The Honorable Reena Raggi
Chair, Advisory Committee on Federal Rules of Criminal Procedure

Dear Judge Raggi:[1]

I write to propose a change in appellate review of claimed sentencing errors. My proposal is that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of "plain error" review, unless the error was harmless.

Rule 52(b) of the Federal Rules of Criminal Procedure provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Supreme Court has stated the strict requirements of "plain error" review. See United States v. Olano, 507 U.S. 725, 732-38 (1993). These requirements are entirely appropriate for trial errors to which no objection was made. A retrial to correct a trial error imposes substantial burdens on the judicial system. A new jury must be empaneled, witnesses must be returned to the courtroom, with the risk of diminished recollections, and considerable time and expense are consumed. Correcting a sentencing error, however, involves no comparable burdens.[2] A resentencing usually consumes less than an hour, requires no jury, and normally requires no witnesses.

Even under advisory sentencing guidelines, a sentencing judge is required to calculate an applicable guideline range, see United States v. Crosby, 397 F.3d 103, 111-12 (2d Cir. 2005), a complicated process in which errors can easily occur, some of which may understandably escape the notice of even experienced defense counsel. An uncorrected guideline miscalculation can add many months and sometimes years of unwarranted prison time to a sentence. There is no justification for requiring a defendant to serve additional time in prison just because defense counsel failed to object to a guideline miscalculation.

The Supreme Court has recognized that the jury trial is the context in which the rigor of the "plain error" doctrine is to be applied. "[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error not only seriously affected 'substantial rights,' but that it had an unfair prejudicial impact on the jury's deliberations." United States v. Young, 470 U.S. 1, 16 n.14 (1985) (emphasis added). When the Advisory Committee Note to Rule 52(b) stated that the rule is "a restatement of existing law," the two decisions it cited both concerned claims of jury trial error. See Wiborg v. United States, 163 U.S. 632, 559-60 (1896), and Hemphill v. United States, 112 F.2d 505 (9th Cir.), rev'd, 312 U.S. 729 (1941), conformed, 120 F.2d

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[1] I am sending this proposal to the chairs of both the Advisory Committee on Criminal Rules and the Advisory Committee on Appellate Rules (as well as the chair of the Standing Committee) because the proposal concerns appellate review of sentencing errors and might be within the jurisdiction of both committees.

[2] See United States v. Leung, 40 F.3d 577, 586 n.1 (2d Cir. 1994); United States v. Baez, 944 F.2d 88, 90 n.1 (2d Cir. 1991).

115 (9th Cir. 1941).

Because Rule 52(b) makes no distinction between trial errors and sentencing errors, it is understandable that the Supreme Court has stated (or assumed) that "plain error" review applies to sentencing errors. In United States v. Cotton, 535 U.S. 625, 631-34 (2002), the Court, reviewing for plain error, declined to reject a sentencing enhancement claimed to be erroneous because drug quantity, on which the enhancement was based, was not alleged in the indictment. In United States v. Booker, 543 U.S. 220, 268 (2005), the Court stated, with respect to sentencing guideline errors, "[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." In Puckett v. United States, 556 U.S. 129, 143 (2009), the Court applied "plain error" review to an unobjected to breach of a plea agreement. See also Henderson v. United States, 133 S. Ct. 1121 (2013) (acting on premise that "plain error" review applies to sentencing errors, Court rules that whether error is plain is determined at time of review, not time of error).[3]

Most of the circuits apply "plain error' review to unobjected to sentencing errors, see, e.g., United States v. Eversole, 487 F.3d 1024 (6th Cir. 2007); United States v. Traxler, 477 F.3d 1243, 1250 (10th Cir. 2007); United States v. Dragon, 471 F.2d 501, 505 (3d Cir. 2006); United States v. Knows His Gun III, 438 F.3d 913, 918 (9th Cir. 2006). The First and Second Circuit's have sometimes applied a lenient form of "plain error" review to unobjected to sentencing errors, see United States v. Cortes-Claudio, 312 F.3d 17, 24 (1st Cir. 2002); United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002).

To implement my suggestion, the following addition to Rule 52 might be considered, although various other formulations could be devised:

Proposed Rule 32(c) of the Federal Rules of Criminal Procedure:

> A claim of error in connection with the imposition of a sentence, not brought to the court's attention, may be reviewed on appeal whether or not the error was plain, if (a) the error caused the defendant prejudice, and (b) correction of the error will not require a new trial.

Sincerely,

Jon O. Newman
U.S. Circuit Judge

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[3] In two cases decided before the adoption of Rule 52(b), the Supreme Court corrected a sentencing error not complained of because the error was deemed "plain." See Pierce v. United States, 255 U.S. 398, 405-06 (1921) (plain error to allow interest on a criminal fine until a judgment had been entered against shareholders of the defendant corporation); Weems v. United States, 217 U.S. 349, 380 (1910) (imposition of punishment deemed cruel and unusual set aside as plain error).