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Extra Legal

Plain Error at Sentencing

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I. Introduction

Any defendant in our criminal justice system is faced with overwhelming odds. Part of this stems from the fact that the vast majority of criminal defendants will be convicted of the crimes of which they are accused.[1] They all, guilty or innocent, feel the weight of that fact. This is particularly true for those with appointed counsel by the Court. The public defender agencies do an admirable job of representing their clients, however; they are stretched to the limit and simply do not have the time or resources to cross every "t" and dot every "i."[2] One possible mistake is through failure to preserve error for appellate review. This article examines the way in which unpreserved claims of error at sentencing may

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[1] Caroline W. Harlow, *Defense Counsel in Criminal Cases*, DEP'T OF JUSTICE 1 (2000), http://www.bjs.gov/content/pub/pdf/dccc.pdf (explaining that in 1998, in federal criminal prosecutions, 91% of those represented by private counsel and 92.3% of those represented with public counsel were convicted).

[2] Erik Eckhol, *Public Defenders, Bolstered by a Work Analysis and Ruling, Push Back Against a Tide of Cases*, N.Y. TIMES, Feb. 18, 2018), http://www.nytimes.com/2014/02/19/us/public-defenders-turn-to-lawmakers-to-try-to-ease-caseloads.html?_r=0.

affect the substantive rights of criminal defendants within the First Circuit.

II. Plain Error

Rule 52(b) of the Federal Rules of Criminal Procedure prescribes that plain error is the standard of appellate review for objections not raised in the trial court.[3] The Rule reads: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[4] In practice, this means that if a party does not " . . . 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 . . . " then the claim of error is unpreserved and the appellant will face plain error review if raised on appeal.[5] Meeting the burden of plain error involves " … four showings: (1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings."[6]

III. History

While Rule 52(b) houses the contemporary basis for plain error review, the doctrine existed long before it was recognized by the Federal Rules. Originally it was used within the context of sua sponte review of

[3] FED R. CRIM. P. 52(b).
[4] *Id.*
[5] FED R. CRIM. P. 51(b).
[6] United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001) (citing Johnson v. United States, 520 U.S. 461, 466-67 (1997); United States v. Olano, 507 U.S. 725, 732 (1993); United States v. Brown, 235 F.3d 2, 4 (1st Cir. 2000)).

obvious error.[7] In 1936, Justice Stone opined in dictum:

> [I]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.[8]

And Justice Stone was not the first. In 1896, Chief Justice Fuller recognized that " . . . if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."[9] The Justices have long recognized:

> [A] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with [the rules of fundamental justice].[10]

Despite what may appear to be a concern for the rights of the convicted, plain error is anything but generous. Such a standard forms a deep prejudice to the party faced with it.[11]

IV. The Sentencing Guidelines

Once a defendant has pled, or a jury has found the defendant guilty, the district judge must determine an appropriate sentence.[12] Due to this wide latitude given to sentencing judges, various disparities began

[7] United States v. Atkinson, 297 U.S. 157, 160 (1936).
[8] *Id.*
[9] Wiborg v. United States, 163 U.S. 632, 658 (1896).
[10] Hormel v. Helvering, 312 U.S. 552, 557 (1941).
[11] United States v. Jiménez, 512 F.3d 1, 3 (1st Cir. 2007).
[12] FED. R. CRIM. P. 32.

to emerge.[13] Of most concern were sentencing disparities involving race.[14] Historically, African Americans were subject to much stricter sentences than whites.[15] In 1984, Congress sought to address this issue by passing the Sentencing Reform Act, creating the United States Sentencing Guidelines (USSG).[16] These guidelines are designed by the United States Sentencing Commission to promote homogeneity and squelch institutional racism.[17]

Despite the laudable aims of the guidelines, in 2005 the mandatory aspect of the guidelines was declared unconstitutional in violation of the Sixth Amendment.[18] However, while the guidelines are no longer binding, they are seen as advisory and provide valuable guidance to the sentencing court.[19] As the First Circuit has observed:

> [T]he guidelines cannot be called just 'another factor' in the statutory list . . . because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges . . . The Sentencing Commission is also an expert agency charged by Congress with the task of promulgating guidelines and keeping them up to date.[20]

The Court went on to note that the "Supreme Court has stressed the continuing role of the guidelines in promoting uniformity and fairness."[21]

