



# Jurisdictional Statement & Standards of Review

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## Why Should You Care?

- **Fed. R. App. 28 requires these sections in your brief**
- **They save you time and help organize your argument**
- **They help the court**
- **They help establish you as a reliable source**
  - **Enhance your credibility**
  - **Strengthen your argument**





# JURISDICTIONAL STATEMENT

Fed. R. App. P. 28(a)(4):

1. Basis for the district court's subject matter jurisdiction.
2. Basis for the appellate court's jurisdiction.
3. Filing dates establishing timeliness of appeal.
4. Assertion that appeal is from a final order or judgment disposing of all parties' claims or establishing some other basis for appellate jurisdiction.



# JURISDICTIONAL STATEMENT

A template:

“Defendant Daniel McIntosh appeals from a judgment of conviction in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231. The court entered judgment on April 24, 2014, and McIntosh filed a timely notice of appeal on April 29, 2014. ER 418, 430; Fed. R. App. P. 4(b). This Court has jurisdiction under 28 U.S.C. § 1291.”

- 18 U.S.C. § 3231: jurisdiction over federal crimes
- 28 U.S.C. § 1291: appeal of final judgment
- 18 U.S.C. § 3742(a): defendant’s appeal of sentence



# JURISDICTIONAL STATEMENT

## Post-conviction motion to vacate sentence:

- 28 U.S.C. § 2255: district court jurisdiction
- 28 U.S.C. § 2253: appellate jurisdiction
  - Defendant must obtain a “certificate of appealability” from district court or circuit court as to specific issue.
  - To obtain certificate, defendant must make a “substantial showing of the denial of a constitutional right.”
  - Government may appeal grant of § 2255 motion by right.



# JURISDICTIONAL STATEMENT

## Government appeals:

- 18 U.S.C. § 3731
  - Order suppressing evidence, excluding evidence, or returning property.
  - Order dismissing indictment or portions of indictment.
  - Post-trial grant of a new trial or judgment of acquittal.
  - Order releasing person charged or convicted of a crime.
- 18 U.S.C. § 3742(b)
  - Government appeal of a sentence.
- All government appeals require approval of the Solicitor General.





# JURISDICTIONAL STATEMENT

Fed. R. App. P. 4(b): Is the notice of appeal timely?

- Defendant has 14 days from entry of judgment.
  - Notice deemed filed when prisoner deposits in prison mail.
  - File motion to dismiss if appeal is untimely. Rule 4(b) is mandatory but not jurisdictional, so you must assert the defense.
- Government has 30 days from the entry of the judgment or final order (and 60 days in § 2255s)
- District court may extend deadline (either side) for 30 days upon showing of excusable neglect or good cause.





# STANDARDS OF REVIEW





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**Mistakes are made!**



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**Goal is to achieve justice. . .**

**. . . with some degree of efficiency.**



## In determining standards of review

- There is first a question of fact: was the error preserved? (What bucket does it go into)
- There is then a question of harmlessness: what do you have to show to get reversal



# 4 categories

**Structural error**

**preserved error**

**forfeited error**

**waived error**



# 4 categories

**Structural error**

**preserved error**

**forfeited error**

**waived error**

Reversible \_\_\_\_\_ Not reversible



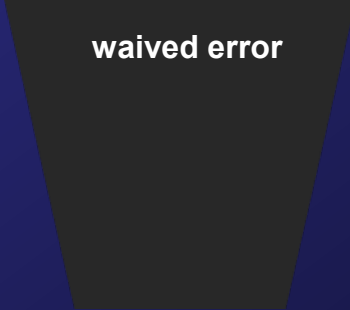
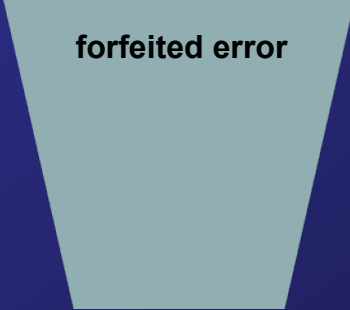
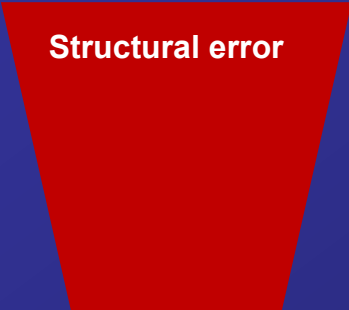
# The four buckets of errors

