

Sentencing Objections: How to Properly Pursue and Preserve Issues Affecting Your Client's Sentence

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The Problems

- Losing issues that increase our client's sentence in the district court
 - E.g., guideline objections, objections to ACCA status, and departure/variance issues
- But also...
 - Losing in such a way that handcuffs appellate judges from casting a more critical eye as to what happened at sentencing
- What can we do better?

The Fix

- Be more thorough.
 - Be more specific.
 - Be creative.
 - Be cognizant of the entire process.
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- Give client best chance of winning now **and** in the future.

Overview

- Review the law concerning:
 - Plain Error
 - Objections to the Presentence Report (PSR)
 - Objections at Sentencing, including what must be done to preserve error.
- Synthesize this material into a process we can all follow in either pursuing or again, at the very least, preserving issues affecting our client's sentence.
- Separate Topic:
 - Update on the Sentencing Commission

Federal Rules of Criminal Procedure

- Rule 1(a)(1)
 - “These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, **and** the Supreme Court of the United States.”

Federal Rules of Criminal Procedure, cont'd.

- **Rule 51: Preserving Claimed Error**

- (b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action **and** the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Federal Rules of Criminal Procedure, cont'd.

- **Rule 52: Harmless and Plain Error**

- (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
- (b) *Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.*

Plain Error

- What is it?
 - United States v. Olano, 507 U.S. 725 (1993).
 - A right of any sort, including a constitutional one, may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before the court having jurisdiction of it.
 - But, even so, courts of appeals have limited power to correct plain errors, i.e. errors that:
 - (1) are plain AND
 - Plain = “clear or obvious”
 - (2) affect substantial rights
 - i.e., prejudicial → affected the outcome of the district court proceeding
 - The power to correct is not automatic though; court has discretion even when the above requirements are met.
 - Court can only correct obvious errors affecting substantial rights “if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.”

Plain Error

- Evolved into 4-prong test:
 - Puckett v. United States, 556 U.S. 129, 135 (2009).
 - **First**, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant.
 - **Second**, the legal error must be clear or obvious, rather than subject to reasonable dispute.
 - **Third**, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings.
 - **Fourth** and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Plain Error

- The bottom line → We want to AVOID it.
- Defendants clearly have a lesser chance of prevailing at the courts of appeals when the court applies a plain error standard to the alleged error.
- “Meeting all four prongs [of the plain error doctrine’s requirements] is **difficult**, ‘as it should be.’”
 - Puckett, 556 U.S. at 135 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

Plain Error

- So, how do we avoid it?
 - Object→ Rule 51(b)
 - Inform the court, when the unfavorable decision is made, of
 - the action you wished the court had taken OR
 - your objection to the action taken and grounds for that objection.
- What does this look like with respect to federal sentencing?
 - Consider:
 - The Presentence Report
 - The Sentencing Hearing

Presentence Report

- Rule 32, Federal Rules of Criminal Procedure
 - (f) Objecting to the Report
 - (1): “the parties must state **in writing** any objections, including objections to **material information**, **sentencing guideline ranges**, and **policy statements** *contained in or omitted from the report*”
 - (g) Submitting the Report
 - PO must submit the presentence report “and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer’s comments on them.”

Presentence Report

- Other Authorities
 - United States Sentencing Guidelines
 - § 6A1.2
 - Mirrors FRCP 32(f) and (g)
 - Local Criminal Rule 32.2
 - (c): parties “shall file, in CM/ECF . . . , objection(s) to the presentence report including **material information, sentencing classifications, guideline ranges,** and **policy statements** contained in or omitted from the report.”

Presentence Report

- Local Rule 32.2, cont'd.
 - (d): “Unresolved contested issues, including a summary of the grounds for the objections, and the probation officer’s comments on them, shall be contained in an addendum to the presentence investigation report.”
 - (d): “The defendant and the government may each file **a memorandum with the court explaining** their respective positions on the **unresolved objections.**”
 - (g): Court Acceptance of PSR
 - The revised PSR “may be accepted by the court as accurate except as to matters set forth in the addendum which shall be resolved as provided in” USSG § 6A1.3.

Sentencing Hearing

- FRCP 32
 - (i) Sentencing
 - (1)(C)–(D)
 - (C) Court must allow the parties’ attorneys to comment on the probation officer’s determinations and other matters relating to an appropriate sentence; and
 - (D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.
 - (2) Introducing Evidence
 - “The court may permit the parties to introduce evidence on the objections.”

