Developing Issues in the Tenth Circuit

**Presented by Hon. Nancy Moritz for the Federal Bar Association; Topeka, KS; September 9, 2015**

**Forfeiture, waiver, and waiving the waiver—whose turn is it, anyway?**

While I’ve only been a member of the Tenth Circuit for a year, my experience as a practitioner and state appellate judge has taught me that appellate practitioners often make mistakes in briefing whether an issue has been raised below and in discussing how the failure to raise an issue below impacts our review. Several recent Tenth Circuit cases have focused on those issues.

One of our most important local rules requires all principal briefs to “*cite the precise reference in the record where*” the issue the party raises on appeal “was raised and ruled on” below. *See* 10th Cir. R. 28.2(C)(2) (emphasis added).

**Why is compliance with this rule important?**

In part, because if you demonstrate that you raised an issue below, you will trigger a more favorable standard of review on appeal.

Errors not raised below are subject to reversal only if the appellant can demonstrate they are plainly erroneous—i.e., that (1) an error occurred; (2) the error was plain; (3) the error affected the appellant’s substantial rights; and (4) the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” [*United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2006436964&fn=_top&referenceposition=732&findtype=Y&vr=2.0&db=0000506&wbtoolsId=2006436964&HistoryType=F) (internal quotation marks omitted).

Thus, if an issue was raised and ruled on below, it is always in the appellant’s best interest to comply with Rule 28.2(C)(2) in order to avoid plain-error review on appeal.

**What does an appellant do if the issue wasn’t raised?**

Don’t assume that if the issue wasn’t raised and ruled on below, you can simply ignore the rule. That’s because the failure to acknowledge the lack of an objection below and to argue that the alleged error warrants reversal under the plain-error test may result in the court *declining to address the issue at all*.

*See* [*Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1308 (10th Cir. 2015)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2036379268&fn=_top&referenceposition=1308&findtype=Y&vr=2.0&db=0000506&wbtoolsId=2036379268&HistoryType=F) (“[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the road for an argument for reversal not first presented to the district court.”) (Internal quotation marks omitted).

I recommend appellants *and* appellees include a subsection in your form brief entitled “Issue raised and ruled on,” to insure that you engage in this analysis.

But even failing inclusion of that subsection, as appellant’s counsel, you should be triggered to argue for plain error by the additional requirement that you state, for each issue, a concise statement of the *applicable standard of review*. See Fed. R. App. P. 28(a)(8)(B).

**Is it always “the end of the road” when an issue wasn’t raised below and appellant fails to argue for plain-error review?**

Not necessarily. If an issue wasn’t raised below and an appellant doesn’t argue for application of the plain-error test, AND the appellee subsequently fails to point out that failure and argue that the court should decline to reach the issue for that reason, the court may conclude that the appellee has “waived the [appellant’s] waiver.” [*United States v. Heckenliable*, 446 F.3d 1048, 1050 n.3 (10th Cir. 2006)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2009044401&fn=_top&referenceposition=1050&findtype=Y&vr=2.0&db=0000506&wbtoolsId=2009044401&HistoryType=F).

Under those circumstances, the court may proceed to address the appellant’s issue for the first time on appeal. *Id.*

*But see* [*United States v. Rodebaugh*, No. 13-1081, 2015 WL 5011174 (10th Cir. Aug. 25, 2015)](https://a.next.westlaw.com/Document/I20eb31264b4c11e5b86bd602cb8781fa/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=2015+WL+5011174) (declining to address argument defendant (1) failed to raise below and (2) failed to analyze under plain-error test on appeal­, even though government didn’t bring defendant’s forfeiture to court’s attention).

**If the appellee “waives the waiver,” does that mean that the court will apply plain-error review despite the appellant’s failure to either raise the issue below or argue for plain-error review?**

Not necessarily.

The court has been known to forego application of the plain-error test, and instead apply a more favorable standard of reviewas though the issue *had* been raised below. *See* [*United States v. Faust*, No. 14-8011, 2015 WL 4620406, at \*6 (10th Cir. Aug. 4, 2015)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2036814904&fn=_top&referenceposition=6&findtype=Y&vr=2.0&db=0000999&wbtoolsId=2036814904&HistoryType=F) (reviewing instructional challenge for abuse of discretion when, on appeal, government never raised appellant’s failure to object below).

