline or legal rule. *U.S. v. Olano*, 507 U.S. 725 (1993). An error is "plain" when it is clear and obvious. *U.S. v. Vonn*, 535 U.S. 55 (2002). Finally, the error is prejudicial and affect's the defendant's substantial rights if, absent the error, the outcome of the trial would have been different. *Id*. The "plain error" standard of review is used to review errors when the defendant did not object to the error when it occurred, provided there is no valid waiver of same. *Id*. For example, in *U.S. v. Harlow,* 444 F.3d 1255, 1261-65 (10th Cir. 2006) the Court reviewed a prosecutor's vouching for a witness under the "plain error" standard where same was not objected to at trial, finding that the error did not effect substantial rights because the testimony was of only collateral import.

For the most part, to qualify as "plain error" the irregularity must be so clear and obvious as to not require any contemporaneous objection to call the court's attention to same. *U.S. v. Goode*,483 F.3d 676, 681 (10th Cir. 2007) ["plain error" must be "clearly contrary to current law"]. Moreover, factual disputes do not, for the most part, rise to the level of "plain error" review. *U.S. v. Lindsey,* 389 F.3d 1334, 1337 (10th Cir. 2004).

Courts have generally discouraged expansion of Rule 52(b)'s "plain error" review doctrine in order to encourage litigants to afford the trial court every opportunity to cure any error. *Johnson*

*v. U.S.*, 520 U.S. 461, 465 (1997); *U.S. v. Young*,470 U.S. 1, 15 (1985) [ "[T]he plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"]; *U.S. v. Trujillo-Terrazas,* 405 F.3d 820 (10th Cir. 2005) ["plain error" rule should be utilizedonly to prevent "particularly egregious" error or a "miscarriage of justice."].

**NEED TO AFFECT INTEGRITY OF THE JUDICIAL PROCESS:**

Even where the court finds the error to be "plain" and to affect the defendant's substantial rights, the court may refuse to grant appellate relief unless the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *U.S. v. Olano,* 507 U.S. 725, 732 (1993); *U.S. v. Lauder,* 409 F.3d 1254, 1269-71 (10th Cir. 2005), *See also: U.S. v. Weidner,* 437 F.3d 1023, 1049-50 (10th Cir. 2005) [violation of *Booker* sentencing standards warranted correction].

**NO NEED TO MAKE FUTILE OBJECTION:**

However, where the law is settled and clearly adverse to the defendant at the time of trial, but becomes more favorable by the time of appeal, then the defendant should not be expected to object to clearly established law. *Johnson v. U.S.,* 520 U.S. 461, 468 (1997); *U.S. v. Lin,* 410 F.3d 1187, 1190 10th Cir. 2005).

**"WAIVER" MAY PRECLUDE EVEN "PLAIN ERROR" REVIEW:**

Where there is an "intentional relinquishment or abandonment of a known right" such waiver precludes even "plain error" review on appeal. *U.S. v. Olano,* 507 U.S. 725, 733 (1993). In *U.S. v. Solomon,* 399 F.3d 1231 12337-38 (10th Cir. 2005), the Court held that failure to raise a

Confrontation Clause objection at trial waived any review on appeal.

It is not uncommon for plea agreements to contain "waivers of appeal." Not withstanding that such agreements meet the definition of "adhesion contracts," and that this Circuit "strictly construes" such waivers, "reading any ambiguities against the Government and in favor of the Defendant's appellate rights," this Court has not hesitated to uphold such contractual waivers. *U.S. v. Ibarra-Coronell,* 517 F.3d 1218, 1221 (10th Cir. 2008).

> "We employ a three-prong analysis to review appeals where a defendant entered into an appeal waiver in the district court….A particular waiver's enforceability hinges on: '(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; 92) whether the defendant knowingly and voluntarily waived h[er] appellate rights; and (3) whether enforcing the waiver would resulting a miscarriage of justice.'[3]…Our waiver-enforceability analysis is informed by contract principles, which govern plea agreements….Whethera defendant's appeal waiver set forth in a plea agreement is enforceable is a question of law we review *de novo*." *U.S. v. Ibarra-Coronell,* 517 F.3d 1218, 1221 (10th Cir. 2008); *U.S. v. Hahn,*359 F.3d 1315, 1324 (10th Cir. 2004).