Sentencing Hearing

- USSG § 6A1.3
 - (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information **without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.**
 - (b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(i), Fed. R. Crim. P.

Sentencing Hearing

- Local Rule 32.2
 - (i): The court “shall disclose to the defendant, defense counsel, and the attorney for the Government, the court’s tentative findings of fact and interpretation of applicable guidelines and”
 - “shall afford the parties an opportunity to object to said tentative findings of fact and interpretation of the guidelines.”

Case Law

- Lots of general guidance, not much specific.
- Fourth Circuit:
 - “[C]ounsel may be constitutionally required to object when there is relevant authority strongly suggesting that a sentencing enhancement is not proper.”
 - United States v. Carthorne, 878 F.3d 458, 466 (4th Cir. 2017) (concluding defense counsel “had a duty to object to” the defendant’s “designation as a career offender”).

United States v. Lynn

- 592 F.3d 572 (4th Cir. 2010).
 - Unpreserved errors are reviewed only for plain error.
 - To preserve a claim of procedural sentencing error, follow Rule 51(b).
 - “We see good reason to adopt the approach to preservation set forth in those Rules, and no reason to reject it.” 592 F.3d at 578.
 - Party may preserve its sentencing objections through written papers or in-court arguments prior to sentencing. *Id.* at 583–84.

Fourth Circuit, cont'd.

- Must present sentencing objections to district court by either “challenging the PSRs or by objecting in the sentencing proceedings.”
 - United States v. Oceanic Illsabe Ltd., 889 F.3d 178, 199 (4th Cir. 2018).
- “Both the defendant and the Government are required to make any objections they may have to the information in the PSR at or before sentencing. . . . This requirement reflects the general principle that, [i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue.”
 - United States v. Hodge, 902 F.3d 420, 428–29 (4th Cir. 2018).

Fourth Circuit, cont'd.

- “[t]o preserve an argument on appeal, the defendant must object on the same basis below as he contends is error on appeal.”
 - United States v. Zayyad, 741 F.3d 452, 459 (4th Cir.2014).
- United States v. Bennett, 698 F.3d 194, 199 (4th Cir. 2012).
 - The entire purpose of an objection is to alert the district court to the actual basis of asserted error. . . . United States v. Bostic, 371 F.3d 865, 871 (6th Cir.2004) (“A party ‘must object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for [the] objection.’ ”) . . . The need for some specificity is not a meaningless ritual; rather, a clear objection can enable a trial court to correct possible error in short order and without the need for an appeal.

Fourth Circuit, cont'd.

- United States v. Camara, 908 F.3d 41, 49 (4th Cir. 2018).
 - Factual findings → reviewed on appeal for “clear error”
 - Legal conclusions → reviewed “de novo”
- Structural Error?
 - Errors which require “automatic reversal because they undermine the fairness of a criminal proceeding as a whole.”
 - United States v. Davila, 569 U.S. 597, 611 (2013).
 - “We have cautioned that judges should be wary of prescribing new errors requiring automatic reversal and that before a court adds a new error to the list of structural errors (and thereby requires the reversal of every criminal conviction in which the error occurs), the court must be certain that the error's presence would render every such trial unfair.”
 - United States v. White, 405 F.3d 208, 221 (4th Cir. 2005) (citations and quotation marks omitted).

Eleventh Circuit

- Judge Pryor:
 - “We remind the defense bar of the importance of specific factual and legal argumentation at every stage of sentencing proceedings. A defendant should **‘specifically and clearly object’ to any facts in a presentence report that she does not intend to admit** and that she wishes to require the government to prove by a preponderance of the evidence. To preserve an issue for appeal, a defendant must first present it to the district court, **‘rais[ing] that point in such clear and simple language that the trial court may not misunderstand it.** When the statement is not clear enough to inform the district court of the legal basis for the objection, ... the objection is not properly preserved.’ An **issue also is not preserved when its ‘factual predicates’ are in the record ‘but were presented to the district court under a different legal theory.’**”
 - United States v. Corbett, 921 F.3d 1032, 1043 (11th Cir. 2019) (citations omitted).