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[13] United States v. Armstrong, 517 U.S. 456, 480 (1996).
[14] *Id.*
[15] *Id.*
[16] 18 U.S.C. § 3551; *Armstrong*, 517 U.S. at 480.
[17] *Armstrong*, 517 U.S. at 480 (explaining that blacks received disparate sentences of over 40% longer than whites).
[18] United States v. Booker, 543 U.S. 220, 226 (2005).
[19] United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006).
[20] *Id.*
[21] *Id.*

V. Appealing a Sentence

Appellate review of federal sentencing decisions involves a two-step analysis. The first step is for the appeals court to assess whether the sentence is procedurally reasonable.[22] The second is to determine whether the sentence is substantively reasonable.[23] The former question asks whether the trial judge has sufficiently satisfied all the required statute and court imposed procedures.[24] Examples of this are the requirement that a sentencing court adequately explain its sentencing decision or adequately consider the factors set forth in section 3553(a).[25] The latter question requires the appellate court to take a holistic view of the crime and punishment and to ask whether such a punishment reflects the magnitude of the crime of conviction.[26]

One of the difficulties defense counsel faces when challenging the procedural reasonableness of a sentence is that the district judge who hears the case on remand may cure the procedural errors, but give the defendant the same sentence.[27] For example, a possible challenge to the procedural reasonableness of a sentence is that the district judge did not adequately explain the reasons for imposing the given sentence.[28] This statutory requirement is enhanced when the USSG sentencing range exceeds 24 months.[29] If a sentence is successfully challenged on these grounds, it is quite easy for the sentencing judge to impose the very same

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[22] United States v. Fernandez-Garay, 788 F.3d 1, 3 (1st Cir. 2015).

[23] *Id.*

[24] United States v. Martin, 520 F.3d 87, 92 (1st Cir. 2008).

[25] *Id.*

[26] *Fernandez-Garay*, 788 F.3d at 6.

[27] *See* United States v. Hughes, 401 F.3d 540, 556 (4th Cir. 2005); but see 18 U.S.C. § 3742(g).

[28] 18 U.S.C. § 3553(c); *see, e.g., Fernandez-Garay*, 788 F.3d at 5-6 (holding that the district court adequately explained the sentence because sentencing court's explanation need not "be precise to the point of pedantry").

[29] 18 U.S.C. § 3553(c)(1).

sentence on remand, but to more adequately explain that sentence.

Examining the substantive reasonableness, on the other hand, comes down to whether the sentence given is within the reasonable range of sentences for that crime.[30] In other words, it's a gut check; regardless of whether or not all the procedural rules were followed, is the sentence simply too long or too short for the crime?

VI. Standard of Review

The reasonableness of a sentence is reviewed for abuse of discretion.[31] Appellate courts have articulated with a consistency bordering on the monotonous that it is not enough that, had they been "sitting as a court of first instance," they would have delivered a different result.[32] Such a system is logical. The trial judge is in a better position to judge credibility, to assess and weigh the multitude of factors supporting both a higher and lower sentence, and to understand the unique geographic and cultural needs of the jurisdictions in which they sit.[33]

Such a system, however, is not without its drawbacks; very few cases go to trial.[34] It is not uncommon for a district judge to have only one, or even no trials in a year. Thus, it is possible that the district court's only interaction with a particular defendant is confined to reading a sentencing memo and attending the associated hearing. As such, many of the advantages a district judge has over a circuit judge are not so stark.

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[30] United States v. Vega-Salgado, 769 F.3d 100, 105 (1st Cir. 2014).

[31] *Fernandez-Garay*, 788 F.3d at 3.

[32] *See, e.g.*, United States v. Martin, 520 F.3d 87, 92 (1st Cir. 2008).

[33] United States v. Jackson, 3 F.3d 506, 511-12 (1st Cir. 1993); United States v. Flores-Machicote, 706 F.3d 16, 23 (1st Cir. 2013).

[34] Caroline W. Harlow, Dep't of Justice, *Defense Counsel in Criminal Cases*, 1 (2000), http://www.bjs.gov/content/pub/pdf/dccc.pdf (explaining that in federal court 6.2% of cases in which the defendant is represented by public counsel and 8% of cases in which the defendant is represented by private counsel result in a trial).

