

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
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6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL
7 REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS
8 OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS
9 OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A
10 RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL
11 OR RES JUDICATA.
12

13 At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the
14 Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the
15 7th day of February, two thousand and six.
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17 PRESENT:

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19 HON. GUIDO CALABRESI,
20 HON. CHESTER J. STRAUB,
21 HON. RICHARD C. WESLEY,
22 *Circuit Judges.*
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27 UNITED STATES OF AMERICA,
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29 *Appellee,*
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31 v.

No. 05-1722-cr

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33 TUNDE ADEYI,
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35 *Defendant-Appellant.*
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39 For Appellee:

Katya Jestin, Assistant United States Attorney (David C.
James, *of counsel*), for Roslynn R. Mauskopf, United States
Attorney for the Eastern District of New York, Brooklyn,
N.Y. (on submission)
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1 For Defendant-Appellant: Vivian Shevitz, South Salem, N.Y. (on submission)

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3 Appeal from a final decision of the United States District Court for the Eastern District of
4 New York (Ross, *J.*).

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7 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
8 **DECREED** that the judgment of the district court is **AFFIRMED**.

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12 Defendant-Appellant Tunde Adeyi appeals his conviction, after a jury trial, for
13 importation and possession with intent to distribute heroin, *see* 21 U.S.C. §§ 952(a),
14 960(b)(1)(A), 841(a)(1), 841(b)(1)(A)(i). Adeyi was arrested at John F. Kennedy International
15 Airport after screening of his luggage revealed that he had transported more than 30 kilograms of
16 heroin from Nigeria. We presume the parties' familiarity with the facts, the procedural history,
17 and the scope of the issues presented on appeal, which we reference only as necessary to explain
18 our decision.

19 Adeyi's attorney raises three issues on appeal. She argues that (1) the district court should
20 not have permitted the government's handwriting expert to opine as to the authorship of certain
21 slips of paper found among the packages of heroin contained in Adeyi's bags; (2) the district
22 court erroneously allowed the government to elicit testimony from a customs inspector as to his
23 education and training even though his testimony was solely as a fact witness; and (3) Adeyi's
24 trial counsel was ineffective for failing to object to these putative evidentiary errors and for
25 failing to obtain Adeyi's hearing aid, which was in the government's possession during Adeyi's
26 trial.

1 Because Adeyi’s trial counsel did not raise either evidentiary objection before the trial
2 court, our review is for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Edwards*, 342
3 F.3d 168, 179 (2d Cir. 2003). Plain error review permits us to grant relief only where (1) there is
4 error, (2) the error is “plain,” (3) the error “affects substantial rights,” and (4) the error “seriously
5 affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v.*
6 *Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (quoting *United States v. Cotton*, 535 U.S. 625, 631-
7 32 (2002)) (alterations omitted).

8 The government’s handwriting expert testified to his belief that, based on the handwriting
9 in Adeyi’s address book, two of the handwritten slips of paper found in the heroin packages
10 appeared to be authored by Adeyi. Our circuit has not authoritatively decided whether a
11 handwriting expert may offer his opinion as to the authorship of a handwriting sample, based on
12 a comparison with a known sample. We have held, however, that “[f]or an error to be plain, it
13 must, at a minimum, be clear under current law. . . . A reviewing court typically will not find
14 such error where the operative legal question is unsettled.” *United States v. Weintraub*, 273 F.3d
15 139, 152 (2d Cir. 2001) (internal quotation marks omitted). Because expert opinion as to
16 handwriting authorship is not clearly inadmissible in this circuit, we cannot say the district court
17 committed plain error.¹

¹ Although we do not now decide on the admissibility of such evidence, we note that those circuits that have considered the question are unanimous that a properly admitted handwriting expert may, if the factors enumerated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), are satisfied, offer an opinion as to the authorship of a disputed document. *See, e.g., United States v. Prime*, 431 F.3d 1147, 1151-54 (9th Cir. 2005); *United States v. Crisp*, 324 F.3d 261, 271 (4th Cir. 2003); *United States v. Mooney*, 315 F.3d 54, 61-63 (1st Cir. 2002); *United States v. Jolivet*, 224 F.3d 902, 905-06 (8th Cir. 2000); *United States v. Paul*, 175 F.3d 906, 909-12 (11th Cir. 1999). *But see United States v. Oskowitz*, 294 F. Supp. 2d 379, 384 (E.D.N.Y. 2003) (citing to district court cases that have excluded handwriting expert testimony

1 Neither can we say the district court committed plain error in permitting the customs
2 inspector who first interviewed Adeyi to testify as to his background and training. A district court
3 has “wide latitude” in determining the relevancy of evidence. *United States v. Ramirez*, 894 F.2d
4 565, 569 (2d Cir. 1990). We cannot say that the customs inspector’s brief discussion of his
5 training “seriously affect[ed] the fairness, integrity, or public reputation” of Adeyi’s trial.

6 Finally, Adeyi’s appellate attorney raises ineffective assistance of counsel claims based
7 on Adeyi’s trial counsel’s failure to object to the evidence just discussed, and on counsel’s failure
8 to obtain Adeyi’s hearing aid during trial. Our court “has expressed a ‘baseline aversion to
9 resolving ineffectiveness claims on direct review.’” *United States v. Khedr*, 343 F.3d 96, 99 (2d
10 Cir. 2003) (quoting *United States v. Williams*, 205 F.3d 23, 35 (2d Cir. 2000)). As the Supreme
11 Court has stated, “[I]n most cases a motion brought under [28 U.S.C.] § 2255 is preferable to
12 direct appeal for deciding claims of ineffective assistance.” *Massaro v. United States*, 538 U.S.
13 500, 504 (2003). Accordingly, we decline to address the ineffective assistance claims raised by
14 Adeyi’s attorney, and dismiss them without prejudice to Adeyi’s raising them in a petition for a
15 writ of habeas corpus under 28 U.S.C. § 2255.² We similarly reserve judgment on and dismiss
16 without prejudice those ineffective assistance claims raised in Adeyi’s *pro se* supplemental
17 submission.

offering an opinion as to authorship).

² Although we do not decide Adeyi’s ineffective assistance claims, we note that the district court addressed his claim as it relates to his hearing aid in its opinion on Adeyi’s Rule 33 motion for a new trial. The court, after conducting a post-trial evidentiary hearing which addressed Adeyi’s comprehension during trial, found that “[t]he evidence, taken in its complete context, is insufficient to establish that Adeyi’s hearing difficulty rendered him effectively absent from his own trial.” *United States v. Adeyi*, No. 01-cr-351, at 16 (E.D.N.Y. filed June 24, 2004).