But see [*Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013)](https://a.next.westlaw.com/Document/I7c235bbca08611e2a555d241dae65084/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=713+F.3d+538), *cert. denied sub nom.* [*Abernathy v. Cozza-Rhodes*, 134 S. Ct. 1874, 188 L. Ed. 2d 916 (2014)](https://a.next.westlaw.com/Document/I04ece34f62d011e381b8b0e9e015e69e/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad705250000014f99e0bd39e5273bec%3FNav%3DMULTIPLECITATIONS%26fragmentIdentifier%3DI04ece34f62d011e381b8b0e9e015e69e%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DUniqueDocItem&listSource=Search&listPageSource=629f45ef81a693b7d8189621b3a624b0&list=MULTIPLECITATIONS&rank=0&grading=na&sessionScopeId=1d6f89f7b2ccb07db9a02a617aa9c6f6&originationContext=NonUniqueFindSelected&transitionType=UniqueDocItem&contextData=%28sc.Search%29) (applying plain-error review when defendant neither raised issue below nor argued for plain-error on appeal and government neglected to raise defendant’s failure to preserve issue); *see also* [*Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011)](https://a.next.westlaw.com/Document/Ic44fd5474e3e11e0a982f2e73586a872/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad705250000014f99e5a43ee5274314%3FNav%3DCASE%26fragmentIdentifier%3DIc44fd5474e3e11e0a982f2e73586a872%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=4abb81545654c4ca461fc683e672f185&list=ALL&rank=1&grading=na&sessionScopeId=1d6f89f7b2ccb07db9a02a617aa9c6f6&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29) (“If a newly raised legal theory is entitled to appellate review at all—if it wasn’t waived before the district court—it may form a basis for *reversal* only if the appellant can satisfy the elements of the plain error standard of review.”)

**So what’s the bottom line?**

Despite these divergent outcomes and the strategizing that may result because of them, the best and safest approach still seems to be the most straightforward.

If you’re the appellant, let the court know when there’s been no objection below and argue the steps of plain-error review.

If you’re the appellee and the appellant fails to argue for plain-error review, point out that failure and urge the court to decline to reach the issue.

**Appeal waivers—where are we a decade later?**

Although it’s been more than 10 years since the court, in [*United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004)](http://www.westlaw.com/find/default.wl?ft=Y&db=0000506&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2004180846&fn=_top&findtype=Y&vr=2.0&wbtoolsId=2004180846&HistoryType=F), adopted a three-part test for evaluating whether a defendant’s appeal-waiver is enforceable, we still see interesting challenges in this area.

In *Hahn*, we said that when faced with a challenge to an appeal waiver, we will consider: “(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice as we define herein.” *Id.* at 1325.

**When, if ever, will the court bypass a waiver to reach the merits?**

And while the court regularly applies this three-step analysis, last year in [*United States v. Black*, 773 F.3d 1113 (10th Cir. 2014)](http://www.westlaw.com/find/default.wl?ft=Y&db=0000506&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2034955894&fn=_top&findtype=Y&vr=2.0&wbtoolsId=2034955894&HistoryType=F), the court bypassed the *Hahn* analysis after characterizing the question of whether the appellant had waived his right to appeal as “relatively complex.” *Id.* at 1115 n.2. Instead, the panel exercised its discretion to resolve the appeal on its merits, concluding the appellant was not entitled to relief. *Id.* at 1115-17.

Following *Black*, other appellants urged the court to exercise its discretion to bypass the waiver analysis to reach the merits of their appeals and grant them relief on their substantive claims. *See, e.g.*, [*United States v. Garcia-Ramirez*, 778 F.3d 856, 857 (10th Cir. 2015)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2036062613&fn=_top&referenceposition=857&findtype=Y&vr=2.0&db=0000506&wbtoolsId=2036062613&HistoryType=F). But in *Garcia-Ramirez*, the court rejected this reading of *Black*, explaining that “[b]ecause this court [in *Black*] was able to determine there was no merit to” the appellant’s substantive claim, “the appeal could be affirmed without devoting judicial resources to decide the waiver issue.”