**"FORFEITURE" AS OPPOSED TO "WAIVER":**

Where there is a mere "failure to make a timely assertion of a right," rather than an intentional "waiver" of that issue, federal appellate courts will generally consider whether that alleged irregularity amounts to "plain error." *U.S. v. Olano,* 507 U.S., at p. 733

**WAIVER REQUIRED BY THE RULES:**

Rule 52(b), F.R.Cr.P.provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." However, Rule 12 expressly provides not only that a suppression motion "must be raised before trial," but that an appellant

[3] The Court has characterized a "miscarriage of justice" as (1) where the district court relied on an impermissible factor such as race, (2) where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, (3) where the sentence exceeds the statutory maximum, or (4) where the waiver is otherwise unlawful. *U.S. v. Ibarra-Coronell,* 517 F.3d 1218, 1222 (10th Cir. 2008).

waives any "defense, objection, or request not raised by the deadline the court sets." Considering these two conflicting propositions, the Third Circuit Court of Appeals recently held that the much more specific provisions of Rule 12 trump the more general provisions of Rule 52, noting that where an appellant raises a new ground in support of his or her motion to suppress for the first time on appeal, same is subject to the waiver provisions of Rule 12 and no "plain error" review may be had. *U.S. v. Rose*, __F.3d__, No. 05-5199 (3rd Cir. August 5, 2008).[4]

**INVITED ERROR:**

When a defendant offers an alternative instruction and verdict form which is "functionally the same" as those used by the court, the Court of Appeals may refuse to review any error on the grounds that the defendant had "invited any error of which he now complains." *U.S. v. Fields*, 516 F.3d 923 (10th Cir. 2008). The Invited error doctrine precludes a party from arguing that the district court erred in adopting a proposition that the party had urged the district court to adopt. *Id*. at 939.

**HARMLESS ERROR:**

Even where timely objection is made and the district court's ruling is determined to be error, same may still not result in reversal where such error is found to be "harmless." [5] "Harmless

[4] Echoing the Supreme Court's reasoning in *Hudson v.* , the 3rd Circuit in *Rose* noted that applying a "plain error" review rather than a "waiver" approach would do little, if anything, to further the deterrent effect of the exclusionary rule. *U.S. v. Rose*, __F.3d__, No. 05-5199 (3rd Cir. August 5, 2008).

[5] *See:* 28 U.S.C. § 2111 provides "On the hearing of any appeal or writ of *certiorari* in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties" and Rule 52(a), F.R.Cr.P. which provides that "Any error, defect, irregularity or variance that does not affect substantial rights must be disregarded."

error" occurs when the error does not substantially prejudice the defendant. *See:U.S. v. Dominguez Benitez,* 124 S. Ct. 2333 (2004). Errors which are subject to the harmless error doctrine are generally called "trial errors." *Webber v. Scott,* 390 F.3d 1169, 1176-77 (10th Cir. 2004).Errors which fundamentally undermine the fairness of the trial, usually referred to as "structural errors," can never be harmless. *Arizona v. Fulminante,* 499 U. S. 279, 310 (1991). Some courts have held that a Constitutional error can only be found to be harmless where same is found "beyond a reasonable doubt" to have contributed to the conviction. *U.S. v. Sells,* 477 F.3d 1226, 1240 (10th Cir. 2007). Whereas non-Constitutional errors may be found to be "harmless" if the judgment was not substantially swayed by the error. *U.S. v. Ramirez,* 479 F.3d 1229, 1247-48 (10th Cir. 2007).

**CURATIVE INSTRUCTION WILL OFTEN RENDER ERROR "HARMLESS":**

Where the trial court issues prompt instructions which were "well designed to cure whatever prejudicial impact" the error may have had, such error will often be found to be "harmless." *Singer v. U.S.,* 380 U.S. 24, 38 (1965); *U.S. v. Lauder,* 409 F.3d 1254, 1262 (10th Cir. 2005).

**PLAIN ERROR DISTINGUISHED FROM HARMLESS ERROR:**

"Plain error" review is similar to "harmless error" review because both require that the error substantially prejudiced the defendant, however under plain error the defendant bears the burden of persuading the appellate court that the error was prejudicial, whereas the government bears this burden under harmless error analysis. *U.S. v. Dominguez Benitez,* 124 S. Ct. 2333 (2004). Furthermore, reversal is discretionary under plain error analysis and mandatory under

harmless error analysis. *Id*.

**EXAMPLES OF "PLAIN ERROR REVIEW":**

In *U.S. v. Hasan* 526 F.3d 653 (10th Cir. 2008) the Court of Appeals was confronted with an appeal of a trial court's denial of a motion to dismiss an indictment for failure to provide Appellant with an interpreter when he was subpoenaed to testify before the grand jury. The *Hasan* court noted that it "traditionally review[s] a district court's denial of a motion to dismiss an indictment for abuse of discretion… But when a party fails to preserve an issue before the court, our review is more circumscribed, limited to ascertaining whether the error charged on appeal qualifies as plain error." *Id*. at 660-61 citing *Taylor*, 514 F.3d at 1096.[6]The Court held thatthe trial court's refusal to reconsider its decision that a defendant did not need an interpreter during his grand jury proceedings, where that same court later determined that the defendant indeed needed an interpreter during his trial, constituted "plain error."The first inquiry, was whether or not there that was error. The Court of Appeals held that inconsistent application of the Court Interpreter's Act constituted legal error, leaving contradictory legal rulings. *Id* at 661-63.The Court next found that this error was "plain," in light of Congress' explicit instruction for uniform application of that Act. *Id* at 664. With respect to the third inquiry: whether such error affected defendant's "substantial rights," or, had a high probability of affecting the outcome,*Id* at 664-65, the *Hasan*Court noted that they were "in doubt that, had the district court reconsidered both motions for the interpreter… [it] wouldstill have denied the motion to dismiss the indictment." *Id*. Addressing the final inquiry, the court noted that the Congressional intent in creating the Court Interpreter's Act was to reduce

[6] The court in *Hasan* did not decide the issue of which standard of review should apply, because it reasoned that the defendant prevailed even under the more stringent "plain error" standard. *Id*. at 661.

the chance that indictments would be spawned by simple language difficulties. *Id*. at 665. Here, the reliability of a criminal indictment obtained upon the testimony of someone unable to comprehend and understand the questions he was required to answer before the grand jury, directly affected the "fairness, integrity [and] public reputation of [those] judicial proceedings." *Id*.