Putting it all Together

- **PSR Stage:**

- Step 1: Closely read the draft PSR to determine its accuracy, ***both*** as to **factual** and **legal** matters.
- Step 2: Prepare and file a written response in form of letter to PO that both **lists** AND **explains** the basis for each item you wish to correct or add.
 - Categorize all such responses as pertaining to either “material information, sentencing classifications, guideline ranges, and policy statements.”

Putting it all Together

- **PSR Stage, cont'd.:**

- Step 3: Await PO's response and be prepared to discuss what you seek added/amended/removed with the PO and the AUSA.
- Step 4: Review the final PSR filed by the PO.
 - Determine what items are still noted as unresolved in the addendum and, if there are any, discuss with your client whether you need more time to address those items.
 - If so, file a motion to continue the sentencing.

Putting it all Together

- **Hearing Stage:**

- *Step 1: Think critically about the nature of your objections.*

- Factual vs. legal → Must know the difference.

- If factual, what do I need to rebut/disprove what's alleged in the PSR or what the government will attempt to prove?

- If legal, research and be prepared to argue.

- Factual objections="material information" (See Local Rule 32.2(c))

Putting it all Together

- Hearing Stage:

- Factual Objections

- Most often come up in the context of guideline calculation.
 - PO writes facts in the offense conduct section of PSR we allege aren't true.
 - For a particular enhancement to apply, alleged fact(s) must be true.
 - Government → put on evidence at sentencing to prove it is.
 - If succeed, enhancement will likely apply.
 - Burden of proof=***preponderance of the evidence***
 - Rules of Evidence=***inapplicable***

Putting it all Together

- **Hearing Stage:**

- Legal Objections

- Don't necessarily disagree with what's alleged in the PSR.
 - But, as a matter of law, disagree with a certain conclusion drawn by the PO.
 - E.g.,
 - Whether client's prior robbery conviction qualifies as a "crime of violence" under USSG § 4B1.2(a)
 - Whether the undisputed facts of the case call for an aggravating or mitigating role adjustment under §§ 3B1.1–1.2
 - Whether certain conduct amounts to "physical restraint" under § 2B3.1(b)(4)(B)
 - *See United States v. Herman*, 2019 WL 3226874, at *4 (7th Cir. July 18, 2019).

Putting it all Together

- **Hearing Stage:**

- *Step 2: Advocate the Objections.*

- For Factual Objections:

- Introduce your own evidence.
 - Be creative → proactive investigation to:
 - find own witnesses to contradict govt witness OR
 - impeachment material to cross-examine the govt witness.
 - Use the subpoena power.
 - See Fed. R. Crim P. 17; United States v. Winner, 641 F.2d 825, 833 (10th Cir. 1981) (noting that subpoenas can be used for sentencing hearings).

Putting it all Together

- Bottom Line for Factual Objections:

- Unless have way to “deal with” the government’s evidence, low BOP and evidentiary standard will likely always mean the govt can overcome factual objection.
 - But, if govt tries to avoid presenting any evidence to support the enhancement, argue the BOP.
 - “The government bears the burden of proving the facts supporting the enhancement by a preponderance of the evidence.”
 - United States v. Andrews, 808 F.3d 964, 968 (4th Cir. 2015).

- For Legal Objections:

- Sentencing memos → brief the judge on the law, especially if it’s a novel issue.
- If need more time to prepare one, ask.

Putting it all Together

- *Step 3: Preserve the Record.*
 - For anything you haven't already addressed in a sentencing memo or in the PSR, insist that the judge allow you to be heard.
 - If you're not interested in further arguing a point you've already briefed or an argument you know the district court is required to reject under existing precedent, use language like "Your Honor, I have already noted my objections to _____ and do not need to be heard further."
 - Do **NOT** use words like waive or withdraw, etc.

Putting it all Together

- *Step 3: Preserve the Record.*
 - If your argument is good/not a stretch, be persistent with it and make what the district court did wrongly look way out of bounds.
 - Want 4th Circuit thinking → “had every opportunity to rule correctly but still didn’t.”
 - Be sure you’re arguing for a specific sentence or range of sentence.
 - If don’t, will be hard to challenge the procedural reasonableness of the sentence on appeal.
 - Save the actual exhibits you used/introduced for appellate counsel.