The panel in *Garcia-Ramirez* narrowly construed *Black*, holding, “*Black* merely addressed a matter of judicial economy in deciding cases[;] it signaled no change in [the court’s] appeal waiver jurisprudence.” *Id.* And because bypassing the waiver analysis to afford the appellant relief on his substantive claim “would deprive the government of a key benefit of its plea bargain, which” the *Hahn* analysis “was designed to protect,” the *Garcia-Ramirez* court enforced the waiver and dismissed the appeal. *Id.*

**How restrictively does the court apply the *Hahn* steps?**

Two other points bear mentioning. First, in applying the second step of the *Hahn* test, the court has not limited itself to the question of whether the appeal *waiver* was knowing and voluntary. Instead, it also considers whether the *plea* *itself* was knowing and voluntary.

*See* [*United States v. Rollings,* 751 F.3d 1183, 1190-91 (10th Cir.)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2033408632&fn=_top&referenceposition=1189&findtype=Y&vr=2.0&db=0000506&wbtoolsId=2033408632&HistoryType=F), *cert. denied*, [135 S. Ct. 494, 190 L. Ed. 2d 362 (2014)](http://www.westlaw.com/find/default.wl?cite=190+L.Ed.2d+362&ft=Y&db=0000471&rs=ap2.0&rp=%2ffind%2fdefault.wl&fn=_top&findtype=Y&vr=2.0&HistoryType=C) (“In sum, in considering whether an appellate waiver is knowing and voluntary, we consider whether the defendant entered into the plea agreement knowingly and voluntarily. Where a plea agreement contains a plea and an appellate waiver, we may therefore look to whether the plea was knowing and voluntary in deciding whether the plea agreement was entered knowingly and voluntarily.”) *See also* [*United States v. Mascheroni*, No. 15-2033, 2015 WL 3451439, at \*2 (10th Cir. June 1, 2015)](https://a.next.westlaw.com/Document/I8211c53f087b11e590d4edf60ce7d742/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=2015+WL+3451439) (unpublished)(“In assessing the knowingness and voluntariness of an appeal waiver, we consider whether the plea-agreement language states that [the defendant] entered into the agreement knowingly and voluntarily and whether the plea colloquy was adequate under Federal Rule of Criminal Procedure 11.”); [*United States v. Gilchrist*, 575 F. App’x 837, 839 (10th Cir. 2014)](https://a.next.westlaw.com/Document/If5005bed433011e4a795ac035416da91/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=575+F.+App%e2%80%99x+837) (unpublished) (same).

On the other hand, in applying the third step of the *Hahn* test, the court has strictly limited itself to determining whether enforcing the *waiver itself* will result in a miscarriage.

The court will not consider whether failing to correct the underlying *error* will result in a miscarriage of justice. *See, e.g.*, [*United States v. Herrera-Zamora*, 521 F. App’x 714, 716 (10th Cir. 2013)](https://a.next.westlaw.com/Document/Ib4a47669a6d811e2981ea20c4f198a69/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=521+F.+App%e2%80%99x+714) (unpublished) (“Thus, ‘[a]n appeal waiver is not ‘unlawful’ merely because the claimed error would, in the absence of waiver, be appealable. To so hold would make a waiver an empty gesture’ (quoting [*United States v. Sandoval*, 477 F.3d 1204, 1208 (10th Cir. 2007)](https://a.next.westlaw.com/Document/I52c18c57c5ff11dbb3d2dfbaa098fb72/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=477+F.3d+1204))); [*United States v. Polly*, 630 F.3d 991, 1001 (10th Cir. 2011)](http://www.westlaw.com/find/default.wl?ft=Y&referencepositiontype=S&rs=ap2.0&rp=%2ffind%2fdefault.wl&serialnum=2024393029&fn=_top&referenceposition=1001&findtype=Y&vr=2.0&db=0000506&wbtoolsId=2024393029&HistoryType=F). *See also* [*United States v. Smith*, 500 F.3d 1206, 1213 (10th Cir. 2007)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013188526&pubNum=506&originatingDoc=I180534af231311e080558336ea473530&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) (“To allow alleged errors in computing a defendant’s sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive).