In *U.S. v. Taylor*, 514 F.3d 1092, 1100 (10th Cir. 2008), the defense made timely objection to the prosecutor's opening statement that the case provided the jury with an opportunity to "end the cycle of violence" on Defendant's Indian Reservation. *Taylor*, 514 F.3d at 1095. In response to defense counsel's objection the trial judge admonished the jury to "remember that what the lawyers tell you is not evidence, and the evidence in the case is what you must decide." *Id.*Defense counsel made no objection to the trial court's instruction, did not request any further curative instruction, nor move for a mistrial. The Court of Appeals reviewed the issue "whether the district court's failure suasponte to grant a mistrial or issue some further curative instructions" under a "plain error" standard.*Id*. At 1099. Finding no plain error, the court affirmed the conviction. *Id*. In deciding between two possible standards of review: abuse of discretion and plain error, the *Taylor* court chose to employ plain error. *Id* at 1096. The defense's failure to "advance a contemporaneous objection to the district court's curative instruction" or "to make a motion for mistrial," deprived "the district court [of] the information necessary to evaluate the need for further curative steps," preventing the trial court from effectively correcting the error. *Id.*

**"*DE NOVO*" REVIEW:**

Of all forms of appellate review "*de novo*" is the least deferential to the trial court. Courts apply *de novo* review to appeals involvingpure questions of law or mixed questions of fact and law, where the appellate court is in the same position as the trial court to rule on such issues. Fact

issues are generally reviewed under a "clearly erroneous" standard, which accords the trial court considerable deference in making such fact-bound determinations.

For example, a question of statutory interpretation (i.e. whether a particular offense constitutes a "crime of violence" under § 2L1.2 of the sentencing guidelines) presents a question of law and the trial court's conclusion is reviewed *de novo*. *U.S. v. Zuniga-Soto,* 527 F.3d 1110, 1116-7 (10th Cir. 2008). Similarly, the Court "review[s] *de novo* the district court's compliance with the Federal Rules of Criminal Procedure. *U.S. v. Tindall,* 519 F.3d 1057, 1062 (10th Cir. 2008).

On appeal from a conviction for assault resulting in serious injury, the court of appeals reviewed *de novo* a district court's compliance with the Federal Rules of Criminal Procedure. *U.S. v. Tindall,* 519 F.3d 1057, 1062 (10th Cir. 2008). The Court found that the defendant's written objections filed before sentencing failed to make specific allegations of factual inaccuracy that would trigger a court's FRCP Rule 32 fact finding allegation for disputed portions of the PSR. *Id* at 1062. Furthermore, on the Defendant's failure to raise sufficiency of the evidence argument at sentencing triggered plain error review, where normally, a court would review a challenge to factual findings for clear error. *Id* at 1064. The district court did not err in relying on an undisputed statement by a doctor for the victim that her injuries posed "a substantial risk of death," to support a seven-level enhancement for sentencing purposes. *Id*. at 1064-65. Finally, the Defendant failed to overcome the rebuttable presumption of reasonableness of his within-guidelines sentence when he failed to show how his circumstances were similar to other defendants that were given lower sentencing enhancements. *Id*. at 1066.

In the *Taylor* casediscussed above, the Court noted that it reviews prosecutorial misconduct claims (the prosecutor's inflammatory remarks to the jury) that are the subject of an overruled

objection under a "*de novo*" standard[7], unless there is a subsequent motion for mistrial, in which case it is reviewed for an "abuse of discretion." *Id.* At 1098-99.

Where, as there, the defense objection is met with a curative instruction, rather than a clear ruling on same, and no further objection or relief is sought, the Court of Appeals treated defendant as if he had received all the relief he had requested and reviewed such error only for "plain error." *Id.* At 1098. On the other hand, the Court has previously noted that "Where there has been no motion for a mistrial or new trial, the district court has not exercised its discretion, and therefore it is meaningless to look for an abuse of discretion. In such cases, we merely review whether the conduct objected to was indeed improper." *U.S. v. Gabaldon*, 91 F.3d 91, 94 (10th Cir. 1996).