1. Structural error: fundamental, structural error in trial or proceeding; no objection necessary
2. Preserved error: the complaining party made a timely objection below or otherwise raised the issue, or the district court considered the issue
3. Unpreserved/forfeited error: the complaining party made no objection below or otherwise did not raise the issue, and the district court did not consider it
4. Waived error: the complaining party knew of issue and affirmatively relinquished any claim





# First, the outliers



Reversible \_\_\_\_\_ Not reversible



# Outlier #1

## Structural Error

- Very rare. Examples include:
  - Court lacked subject matter jurisdiction
  - Complete lack of counsel or denial of counsel of choice or self-representation
  - Biased judge or jury
  - Completely closed courtroom without adequate findings
- No harmless review. Reversible error.



## Outlier #2 Waiver

- Waived issues cannot be reviewed because the court of appeals lacks jurisdiction over them
  - Generally: express relinquishment of a known right
  - Sometimes: issues that the parties and court discussed and no objection was made
  - Almost always: **appeal waivers in plea agreements**
    - Generally enforceable
    - File a motion to dismiss



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**Now, the two primary categories:**

- **Preserved error**
- **Unpreserved/forfeited error**



**Mistakes are made all the time  
(especially in trial)**

**The goal of standards of review is to allow for  
error correction, when important enough, but  
also to allow the judicial system to function  
effectively**

**The goal is efficiency**



## 2 categories

preserved error

forfeited error

Reverse \_\_\_\_\_

\_\_\_\_\_ No reversal



# STANDARDS OF REVIEW

## Unpreserved Error

- Fed. R. App. P. 52(b): Plain error
  - Appellant has the burden
    1. Error
    2. Plain or obvious (at the time of appeal)
    3. Affects substantial rights (outcome of the proceeding would have been different), AND
    4. Impairs the integrity of the proceedings, the perception of justice, etc.





## 2 categories

preserved error

forfeited error

Reverse \_\_\_\_\_

\_\_\_\_\_ No reversal



# Overarching question

**1. Who is in the better place to make the necessary decision?**



# Who is in the better position

**To make conclusions of law?**

**To make findings of fact?**

**To make discretionary, housekeeping decisions?**

**Jury**

**District Court or  
Court of Appeals**



- Discretionary decisions
  - Admit or exclude evidence
  - Impose a sentence
  - Continue a trial, timing and management
  - Whether to hold a hearing
  - Authorize CJA funds, sanction counsel, remove counsel
  - Recusal



# Preserved Error

Degree of deference

A little  
de novo

A lot  
clear error  
abuse of discretion



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**If a jury trial has occurred. . .**

**Society has invested a great deal already.**

**If a district court judge has pondered and given his or her take on the law. . .**

**Society has also invested a fair amount.**



# STANDARDS OF REVIEW

## Preserved Error

- Fed. R. App. P. 52(a): Harmlessness
  - Not every error requires reversal
  - The government bears the burden
  - Non-constitutional error: high probability that “the error had [no] substantial and injurious effect or influence in determining the jury's verdict” *Kotteakos*, 328 U.S. 750, 776 (1946).
  - Constitutional error: harmless beyond a reasonable doubt, *Neder*, 527 U.S. 1, 7 (1999).