Putting it all Together

- *Step Four: Make your 3553(a) Argument.*
 - How to do this effectively = topic for another day and a better lawyer
 - But, a few points...
 - Don't want to reargue objections but don't just abandon them.
 - If close call, use that to argue for a variance or low end of the GL range.
 - If appropriate, try to weave objections into your 3553(a) argument.
 - Again, be creative but, most importantly, do NOT
 - use language in your argument that might be construed as waiver or withdrawal of what you previously argued in the objections phase.

Putting it all Together

- *Step Four: 3553(a), cont'd.*
 - If **succeed** and get a variance, make sure the judge *properly explains the sentence*.
 - Obviously can be difficult but consider...
 - Asking the judge to adopt, as his/her explanation, the reasons outlined in the PSR, your sentencing memo, or another filing.
 - Do NOT want the government to succeed in getting the downward variant sentence reversed on appeal for lack of explanation, etc.
 - See United States v. Carter, 564 F.3d 325, 328 (4th Cir. 2009) (noting that the judge must “set forth enough [reasoning] to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority”) (quoting Rita v. United States, 551 U.S. 338 (2007)).

Putting it all Together

- Final Reminders
 - Try to win!
 - Don't rely on preservation alone; higher up you go, harder it is to win.
 - “[S]entencing in the district court is the main event.”
 - United States v. Lewis, 823 F.3d 1075, 1083 (7th Cir. 2016).
 - Talk to appellate folks.

Miscellaneous

- Conditional Pleas

- Fed. Rule. Crim. P. 11(a)(2)

- “With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.”

- United States v. Bundy, 392 F.3d 641, 645–48 (4th Cir. 2004).

- “[A] valid conditional guilty plea preserves for appellate review only case-dispositive pretrial issues.”

- Ideal way to preserve unfavorable ruling on dispositive motion to suppress (when makes sense to otherwise plead guilty).

- Caveat → rare in our district.

Miscellaneous

- Plea Agreement Appellate Waivers
 - Standard language:
 - Requires D “[t]o waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, **including any issues that relate to the establishment of the advisory Guideline range**, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant’s guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.”

Miscellaneous

- Plea Agreement Appellate Waivers:
 - Takeaway:
 - Regardless of how well you pursue and/or preserve a GL objection, if your client has signed a plea agreement with the standard appellate waiver and then loses the objection at sentencing, he will likely not succeed in appealing adverse ruling, as the government will most likely move to dismiss his appeal.
 - If have a plea agreement with standard appellate waiver, can usually only appeal in 3 situations:
 - Sentenced above GL range established at sentencing
 - Ineffective assistance of counsel
 - Prosecutorial misconduct not known at time of guilty plea
 - *Note* → this does **not** mean you shouldn't file a notice of appeal for client if he wants you to! See Garza v. Idaho, 139 S. Ct. 738 (2019).

Miscellaneous

- 21 U.S.C § 851
 - (c) Denial; written response; hearing
 - (1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he **shall file a written response** to the information. . . . The court **shall hold a hearing to determine any issues raised by the response** which would except the person from increased punishment. . . . The hearing shall be before the court without a jury and **either party may introduce evidence**. Except as otherwise provided in paragraph (2) of this subsection, the **United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact**. At the request of either party, the court shall enter findings of fact and conclusions of law.
 - (2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. **Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.**
 - (d) Imposition of sentence
 - (1) **If the person files no response to the information**, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the **court shall proceed to impose sentence upon him** as provided by this part.

Miscellaneous

- Holguin-Hernandez v. United States, No. 18-7739.
 - Argument scheduled for December 10, 2019.
 - Issue= whether a formal objection after pronouncement of sentence is necessary to invoke appellate reasonableness review of the length of a defendant's sentence.
 - Circuit Split
 - Fifth says "yes" and requires a contemporaneous reasonableness objection.
 - Has done so for more than 11 years.
 - Others say "no" and that if D simply argued for a sentence shorter than what he ultimately received, he need not object again after the court imposes the sentence.
 - Includes the Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits.
 - For now, stay tuned, but probably good practice to lodge an objection to the substantive reasonableness of the sentence after the judge announces it, assuming it's *higher* than what you'd argued for.