The Court reviews whether jury instructions "as a whole" to "determine whether they accurately informed the jury of the governing law" under a *"de novo"* standard, however, "review [of] a district judge's refusal to issue a requested instruction" is reviewed for "abuse of discretion." *U.S. v. Nacchio*, 519 F.3d 1140, 1158-59 (10th Cir. 2008); *U.S. v. Martin*, ___ F.3d ____, No. 07-2090, 2008 WL 2332049, (10th Cir., June 9, 2008).

In reviewing a trial court's denial of a motion to suppress a defendant's confession for *Miranda* violations, the Court applies a *de novo* standard on appeal. *U.S. v. Chee*, 514 F.3d 1106, 1112 (10th Cir. 1008).

> "We fist address whether Mr. Chee's oral and written confessions were obtained in violation of his Fifth Amendment rights articulated in *Miranda*. We review the district court's denial of Mr. Chee's motion to suppress and whether Mr. Chee was in custody for *Miranda* purposes *de novo*….We accept the district court's factual findings unless they are clearly erroneous and view the evidence in the light most favorable to the government." *Id.* at p. 1112; *U.S. v. Thompson*, 354 F.3d 1197, 1199-1200 (10th Cir. 2005).

[7] Most other Circuits apply an "abuse of discretion" standard to an overruled objection to prosecutorial misconduct. *See: U.S. v. Griffin*, 437 F.3d 767, 769 (8th Cir. 2006); *U.S. v. Mitchell*, 502 F.3d 931, 970 (9th Cir. 2007); *U.S. v. Simpson*, 479 F.3d 492,503 (7th Cir. 2007); *U.S. v. Lore*, 430 F.3d 190, 210 (3rd Cir. 2005).

In reviewing "the district court's denial of Defendant's suppression motion" this Court has "deferred to the [trial] court's factual findings unless clearly erroneous." *U.S. v. Burkley*, 513 F.3d 1183, 1186 (10th Cir. 2008). More interestingly, the Court held that it "review[ed] the district court's finding of reasonable suspicion for clear error, but we review *de novo* the ultimate question of reasonableness under the Fourth Amendment. *Id.* at p. 1186; *U.S. v. Walker,* 941 F.2d 1086, 1090 (10th Cir. 1991).

Again, in *U.S. v. Worthon,* 520 F.3d 1173, 1178 (10th Cir. 2008) the Court noted that while it "review[s] *de novo* the reasonableness of a search or seizure under the Fourth Amendment," *See: U.S. v. Lyons*, 510 F.3d 1225, 1234 (10th Cir. 2007), it "review[s] the court's factual findings for clear error and view the evidence in the light most favorable to the government." As for a defendant's standing to complain, this Court held that "Whether a defendant has standing to challenge a search is…subject to *de novo* review." *Id.* at p. 1178; *U.S. v. Nava-Ramirez*, 210 F.3d 1128, 1131 (10th Cir. 2000).

The reasonableness of a traffic stop was reviewed *de novo* in order to determine if a district court erred in denying a motion to suppress. *U.S. v. Martinez*, 512 F.3d 1268, 1272 (10th Cir.2008). The Court of Appeals accepted the district court's finding that the state trooper had sufficient justification for stopping the defendant's vehicle when there was no license plate on the vehicle. *Id*. at 1273. Since neither defendant could produce a driver's license, and the owner was too far away to pick up the car, the car had to be impounded, and a search would have inevitably resulted. *Id*. at 1273-74. Under the "inevitable discovery" doctrine, the court reasoned that the evidence was admissible, and did not review the remaining Fourth amendment claims that the defendant's detention was unreasonably prolonged and that their consent to search was invalid. *Id*.

In *U.S. v. Gabaldon*, 91 F.3d 91, 94 (10th Cir. 1996) the Court was confronted with a

defendant who "both objected contemporaneously and unsuccessfully moved the district court for a mistrial" relating to prosecutorial misconduct [prosecutor repeatedly vouched for Government witnesses[8]]. Recognizing that "an allegation of prosecutorial misconduct presents a mixed question of fact and law reviewed *de novo*," *Id.* at p. 92, the Court held that where a defendant's objection is followed by a motion for mistrial, same is reviewed for "abuse of discretion." *U.S. v. Gabaldon*, 91 F.3d 91, 94 (10th Cir. 1996) [holding that both motions for mistrial and new trial are reviewed for abuse of discretion]. *U.S. v. Haar*, 931 F.2d 1368, 1374 (10th Cir. 1996); *U.S. v. Evans*, 42 F.3d 586, 593 (10th Cir. 1996); *U.S. v. Caballero*, 277 F.3d 1235, 1242 (10th Cir. 2002). However, had the defendant made a motion to dismiss, rather than mistrial or new trial, the issue of whether prosecutorial misconduct warranted reversal may have been subject to *de novo* review. *See: U.S. v. Ramirez*, 63 F.3d 937, 940 (10th Cir. 1995). *See also: U.S. v. Gobaldon*, 91 F.3d 91, 94 n. 2 (10th Cir. 1996).