On the other hand, if a claim of error goes unpreserved, the review is for plain error.[35] This test forms a steep climb for any party, but its rigors are often warranted. The efficient running of the judicial system necessitates that if a judge errs, it should be corrected when the mistake is made, instead of requiring the additional effort and expense of what can often be a costly appeal.

However, despite these compelling justifications it must be noted that courts have taken a doctrine used and designed for trial and have attempted to contort it into the box of sentencing.[36] Many of the compelling justifications for plain error become hollow in this setting. The remedy for error is not an entirely new trial, as it may be with errors involving jury instructions.[37] Instead, at most, it is merely another hearing.[38] Because of this, some courts, such as the Second Circuit, have applied a less rigorous form of plain error at sentencing.[39] However, even the Second Circuit only applies this lesser standard "on occasion."[40]

VII. Plain Error's Effect on Defendants

As should be clear, a criminal defendant who faces plain error on appeal has been severely prejudiced by the action (or inaction) of their counsel. However, as one plunges through the decided cases, the reality is that challenges to a sentence are rarely indulged, regardless of the standard of review. For example, in the First Circuit in 2011, of the sixteen reported sentencing appeals, in only two were the sentences

[35] FED R. CRIM. P. 52(b).
[36] United States v. Padilla, 415 F.3d 211, 229 (1st Cir. 2005).
[37] *Id.*
[38] *Id.*
[39] *See, e.g.*, United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002).
[40] *Id.*

remanded for sentencing defects.[41] Of those sixteen appeals, fourteen faced abuse of discretion review.[42] Two faced plain error.[43] One of the successful appeals was faced with plain error, and the other faced abuse of discretion.[44]

In the First Circuit in 2012, there were approximately twenty-six sentencing appeals.[45] Nine of those implicated plain error.[46] Only one

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[41] *See* United States v. Torres-Rosario, 658 F.3d 110, 117 (1st Cir. 2011) [remanded for resentencing]; United States v. Molignaro, 649 F.3d 1, 5 (1st Cir. 2011) [remanded for resentencing]; *but see* United States v. Walker, 665 F.3d 212, 233-34 (1st Cir. 2011); United States v. Fernández-Hernández, 652 F.3d 56, 71-72 (1st Cir. 2011) [remanded for resentencing]; United States v. Rios-Hernandez, 645 F.3d 456, 462-63 (1st Cir. 2011); United States v. Clogston, 662 F.3d 588, 590 (1st Cir. 2011); West v. United States, 631 F.3d 563, 571-72 (1st Cir. 2011); United States v. Battle, 637 F.3d 44, 51-52 (1st Cir. 2011); United States v. Ozuna-Cabrera, 663 F.3d 496, 503 (1st Cir. 2011); United States v. Vargas-Davila, 649 F.3d 129, 131-32 (1st Cir. 2011); United States v. Butler-Acevedo, 656 F.3d 97, 99 (1st Cir. 2011); United States v. De Jesus-Viera, 655 F.3d 52, 54-55, 61 (1st Cir. 2011); United States v. Madera-Ortiz, 637 F.3d 26, 28-32, (1st Cir. 2011); United States v. Thomas, 635 F.3d 13, 15 (1st Cir. 2011); United States v. Polanco, 634 F.3d 39, 44 (1st Cir. 2011); United States v. Pol-Flores, 644 F.3d 1, 5 (1st Cir. 2011).

[42] *Walker*, 665 F.3d at 233-34; *Fernández-Hernández*, 652 F.3d at 71-72; *Clogston*, 662 F.3d at 590; *West*, 631 F.3d at 571-72; *Vargas-Davila*, 649 F.3d 130; Ozuna-Cabrera, 663 F.3d at 503; Butler-Acevedo, 656 F.3d at 99; *De Jesus-Viera*, 655 F.3d at 61; *Madera-Ortiz*, 637 F.3d at 30; *Thomas*, 635 F.3d at 18; *Polanco*, 634 F.3d at 44; *Pol-Flores*, 644 F.3d at 5; *Molignaro*, 649 F.3d at 5; *Battle*, 637 F.3d at 51-52.

[43] *Rios-Hernandez*, 645 F.3d at 462-63; *Torres-Rosario*, 658 F.3d at 116.

[44] *Torres-Rosario*, 658 F.3d at 116-17; *Molignaro*, 649 F.3d at 5.

