

RECURRENT OBJECTION PRESERVATION ISSUES AT TRIAL

Following the guidelines below will help reduce the risk of forfeiting your objections, resulting in plain error review on appeal or even, in some cases, waiving your objections, which usually precludes any review at all. For background citations for these guidelines, see the endnotes.

OBJECTIONS IN GENERAL

Be sure any objections to evidence are **timely and contemporaneous**.¹

Be sure to **state the ground**.²

If you are **objecting to the exclusion of evidence**, make an **offer of proof** of the **substance of the evidence** unless the substance is apparent from the context of questioning.³

Do not fail to respond if the court offers you an opportunity to address an issue – silence may be construed as agreement and waiver of issue.⁴

MOTIONS IN LIMINE

Where **no definitive pretrial ruling** has been made, be sure to **renew the objection at trial**.⁵

If the **prosecution violates** the in limine ruling, be sure to **object at that time and move for a mistrial/curative instruction**.

If the court **tentatively denies or delays ruling**, **renew the objection** at trial.

If your **grounds for objection change legally or factually** at the time of admission, **be sure to state any new grounds/new facts at the time the evidence is proffered**.

STATUTORY CHALLENGES

Legal and constitutional claims **must be raised in the district court** (via motion to dismiss and Rule 29) to receive de novo review.⁶

SUPPRESSION

Object to the introduction of the evidence at trial if your suppression motion was **not definitively denied**.⁷

Do not say “no objection” when the evidence is introduced at trial – you can say “subject to my previous motion” or something similar.⁸

If **new evidence** comes out at trial in support of suppression, **renew the motion to**

suppress at trial.⁹

Raise every argument in support of the motion to suppress.¹⁰

JURY SELECTION AND VOIR DIRE

Always challenge a juror for cause during voir dire before juror is seated/peremptory challenges raised.¹¹

To preserve a challenge to the court's refusal to strike a juror for cause:

- 1) use a **peremptory challenge** to strike that juror;
- 2) use **all your peremptories**;
- 3) **identify other jurors you would have struck** if you did not have to use peremptories to strike jurors who should have been stricken for cause.

To preserve a challenge to the court's failure to conduct an adequate voir dire put the **proposed questions on the record.**

Object to the exclusion of the public from the courtroom during jury selection as a denial of the Sixth Amendment **right to a public trial.** This includes **objecting to conducting individual voir dire in chambers** unless you want the court to use that procedure.¹²

Make a ***Batson*** challenge to contest the government's exercise of a **peremptory juror challenge on the basis of race/ethnicity or gender.**

There are **three steps**:

- (1) **make a prima facie** showing the challenge was exercised on the basis of race/ethnicity/gender;
- (2) if the court finds a prima facie showing, the **prosecution must offer a race/ethnic/gender-neutral basis** for striking the juror in question; and
- (3) the trial court must decide whether the defendant has shown **purposeful discrimination.** *Batson v. Kentucky*, 476 U.S. 79 (1986).

A defendant need **not** be of the same race as the stricken juror to raise a ***Batson* challenge.**

Be **explicit** that you are making a ***Batson* challenge.**¹³

CONTINUING OBJECTIONS

Be sure to **make a request for a continuing objection and have the Court allow it.**¹⁴

HEARSAY ISSUES

- IN GENERAL

Review FRE Article VIII

Object at the time hearsay testimony is offered on grounds that **testimony is hearsay and does not fit within a hearsay exception.**

Specifically state a Crawford/Confrontation objection as a Crawford/confrontation objection. A *Crawford* (Confrontation) objection is **not preserved** by simply arguing that testimony is hearsay, or does not fit within a hearsay exception, or is in some other way inadmissible.¹⁵

- CO-CONSPIRATOR STATEMENT

Object to the admission of **co-conspirator statements** both **when hearsay statements are offered**, and **renew the objection at the close of all the evidence.**

Articulate the basis – failure to meet the criteria for admission required by *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977) and **FRE 801(d)(2)(e)**

Under *Petrozziello*, in order to admit the statement over objection, the trial court must find:

- (1) it is **more likely than not** that the **declarant and the defendant** were **members of the conspiracy** when the statement was made, and
- (2) the **statement in question was made in furtherance of the conspiracy.**

The trial court may first make this ruling **provisionally**, subject to a final ruling as to whether the co-conspirator exception is satisfied. If the **trial court does not make a final determination**, you must **object to the omission of an express trial-end determination.**

Consider requesting a grant of a **continuing objection** where multiple statements will be admitted over a period of time. Make sure you are specific about any objections particular to that statement, e.g., not in furtherance of the conspiracy.¹⁶

MOTION FOR MISTRIAL AND CONTINUANCE FOR FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