The Court reviews a *Bruton* challenge (i.e. that "in a joint trial, one defendant's…incriminating extrajudicial statements regarding a co-defendant violate the co-defendant's Sixth Amendment rights, despite instructions to the jury to disregard that evidence") as a legal issue *de novo*. *U.S. v. Rahseparian*, 231 F.3d 1267, 1277-78 (10th Cir. 2000) [finding that the trial court's curative instruction cured any *Bruton*error, because the co-defendant's statement there was only "inferentially incriminating," rather than "accusatory"].

In *U.S. v. Nash*, 482 F.3d 1209 (10th Cir. 2007) the Court there agreed with Nash that the challenged statements violated *Bruton*. *Id* . However, the Court went on to note that the mere finding of a Bruton violation, "does not automatically require reversal of the ensuing criminal

[8] For example, the prosecutor's opening statement he argued that one of the Government's witnesses "will testify, the government believes, that he has no doubt in his mind who it was that broke into his cousin's house. And the government, as well, harbors the conviction that after you hear the evidence…" *Id.* at p. 93.

conviction [unless] we can conclude beyond a reasonable doubt that the constitutional error was harmless. *Id*. The Bruton error was harmless because evidence of guilt was overwhelming compared to prejudicial effect of the Bruton statements. Id.

In his dissent, Justice McKay stated a different definition of the harmless error test :

> the test for determining whether a constitutional error is harmless…is whether it appears "beyond a reasonable doubt" that the error complained of did not contribute to the verdict obtained. Here majority did not consider the "probable impact" of the Bruton evidence "on the minds of the average jury." "the majority's failure to address the overall effect of the *Bruton* evidence strips the harmlessness test of a crucial component while reducing the overwhelming evidence requirement to no more than a sufficiency of the evidence examination.

**COMPONENT PARTS OF THE "ABUSE OF DISCRETION" STANDARD:**

The Court has often pointed out that in reviewing a trial court's ruling under the more deferential "abuse of discretion" standard, the Court of Appeals reviews the district court's findings of fact under a "clearly erroneous" rubric, while conclusions of law are reviewed *de novo* simply for error. *U.S. v. McComb*, 519 F.3d 1049, 1053 (10th Cir. 2006); *Cartier v. Jackson*, 59 F.3d 1046, 1048 (10th Cir. 1995).

> "Thus the abuse of discretion standard consist of component parts, affording greater dererence to findings of fact (clearly erroneous) than to conclusions of law (erroneous). The factual findings of trial courts have always been afforded great deference, based on the role, position, and expertise of the trial court to make factual determinations….On the other hand, '[a] district court by definition abuses its discretion when it makes an error of law." *Id.*

**EXAMPLES OF "ABUSE OF DISCRETION" REVIEW:**

The Court reviews the denial of a motion for continuance for "abuse of discretion," *U.S. v. Nash*, 482 F.3d 1209 (10th Cir. 2007). The Court in *Nash* noted that:

> "We review for abuse of discretion a district court's denial of a motion for continuance of trial….Under that standard, 'we will find error only if the district court's decision was

> arbitrary or unreasonable and materially prejudiced the defendant….In determining whether a district court arbitrarily or unreasonably denied a motion for continuance,' we examine the following factors: '(1) the diligence of the party requesting the continuance; (2) the likelihood that the continuance, if granted, would accomplish the purpose underlying the party's expressed need for the continuance; (3) the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; [and] (4) the need asserted for the continuance and the harm that appellant might suffer as a result of the district court's denial of the continuance." *Id.* at p. 1216.

The Court reviews a district court's determination regarding the admissibility of expert testimony under an "abuse of discretion" standard. *U.S. v. Nacchio*, 519 F.3d 1140, 1151 and 53 (10th Cir. 2008). In *Nacchio* the Court of Appeals held that the trial court's application of the more stringent civil rules regarding pre-trial proffer of an expert's expected testimony constituted an abuse of discretion, as was its *Daubert* ruling that was "devoid of any factual basis." *Id.* at p. 1153.

The determination of whether to admit character evidence is reviewed for "abuse of discretion." *U.S. v. Yarbrough*, 527 F.3d 1092, 1101 (10th Cir. 2008) [Excluding a character witness on the ground that proffered evidence went to the defendant's "state of mind at a particular incident" and not the existence of "operative facts."].

The Court reviews a district court's decision to deny severance for abuse of discretion*U.S. v. Berkley*, 515 F.3d 1183, 1185, 1188 (10th Cir.2008) [defendant there sought severance of counts charging possession of marijuana with intent to distribute, carrying a firearm in relation to drug trafficking, and being an unlawful user of marijuana in possession of firearms and ammunition]. In order to receive a reversal under an abuse of discretion standard, the Court held that the defendant had to show that that the denial of his motion actually affected the outcome of his trial. *Id* at 1188. The court of appeals found no error in the district court's conclusion that the drug and firearm charges were "inextricably intertwined" and that even if the counts had been severed, the outcome of the case would not have been significantly affected, since, for example, evidence of the Defendant's firearm possession would have been admissible to prove his intent to distribute. *Id.*

In applying the abuse of discretion standard in the context of denial of motion for continuance the Court of Appeals stated that it would "find error only if the district court's

decision was arbitrary or unreasonable and materially prejudiced the defendant." *Nash*, 482 F.3d at 1216. In order to determine if a district court's denial of a motion to continue was "arbitrary or unreasonable," the court examined four factors: (1) the diligence of the party requesting the continuance; (2) the likelihood that the continuance, if granted, would accomplish the purpose underlying the party's expressed need for the continuance; (3) the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; [and] (4) the need asserted for the continuance and the harm the appellant might suffer as a result of the district court's denial of the continuance, and ultimately determined that the district court's decision was not arbitrary or unreasonable. *Id*.