Conclusion

- Example of the importance of sentencing objections...
 - United States v. Norman, 935 F.3d 232 (4th Cir. 2019).
 - D convicted of 922(g), 841(a)(1), and 924(c). Sentenced to 156 months total.
 - 841(a)(1) and 922(g) offenses grouped under § 2K2.1. BOL was enhanced to 20 based on a prior conspiracy conviction under 21 U.S.C. § 846.
 - In the PSR and at sentencing, D *never argued* the 846 predicate should ***not*** be deemed a “controlled substance offense” under § 4B1.2(b).
 - If not, GL’s on 841 and 922 counts would have been 46–57 months, rather than 84–105 months, a **difference of 38–48 months**.
 - On appeal, though agreeing with D that 21 U.S.C. § 846 is not a controlled substance offense, court **refused** to deem the district court’s error “plain.”
 - “[W]e conclude that the district court’s error here was not plain and so provides no basis for reversal.”

Sentencing Commission

- Visiting AFD from October 2018 through August 2019.
- Commission can have up to 7 voting members.
- Had 4 members for 2018.
 - Judge William Pryor (Acting Chair) (Eleventh Circuit)
 - Judge Charles Breyer (N.D. Cal.)
 - Judge Danny Reeves (E.D. Ky.)
 - Professor Rachel Barkow (NYU Law)
- Lost two members at end of 2018 by virtue of terms expiring for Barkow and Pryor.

Sentencing Commission

- Before losing quorum, had voted to publish 4 categories of proposed amendments to the Guidelines:
 - (1) § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range)
 - (2) Career Offender
 - (3) Miscellaneous
 - (4) Technical
- No quorum = No action on these amendments.
- We should be thankful...

Sentencing Commission

- Career Offender Amendments

- Synopsis:

- “This proposed amendment is a result of the Commission’s consideration of possible amendments to §4B1.2 (Definitions of Terms Used in Section 4B1.1) to (A) ***allow courts to consider the actual conduct of the defendant, rather than only the elements of the offense (i.e., ‘categorical approach’), in determining whether an offense is a crime of violence or a controlled substance offense***; and (B) address various application issues, including the meaning of ‘robbery’ and ‘extortion,’ and the treatment of inchoate offenses and offenses involving an offer to sell a controlled substance.”

- See U.S. Sentencing Comm’n, “Notice of Final Priorities,” 83 FR 43956 (Aug. 28, 2018).

- “The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not mutually exclusive.”

Sentencing Commission

- Career Offender Amendments
 - “Part A of the proposed amendment would amend §4B1.2 to **establish that the categorical approach and modified categorical approach do not apply in determining whether a conviction is a ‘crime of violence’ or a ‘controlled substance offense.’** Specifically, it would provide that, in making that determination, a court shall *consider any element or alternative means for meeting an element of the offense committed by the defendant, as well as the conduct that formed the basis of the offense of conviction.* In addition, Part A would **allow courts to look at a wider range of sources from the judicial record, beyond the statute of conviction, in determining the conduct that formed the basis of the offense of conviction.** Part A would also make similar revisions to §2L1.2 (Unlawfully Entering or Remaining in the United States), as well as conforming changes to the guidelines that use the terms ‘crime of violence’ and ‘controlled substance offense’ and define these terms by making specific reference to §4B1.2.”

Sentencing Commission

- Career Offender Amendments
 - Defense Bar strongly opposes these amendments, for obvious reasons.
 - See Public Comment from Federal Defender Sentencing Guidelines Committee, Feb. 19, 2019, available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20190219/FPD.pdf>.
 - “Instead of reserving the career offender guideline for the most serious repeat offenders, the Commission’s proposal would expand this already over-inclusive penalty.”
 - DOJ supports the changes but wants the Commission to go even further.
 - See Public Comment from United States Department of Justice, Feb. 19, 2019, available at <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20190219/DOJ.pdf>.

Sentencing Commission

- For now though, we still have the categorical approach.
- What's next? Who knows...
 - No new Commissioners to date.
 - Political process; can't agree on nominees.
 - Election year coming up won't help.
- Something to consider...
 - Judge Pryor still wants to be the Chair
 - If that's the case, these career offender/categorical approach amendments are likely to resurface.
 - He's very much in favor of a conduct-based approach and wants to get rid of the categorical approach.
 - See *Ovalles v. United States*, 905 F.3d 1231, 1253–62 (11th Cir. 2018) (Pryor, J., concurring), abrogated by *United States v. Davis*, 139 S. Ct. 2319 (2019).

Questions?