Request a continuance when **exculpatory evidence** is turned over **late**, in addition to any other remedy you are seeking (e.g., motion for a mistrial).¹⁷

PROSECUTORIAL MISCONDUCT IN WITNESS EXAMINATION

Object when a prosecutor asks a witness to **comment on the veracity of the testimony of another witness**, stating that ground.¹⁸

Object when a prosecutor elicits testimony to **bolster testimony** of another government witness, stating that ground.¹⁹

- USE OF SUMMARY/OVERVIEW WITNESS

Object on grounds testimony is based on **inadmissible hearsay, violates the confrontation clause, constitutes impermissible lay opinion testimony (when agent describes alleged roles in offense), and/or improperly endorses government's theory of case.**²⁰

- EXPERT TESTIMONY OR LAY OPINION TESTIMONY?

Consider objecting if an **agent's testimony** offered as **lay opinion testimony** may be argued to **be expert testimony offered without compliance with the requirements of FRE 702 or the required notice.**²¹

JUDGMENT OF ACQUITTAL

Be sure to move for a **judgment of acquittal** (arguing that evidence is insufficient as a matter of law). Fed.R.Crim.P.29.²²

Move both at the close of the government's case and again at the close of the case if you later introduce your own evidence.

(Under Rule 29(c), however, you do not have to move for judgment of acquittal before the case is submitted to the jury in order to make a motion after the jury is discharged.)²³

Renew any grounds given at the close of the case if you also make a motion for judgment of acquittal after trial.

It is **safest** to make just a **general Rule 29 sufficiency motion**, or maybe, in the alternative, a general Rule 29 motion that also **specifies grounds, but says that these are merely examples of why the evidence is insufficient.** [Where a Rule 29 motion only articulates specific grounds, all non-specified grounds are waived.]²⁴

JURY INSTRUCTIONS

Object, using specific grounds, after the court has charged the jury and before the jury begins deliberations.

[It is not enough to object at charge conference and/or submission of instructions; nor is it enough to object simply by referring to the number of the instruction submitted] The court must give an opportunity to object out of the jury's hearing and, if requested, out of the jury's presence.²⁵

Propose a cautionary instruction if you think one should be given.²⁶

If you move for a **mistrial or to strike** (e.g., due to inadmissible co-conspirator statements), object after a **cautionary instruction** is given that the instruction **is insufficient to cure prejudice**.²⁷

CLOSING ARGUMENT

Look for: appealing to **emotions** of jury

burden shifting

comment on D's failure to testify, even if only implied

misstating evidence or improperly using evidence admitted for limited purpose

vouching for government witnesses

Object during argument rather than at the close of argument, **unless** there has been an on-record **agreement** that **objections will be made after argument**.²⁸

ENDNOTES

¹ See Federal Rule of Evidence 103(a)(1); *United States v. Carpenter*, 736 F.3d 619, 630 (1st Cir. 2013) (discussing need for timely and contemporaneous objection in context of objections to closing argument); *United States v. Goodhue*, 486 F.3d 52 (1st Cir. 2007) (discussing need for timely and contemporaneous objection in context of objections at sentencing). The lack of a timely objection cannot be cured by a trial court's ruling to the contrary. *United States v. Acevedo-Maldonado*, 696 F.3d 150 (1st Cir. 2012).

² *United States v. Gordon*, 2017 WL 5150276 (1st Cir. November 7, 2017) (objection to 404 character evidence without articulating ground not preserved because basis of objection could have been relevance or the form of question); *United States v. Monell*, 801 F.3d 34, 46 (1st Cir. 2015) (objection to the witness's opinion of the ultimate issue in trial court insufficient to preserve the objection to testimony on another ground raised on appeal); *Monell* 801 F.3d at 44 &n.10 (objecting without articulating specific ground for objection to testimony raises questions as to sufficiency of preservation but grounds may have been apparent from record, including motion in limine); *United States v. Hurley*, 842 F.3d 170, 173 (1st Cir. 2016) (reviewing only for plain error because a general objection that marijuana rather than THC was the appropriate comparator in making drug quantity determination for synthetic cannabinoids is not sufficient notice of the specific issue raised on appeal – that cannabinoids contained large quantities of plant matter like marijuana and unlike THC).

³ *Rosa-Rivera v. Dorado Health, Inc.*, 787 F.3d 614 (1st Cir. 2015) (court erred in excluding leading questions but no relief because plaintiff failed to proffer some specific information counsel might have elicited if permitted use of leading questions).

⁴ *United States v. Corbett*, 870 F.3d 21, 30-31 (1st Cir. 2017) (where court invites response to proposed action, if counsel says nothing silence may be construed as agreement with court's proposal and as waiver of any objection).