In reviewing the district court's refusal to grant a motion for mistrial for abuse of discretion the Court described the test using somewhat different terminology:

> "in reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests in a clear error of judgment." *Id*. at 1217; citing*U.S. v. Stiger*, 413 F.3d 1185 (10th Cir.2005) .

The Court was there reviewing a trial court's refusal to grant a mistrial based upon the admission of improper evidence, noting that the proof of defendant's intent to knowingly possess a kilogram of cocaine was overwhelming, thus the district court acted well within its discretion in denying the motion for mistrial. *Id*; *See generally U.S. v. Cavely*, 318 F.3d 987, 997 (10th Cir. 2003)

A trial court abused its discretion when it dismissed a petitioner's motion for equitable tolling of the statute of limitations for appeal of his conviction, when the record showed that his legal materials were confiscated six weeks prior to his deadline, constituting extraordinary circumstances, and the petitioner had exercised due diligence. *U.S. v. Gabaldon*, 522 F.3d 1121

(10th Cir. 2008). This decision is in agreement with both the Second and Ninth Circuit stance on equitable tolling when a prisoner's legal papers are confiscated (*Valverde v. Sinson*, 224 F.3d 129, 133 (2d Cir. 2000) and when a prisoner is segregated from his papers (*Espinoza-Matthews v. California*, 432 F.3d 1021, 1027-28 (9th Cir.2005).

All reviews of reasonableness of a sentence are broken down into a procedural component (review of how sentence was calculated) and a substantive component (whether the length of the sentence is reasonable). *U.S. v. Zamora-Solorzano*, ___ F.3d ___, No. 07-3205, 2008 WL 2035476, at *2 (10th Cir. May 13, 2008). First, an appellate court must determine whether the sentencing court committed any significant procedural error, such as improperly calculating the Guidelines range, treating the Guidelines as mandatory, failing to consider the statutory sentencing factors in 18 U.S.C.A. Section 3553(a), selecting a sentence based on clearly erroneous facts, or failing to adequately explain a chosen sentence. *U.S. v. Verdin-Garcia*, 516 F.3d 884 (10th Cir. 2008). Next, the substantive inquiry involves review of whether the length of the sentence is reasonable given the circumstances of the case and the statutory factors. *Id.*

Several circuit courts of appeal mandate a "due deference" to a sentencing court's reasoning and application of the statutory factors. *U.S. v. Regalado*, 518 F.3d 143 (2d Cir. 2008); *U.S. v. Evans*, 526 F.3d 155 (4th Cir. 2008); U.S. v. Moon, 513 F.3d 527 (6th Cir. 2008); *U.S. v. Thompson*, 523 F.3d 806 (7th Cir.2008); *U.S. v. Lehmann*, 513 F.3d 805 (8th Cir. 2008). However, the Third Circuit exercises "plenary review," and a less deferential standard that approaches de novo review of legal errors, such as misapplication of the sentencing guidelines. *U.S. v. Miller*, 527 F.3d 54 (3d Cir. 2008); *U.S. v. Wise*, 515 F.3d 207 (no deference for legal error); *But see U.S. v. Wood*, 526 F.3d 82 (substantive reasonableness reviewed for abuse of discretion); *See also U.S. v. Pugh*, 515 F.3d 1179 (11th Cir.2008) (appellate court is not limited to

considering only the factors given in the district court's explanation of a sentence).

No procedural error was found in an upward variance, 95 months above the top of the advisory guidelines range, was applied in sentencing a defendant convicted of sexual exploitation of a minor. *U.S. v. Taghizadeh*, 2008 WL 1790191 (10th Cir. April 21, 2008). The district court "adequately explained its reasons for deviating upward from the advisory range." The court has developed new sentencing jargon to describe the different ways in which a district court may assign a sentence that is outside the sentencing guidelines range, such as variances (any increase based upon ß3553 factors) and departures (not based upon ß3553 factors). For instance "when a sentencing court justifies a variance, it commits a procedural error if the reason for the variance is already factored into the sentence. *Id*. at *4. The trial court did not commit this type of "double counting" when it used offensive conduct (videotaping a minor in a sexual act and actual, rather than third party participation) to support separate increases.