# STANDARDS OF REVIEW

## Writing

- One sentence:
  - Active voice:
    - This Court reviews . . .
  - Ruling under review:
    - . . . the district court's evidentiary rulings. . .
  - Standard:
    - . . . for abuse of discretion.
  - Citation: same circuit or Supreme Court



# STANDARDS OF REVIEW

## Writing

- Sometimes two sentences:
  - Because Smith did not object to the admission of Officer Davis's testimony, see (ER 10), this Court reviews for plain error. Cite. Accordingly, Smith must show (1) an error, (2) that is plain, (3) that affects his substantial rights, and (4) that impairs the integrity of the judicial process. Cite.



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# Standards of Review

**Finding: Ninth Circuit Website**

**Legal Guides**

**Standards of Review**



# STANDARDS OF REVIEW

## Writing

- Like stating the issues, standards of review frame the question the court will answer.
- *E.g.*, The district court refused to admit some of defendant's evidence because it was hearsay.
  - If Defendant claims that this abrogated his right to present a defense, this is a constitutional question reviewed de novo.
  - But if it is reframed as an evidentiary issue, it receives review for abuse of discretion.



# STANDARDS OF REVIEW

## Structure

- Fed. R. App. P. 28(a)(8)(B): “concise statement of the applicable standard of review”
  - Simple, short brief: between the summary and the argument
  - Complex, multi-issue brief: at the beginning of each argument section



# STANDARDS OF REVIEW Structure

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**That's (relatively) easy.**

**But applying the standard can be more challenging.**





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**Few actually use the standards**



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**De novo**



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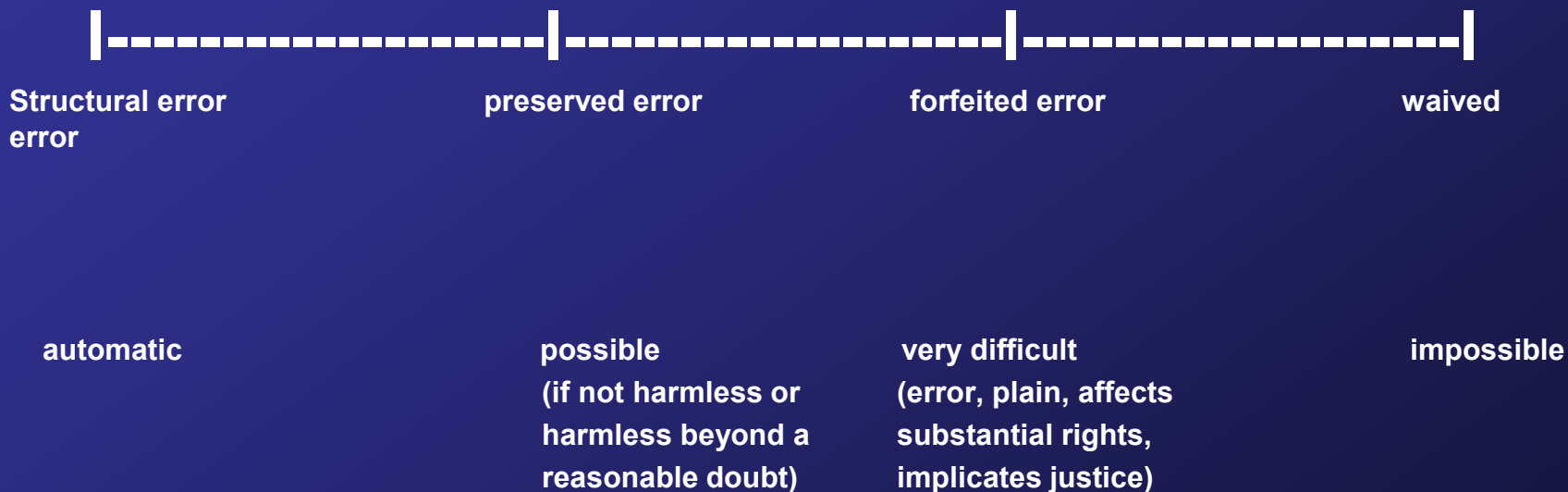
**Clear error**



# Abuse of discretion



# Level of difficulty in achieving reversal





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