[45] United States v. Leahy, 668 F.3d 18, 23 (1st Cir. 2012); United States v. Medina-Villegas, 700 F.3d 580, 584 (1st Cir. 2012); United States v. Davis, 676 F.3d 3, 9 (1st Cir. 2012); United States v. Curet, 670 F.3d 296, 300 (1st Cir. 2012); United States v. Goergen, 683 F.3d 1, 5 (1st Cir. 2012); United States v. Vixamar, 679 F.3d 22, 33 (1st Cir. 2012); United States v. Farrell, 672 F.3d 27, 37 (1st Cir. 2012); United States v. Aguasvivas-Castillo, 668 F.3d 7, 13-14 (1st Cir. 2012); United States v. Jones, 700 F.3d 615, 630 (1st Cir. 2012); United States v. Denson, 689 F.3d 21, 26 (1st Cir. 2012); United States v. Espinal-Almeida, 699 F.3d 588, 618 (1st Cir. 2012); United States v. Savarese, 686 F.3d 1, 14-15 (1st Cir. 2012); United States v. Valdivia, 680 F.3d 33, 55 (1st Cir. 2012); United States v. Landrón-Class, 696 F.3d 62, 78 (1st Cir. 2012); United States v. Gallardo-Ortiz, 666 F.3d 808, 811 (1st Cir. 2012); United States v. Appolon, 695 F.3d 44, 70 (1st Cir. 2012); United States v. Desimone, 699 F.3d 113, 128 (1st Cir. 2012); United States v. Cortés-Cabán, 691 F.3d 1, 28 (1st Cir. 2012); United States v. Maldonado-Escarfullery, 689 F.3d 94 (1st Cir. 2012); United States v. Chiaradio, 684 F.3d 265, 283 (1st Cir. 2012); United States v. Stefanik, 674 F.3d 71, 78 (1st Cir. 2012); United States v. Rodríguez-Adorno, 695 F.3d 32, 43 (1st Cir. 2012); United States v. Rivera-Donate, 682 F.3d 120, 138 (1st Cir. 2012); United States v. Lozada-Aponte, 689 F.3d 791, 792 (1st Cir. 2012); United States v. Parks, 698 F.3d 1, 8-9 (1st Cir. 2012); United States v. Green, 698 F.3d 48, 57-58 (1st Cir. 2012).

appeal was successful, and it was a case in which plain error was applied.[47]

Regardless of the standard of review, a criminal defendant who seeks to challenge his sentence faces a Herculean task. However, as is evidenced by the information above, it is not clear that the standard of review has a noticeable impact on the rights of any particular defendant. There are multiple possible explanations for this. One is that counsel may decide not to bring a claim if they know the issue was not preserved. Another is that sentencing appeals are fairly easy to claim and may be tacked on to other, more meritorious claims, with minimal additional effort.

It should also be noted that, regardless of any actual impact on a defendant's rights, a defendant may feel cheated, ignored by the system or treated unfairly. These feelings can fester and create a lack of faith in the system which, on their own, can be problematic. Further, from a more practical standpoint, if a defendant feels inadequately represented by his attorney, he or she may feel more inclined to file for post-conviction relief.[48] While those petitions are often frivolous, and rarely granted, they eat up valuable resources for the courts, defense counsel, and the government.[49]

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[46] *Leahy*, 668 F.3d at 23; *Medina-Villegas*, 700 F.3d at 583; *Davis*, 676 F.3d at 9; *Curet*, 670 F.3d at 301; Goergen, 683 F.3d at 5; Vixamar, 679 F.3d at 33; Farrell, 672 F.3d at 37; *Aguasvivas-Castillo*, 668 F.3d at 13-14; *Jones*, 700 F.3d at 630.

[47] *Farrell*, 672 F.3d at 37.

[48] Roger A. Hanson, *Federal Habeas Corpus Review*, DEP'T OF JUSTICE 14 (Sept. 1995), http://www.bjs.gov/content/pub/pdf/FHCRCSCC.PDF (explaining that the most common issued raised in habeas corpus petitions is for ineffective assistance of counsel).

[49] *Id.* at 17.

VIII. Conclusion

Any defendant who finds himself in the criminal justice system is at a unique disadvantage – one that can seem even more overwhelming when counsel has failed to exercise the foresight to preserve claims of error at every level of the case. While the numbers do not show that a defendant faced with plain error review on appeal is particularly prejudiced, the integrity of the system requires that each person's rights are respected and that each defendant does not feel cheated by a system designed to protect their rights.