No substantive or procedural error was found when a defendant sought review of his sentence, arguing that it was unreasonable because the judge erred in failing to take into account his drug abuse history and lack of eligibility for early release. *U.S. v. Garrett*, ___ F.3d ___, No. 07-1464, (10th Cir. June 13, 2008). The court reviewed for an abuse of discretion. *Id*, citing *U.S. v. Angel-Guzman*, 506 F.3d 1007, 1014-15 (10th Cir. 2007). As to the procedural error, the defendant alleged a mistaken apprehension, but the court of appeals dismissed this allegation, stating that the trial court judge "at worst spoke loosely" about Defendant's ability to participate in drug rehabilitation program, and not his eligibility for early release and "This is not procedural error." *Id*. at 4. As to the substantive reasonableness of the defendant's sentence, the court stated cursorily, "[Defendant's] references to his drug problems are insufficient to overcome the presumption of [reasonableness]." *Id* at 5.

A defendant was convicted of conspiracy, bank fraud and money laundering. *U.S. v. Wittig*, ___F.3d____, No. 07-3051, 2008 WL 2427049 (10th Cir. June 17, 2008). The Court of Appeals held that his prison term of 24 months was procedurally and substantively reasonable, but that the occupational restriction was not reasonable when it reviewed the special conditions of supervised release for abuse of discretion. *Id*.Finding no indication that the trial court considered any less restrictive alternatives for the occupational restriction, the court held that the district court committed reversible error. *Id; See US v. Souser*, 405 F.3d 1162, 1167 (10th Cir. 2005).

No substantive error was found when a defendant was sentenced below the suggested Guidelines range, and the district judge based the lower sentence on "not wanting to punish [the Defendant] for going to trial" when his more culpable co-defendant received a 120 month sentence for accepting a plea. *U.S. v. Smart*, 518 F.3d 800 (10th Cir. 2008). The majority found that the trial judge did not abuse his discretion in lowering the sentence for the Defendant's lesser culpability in the offense (videotaping sexually explicit behavior of a minor). *Id*. The dissent argued that there was a procedural error because the trial judge "considers an improper factor" such as co-defendant's sentence and only gives reason that he does not want to punish Defendant for going to trial. *Id*. at 811-17.

There are instances where sentences within the advisory guidelines' range have been reversed and remanded by this Court. *US v. Santillanes*, ____ F.3d ____, No.07-2206, 2008 WL 1790381, (10th Cir. April 21, 2008), (reversed and remanded for resentencing due to a procedural error, and holding that under *Kimbrough*, a sentencing court must consider disparity between mixed and actual methamphetamine in the sentencing guidelines). *Kimbrough v. U.S.*, 128 S.Ct. 558 [2007]). Furthermore, failure of district court to "find and articulate sufficient facts and reasons to allow us to review the findings and failure to provide proper explanation for the chosen

sentence is reversible procedural error." *U.S. v. Pena-Hermosillo*, 522 F.3d 1108 (10th Cir. 2008) citing. *Gall v. U.S.*, 128 S.Ct. 586 (2007).

A downward adjustment of a Sentencing Guidelines base level by one point was not harmless error when a district court would not have imposed the same sentence absent the error. *U.S. v. Lozano*, 514 F.3d 1130 (10th Cir.2008). The Sentencing Guidelines permitted either a two-level reduction or none for acceptance of responsibility. *Id*. at 1133; USSG ß 3E1.1(a). The district court imposed a "one-level reduction for partial acceptance of responsibility" which the Court of Appeals characterized as a misapplication of the sentencing guidelines, a legal question, reviewed de novo," while the issue of whether a defendant actually accepted responsibility as a factual issue reviewed for clear error. *Id*. at 1135. The defendant was able to preserve error for the less deferential harmless error review by renewing her objection to the presentence report at the sentencing hearing. *Id* at 1132. Because the appeals court concluded that "hazarding a guess" about the district court's potential sentence, absent the procedural error, would put them "in the zone of speculation and conjecture," the error was not harmless, and the court remanded for resentencing. *Id*. at 1136.

A district court committed procedural error when it incorrectly calculated the sentencing guidelines by relying on an ordinance violation as relevant to criminal history enhancements without first determining that the ordinance violation constituted violation of a state statute. *U.S. v. Saavedra*, 523 F.3d 1287 (10th Cir. 2008). The PSR did not detail which part of the city ordinance he violated, and the district court "conducted no inquiry into the matter." *Id*. at 1290. However, no error was found when the district court failed to read a scienter requirement into the relevant guideline section. *Id*. at 1289. The Court cited several circuits that agree that a *mensrea*element is not required unless it is expressly stated in the guidelines. *Id. See e.g. U.S. v.*

*Gonzalez-Lopez*, 335 F.3d 793, 798 (8th Cir. 2003); *U.S. v. Fry*, 51 F.3d 543, 545-56 (5th Cir. 1995); *U.S. v. Brown*, 514 F.3d 256, 269 (2d Cir. 2008); *U.S. v. Thornton*, 306 F.3d 1355, 1359 (3d Cir. 2002).