⁵ See Federal Rule of Evidence 103(a) & (b); *United States v. Raymond*, 697 F.3d 32 (1st Cir. 2012) (failure to renew objection at trial to 404(b) evidence conditionally admitted after hearing on motion in limine forfeits claim of error); *United States v. Carpenter*, 494 F.3d 13, 18-19 (1st Cir. 2007); *United States v. Iwuala*, 789 F.3d 1, 5 (1st Cir. 2015) (concluding motion in limine objection to all evidence did not preserve the objection for each piece of evidence where the denial of the motion was tentative); *United States v. Almeida*, 748 F.3d 41, 50 (1st Cir. 2014) (pre-trial objection to in limine motion rulings not preserved where defendant failed to renew objection at trial and failed to argue that the in limine rulings were final rather than tentative).

⁶ *United States v. Neuci-Pena*, 711 F.3d 191 (1st Cir. 2013) (where motion to dismiss for lack of jurisdiction was based on one ground in the district court and a different ground on appeal, claim was not properly preserved and would be reviewed for plain error); *United States v. Paz-Alvarez*, 799 F.3d 12, 27 n.14 (1st Cir. 2015) (challenge to constitutionality of statute as applied reviewed for plain error where constitutional argument raised for first time on appeal).

⁷ *Lawn v. United States*, 355 U.S. 339, 353-54 (1958).

⁸ *Id.*

⁹ *United States v. Howard*, 687 F.3d 13 (1st Cir. 2012).

¹⁰ Failure to raise an argument in support of a motion to suppress results in waiver, not forfeiture, of the issue. *United States v. Crooker*, 688 F.3d 1, 9-10 (1st Cir. 2012).

¹¹ *United States v. McNeill*, 728 F.2d 5, 10 (1st Cir. 1984).

¹² *United States v. Negron-Sostre*, 790 F.3d 295 (1st Cir. 2015).

¹³ See *Sanchez v. Roden*, 808 F.3d 85 (1st Cir. 2015); *United States v. Mensah*, 737 F.3d 789 (1st Cir. 2013); *United States v. Charlton*, 600 F.3d 43 (1st Cir. 2010) for First Circuit discussions of criteria of and procedures for *Batson* claims.

United States v. Casey, 825 F.3d 1 (1st Cir. 2016) (defendant need *not* be of the same race as the stricken juror to raise a *Batson* challenge).

Scott v. Gelb, 810 F.3d 94, 102 (1st Cir. 2016) (assertion that “this is the fourth person of color that the Commonwealth has challenged” insufficient to support *Batson* claim).

¹⁴ *United States v. Rivera-Santiago*, 872 F.2d 1073, 1083 (1st Cir. 1989) (absent grant of continuing objection, defendant could preserve issue only by continuing to object when testimony warranted it as the trial progressed).

¹⁵ *United States v. Ziskind*, 491 F.3d 10, 13-14 (1st Cir. 2007); *United States v. Angulo-Hernandez*, 565 F.3d 2 (1st Cir. 2009); *United States v. Ciresi*, 697 F.3d 19 (1st Cir. 2012).

¹⁶ *United States v. Geronimo*, 330 F.3d 67, 75 (1st Cir. 2003); *United States v. Famania-Roche*, 537 F.3d 71, 75-76 (1st Cir. 2008); *United States v. Mangual-Garcia*, 505 F.3d 1, 9 (1st Cir. 2007); *United States v. Aviles-Colon*, 536 F.3d 1, 13-14 (1st Cir. 2008); *United States v. Ciresi*, 697 F.3d 19 (1st Cir. 2012). *United States v. Paz-Alvarez*, 799 F.3d 12, 29 (1st Cir. 2015) (reiterating that if a court provisionally admits a statement under objection, defendant must object again at close of evidence).

¹⁷ *United States v. Smith*, 292 F.3d 90, 102-103 (1st Cir. 2002); *United States v. Mangual-Garcia*, 505 F.3d 1, 5 (1st Cir. 2007), quoting *United States v. Sepulveda*, 15 F.3d 1161, 1178 (1st Cir. 1993) (“As a general rule, a defendant who does not request a continuance will not be heard to complain on appeal that he suffered prejudice as a result of late-arriving discovery.”); *United States v. Bresil*, 767 F.3d 124, 126-27 (1st Cir. 2014) (holding defendant preserved claim for continuance; late expert disclosure; defendant moved for continuance citing need to investigate and obtain own expert but did not explicitly cite Rule 16. Court rejected government argument that defendant waived claim; held defendant preserved claim and reviewed for abuse of discretion, *but* defendant did not show prejudice).

¹⁸ *United States v. Pereira*, 848 F.3d 17, 21-30 (1st Cir. 2017).

¹⁹ *United States v. Valdivia*, 680 F.3d 33, 48-49 (1st Cir. 2012).