**Supervised release conditions – not just an afterthought.**

The court recently has considered numerous challenges to conditions of supervised release.

**Suggestions for prosecutors, defense counsel and the district court.**

In [*United States v. Martinez-Torres*, No. 14-2084, 2015 WL 4590987, \_\_ F.3d \_\_ (10th Cir. July 31, 2015)](https://a.next.westlaw.com/Document/I6ef7da2037ab11e5a807ad48145ed9f1/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=2015+WL+4590987), the court opened its opinion with this prod:

The most important thing at sentencing is determining whether the defendant will be incarcerated and, if so, for how long. Other matters, such as restitution and conditions of supervised release, are, appropriately, of secondary concern. But they are not inconsequential and deserve focused attention. Readily avoidable errors regarding these “secondary” matters appear too frequently on our docket. Particularly frustrating is that often the errors were not raised by defense counsel until the appeal. If the prosecutor, the defense attorney, and the district court would devote a bit more time at sentencing hearings to issues beyond incarceration, much time and effort will be saved in the long run.

In *Martinez-Torres*, the defendant was convicted of a drug crime and at sentencing, the presentence report indicated he had a charge pending in state court for aggravated sexual assault of a child younger than 14. The district court imposed numerous conditions of supervised release and on appeal, he challenged three of those conditions: a condition prohibiting the use or possession of alcohol and other intoxicants; a condition requiring psychosexual evaluation, sex-offender treatment and polygraph testing; and a condition prohibiting defendant from viewing or possessing any material depicting or describing sexually explicit conduct. Our court vacated all three—the government conceded the first two must be set aside on plain error review, and the court vacated the third based on an abuse of discretion.

**Some conditions require an individualized assessment.**

In vacating the condition on sexually explicit materials, the *Martinez-Torres* panel noted that some conditions can be imposed without an individualized assessment (e.g., restrictions on committing additional crimes, SORNA registration).

But “when neither the Sentencing Commission nor Congress has required or recommended a condition, we expect the sentencing court to provide a reasoned basis for applying the condition.”

This court explained that “a reasoned basis” requires the district court to make an individualized assessment of whether the condition is appropriate *in the particular circumstances before the court* and to provide at least generalized reasons for imposing the condition. *See id.* at \*4.

Because the district court failed to explain why a restriction on viewing or possessing materials depicting or describing sexually explicit material was supported by the statutory factors in that case, the court found the district court abused its discretion. *See id.* at \*8 (concluding that although the district court “may have relied on scientific literature or personal experience,” none was cited for the record).

**Be aware that some conditions require special scrutiny.**

A condition that invades a fundamental right or liberty interest must be justified by “compelling circumstances.” *See* [*United States v. Burns*, 775 F.3d 1221, 1223-24 (10th Cir. 2014)](https://a.next.westlaw.com/Document/I43e8f856906711e4b86bd602cb8781fa/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=775+F.3d+1221) (vacating condition restricting a father’s access to his child); *see also* [*United States v. Dunn*, 777 F.3d 1171, 1178 (10th Cir. 2015)](https://a.next.westlaw.com/Document/I7cacadc2b16211e4b86bd602cb8781fa/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=777+F.3d+1171) (applying “special scrutiny” to condition impacting defendant’s ability to obtain employment).

Prosecutors/defense counsel should also be cognizant of the uncertainty surrounding some special conditions. For instance, the court recently noted a circuit split as to whether a condition prohibiting an offender from viewing or possessing materials describing or depicting sexually explicit conduct is lawful. *See* [*United States v. Barela*, No 14-2103, 2015 WL 4901785, \_\_ F.3d \_\_ (10th Cir. Aug. 18, 2015)](https://a.next.westlaw.com/Document/I24d2a29345e111e5a807ad48145ed9f1/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=2015+WL+4901785) (upholding the condition on plain-error review due to circuit split and offender’s specific circumstances).