In order to receive abuse of discretion review of sentencing errors, the errors must be adequately preserved. A defendant failed to preserve his objection that the government had not afforded the sentencing guidelines a presumption of reasonableness, when he raised it for the first time on appeal, and therefore received plain error review, and not abuse of discretion review. *U.S. v. Zamora-Solorzano*, ___ F.3d ___, No. 07-3205, 2008 WL 2035476, at *2 (10th Cir. May 13, 2008). A defendant's failure to preserve error led to plain error review instead of abuse of discretion review when a Defendant did not object on procedural grounds under ß 3553(a) or (c) after the district court imposed his sentence. *U.S. v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007). There, the error did not result in a reversal was found the Defendant failed to prove that he would have received a lower sentence absent the error. Id.

However, a procedural error was properly preserved for abuse of discretion review when a defendant asserted generally that the court was not using its full range of discretion, by not calculating his sentence based on cocaine rather than crack. *U.S. v. Kinchion*, No. 07-6064, 2008 WL 886039 at *2 (10th Cir. April 1, 2008).Furthermore, the error was not harmless, even though district court saw no justification for the downward variance for from the suggested guidelines. *Id*. at *3. The Government's assertion was insufficient to show that district court's erroneous presumption of reasonableness had no effect on the sentence imposed, so as to render the error harmless. *Id*. at *4. "Harmless error is that which did not affect the district court's selection of the sentence imposed," and the burden of proving harmlessness "is the beneficiary of the error." *U.S. v. Montgomery*, 439 F.3d 1260, 1263 (10th Cir. 2006).

**REPLY BRIEFS:**

The Federal Rules of Appellate Procedure have only two requirements for a reply brief, a table of contents and a table of authorities. *Fed. R. App. P. 28*. However, it is clearly settled law that the appellant cannot raise new issues in a reply brief; it can only respond to arguments raised for the first time in the appellee's brief. *Pennsylvania Elec. Co. v. FERC*, 11 F.3d 207, 209 (D.C. 1993); *Ondine Shipping Corp. V. Cataldo*, 24 F.3d 353, 356 (1st. 1994); *Torrington Extend-A-Care Employee Assn. V. NLRB*, 17 F.3d 580, 593 (2d. 1994); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 n.3 (3d. 1993); *U.S. v. Anderson*, 5 F.3d 795, 801 (5th 1993); *Wildlife Express Corp. v. Carol Wright Sales, Inc*., 18 F.3d 502, 508 n. 5 (7th 1994); *Dyer v. U.S.*, 23 F.3d 1421, 1424 (8th 1994); *U.S. v. Cox*, 7 F.3d 1458, 1463 (9th 1993); *RTC v. FSLIC*, 25 F.3d 1493, 1506-07 (10th 1994); *U.S. v. Kimmons*, 1 F.3d 1144, 1145-46 (11th 1993); *Kaufman Co., Inc. v. Lantech, Inc*., 807 F.2d 970, 973 n.*. (Fed. 1986).

In the Tenth Circuit, the initial appellate brief must be specific and fully developed all issues and arguments, or they will be considered "waived" for purposes of the reply brief. *U.S. v. Redcorn*, 528 F.3d 727 (10th Cir. 2008) *citing Hanh Ho Tran v. Trustees of State Colls in Colo*., 355 F.3d 1263, 1266 (10th 2004) (issues not raised in opening brief are waived). For example, when a Defendant first raised the issue of having a license plate for state purposes in his reply brief, but failed to challenge the district court's finding in an opening brief, the issue was considered to have been "waived." *U.S. v. Martinez*, 518 F.3d 763 (10th Cir. 2008). Furthermore, errors asserted in the original brief, but "dropped" in the reply brief, will also be considered to have been "waived." *See Headrick v. Rockwell Internat. Corp*., 24 F.3d 1272, 1278-79 (10th Cir. 1994) The Tenth Circuit reasons that the waiver rule is applied in order to protect the appellee, who has

no chance to respond, and the court, which when deprived of this response would risk the possibility of an ill-advised decision. *Id.*

The most important question for preservation of error in a reply brief is what exactly must be written in order for an argument to be "sufficiently raised." If you feel that your initial brief does not sufficiently raise an argument, you may file a motion for leave to file a supplemental brief, however, your supplemental brief must argue a new ground of error, raise some novel legal issue, or raise a factual point not specifically argued previously, which is crucial to the your case.

**"CONCURRENT SENTENCE DOCTRINE"**

The Court of Appeals may decline to consider an appeal where the defendant received a concurrent sentence on another unchallenged or valid count. *Barnes v. U.S.*, 412 U.S. 837, 848 n.16 (1973); *U.S. v. Seguin*, 114 F.3d 1014 (10th Cir. 1977) [any review of sentencing error would be rendered "harmless" where the underlying conviction was valid and that sentence ran concurrently with equal or longer sentence in separate indictment].

**CONCLUSION**

The above discussion was intended as a rough road map to assist the practitioner navigating his or her way through the varying standards for preservation and review of federal criminal cases in the United States Court of Appeals for the Tenth Circuit. One is cautioned that this cursory outline is by no means exhaustive, and, as when charting any course, a good navigator is always reminded to consult the latest authoritative sources before journeying too far from home port.