²⁰ *United States v. Meises*, 645 F.3d 5, 13-18 (1st Cir. 2011); *United States v. Flores-De-Jesus*, 569 F.3d 8 (1st Cir. 2009).

²¹ *United States v. Valdivia*, 680 F.3d 33, 56-61 (1st Cir. 2012) (concurrency).

²² *United States v. Venezuela*, 849 F.3d 477 (1st Cir. 2017).

²³ *United States v. De La Cruz*, 835 F.3d 1, 9 (1st Cir. 2016) (filing a timely post-verdict motion for

judgment of acquittal under Rule 29(c) fully preserves rights for de novo review).

²⁴ *United States v. Dawlett*, 787 F.2d 771, 775-76 (1st Cir. 1986); *United States v. Clotida*, 892 F.2d 1098, 1102 (1st Cir. 1989); *United States v. Pena-Lora*, 225 F.3d 17, 26, n.5 (1st Cir. 2000) citing *United States v. Dandy*, 998 F.2d 1344, 1356-57 (6th Cir. 1993) ("Although specificity of grounds is not required in a Rule 29 motion, where a Rule 29 motion is made on specific grounds, all grounds not specified are waived); *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014) (sufficiency argument concerning need for signature on HUD documents not preserved where counsel moved for judgment of acquittal on all counts but said in reality only serious issue was venue, and in post-trial motion only argued venue). A general Rule 29 motion that specifies grounds, but indicates that the grounds are merely examples, *may* not waive non-specified grounds. Where a trial judge has considered a non-specified ground, the ground is not waived. *United States v. Marston*, 694 F.3d 131 (1st Cir. 2012); *United States v. Foley*, 783 F.3d 7, 12 (1st Cir. 2015) (stating "general sufficiency objection accompanied by specific objections preserves all possible sufficiency objections.").

²⁵ Fed. R. Crim. Pr. 30(d); *United States v. Roberson*, 459 F.3d 39, 45 (1st Cir. 2006); *Rosa-Rivera v. Dorado Health, Inc.*, 787 F.3d 614, 618 (1st Cir. 2015) (holding a timely objection is made when court gives opportunity to object to proposed jury instructions before closing; failure to do so means objection forfeited); *United States v. McPhail*, 831 F.3d 1, 9 (1st Cir. 2016) (finding failure to renew specific objection after instructions were given, particularly in light of court's asking counsel after instructions given if there were any objections, resulted in failure to preserve objection for de novo review). Failure to comply with the court schedule and request jury instructions in writing at the charge conference held before the government rested has been held to constitute waiver, even where the defendant orally requested the instruction when the government's case was complete, and before instructions were given. See *United States v. Upton*, 559 F.3d 3 (1st Cir. 2009); See also *United States v. Place*, 693 F.3d 219 (1st Cir. 2012) (discussing but declining to decide whether late submission of request for instruction, which was discussed at charge conference and followed after charge with objection for failure to provide, was forfeited); *United States v. Lachmann*, 469 F.2d 1043, 1044 (1st Cir. 1972)(referring by number to a request filed prior to the charge is not sufficient to preserve an objection to the court's failure to give the requested instruction).

²⁶ Objection to failure to give cautionary instruction is procedurally defaulted if defendant offers no proposed cautionary instruction. See *United States v. Hernandez*, 146 F.3d 30, 34 n.6 (1st Cir. 1998).

²⁷ *United States v. Machor*, 879 F.2d 945, 950 (1st Cir. 1989) (where final determination is against admitting alleged co-conspirator declaration after it has been provisionally admitted, court should give cautionary instruction or, *upon appropriate motion*, declare mistrial if instruction will not cure prejudice).

²⁸ *United States v. Wihbey*, 75 F.3d 761, 771 (1st Cir. 1996), comparing *United States v. Sepulveda*, 15 F.3d 1161, 1186-87 (1st Cir. 1993) (where defendant did not object or raise improper prosecutorial argument until motion for mistrial after conclusion of summations, error forfeited and reviewed for plain error only), with *United States v. Mandelbaum*, 803 F.2d 42, 43 (1st Cir. 1986)(objection made after closing arguments was timely enough to preserve error for appeal, although it "should have been made earlier") and *United States v. Levy-Cordero*, 67 F.3d 1002, 1008 n.6 (1st Cir. 1995) (objection after arguments sufficient to preserve issue for appeal where parties had agreed not to object during arguments); *United States v. Carpenter*, 736 F.3d 619, 630 (1st Cir. 2013) (finding defendant preserved three arguments by objecting to them at closing and highlighting them in brief on new trial motion, but did not preserve fourth argument because he failed to object contemporaneously or to include it in his objections immediately after closing).
