NOTES

"Objection: Your Honor Is Being Unreasonable!"—Law and Policy Opposing the Federal Sentencing Order Objection Requirement

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INTRODUCTION

"I think you ought to object, counselor," boomed the judge.[1] One could not help but to be taken aback: this instruction was not directed towards a *pro se* defendant, nor was it addressing an action by an opposing party. Instead, the judge had actually suggested—with a straight face and a hint of irony—that an attorney object to the sentence the judge had just imposed. Unlike the attorney, the judge had been following the development of a quirk in the circuit's sentencing law. In *United States v. Vonner*,[2] the Sixth Circuit had recently held that a party must object to a sentence while still in the trial court in order to preserve for appeal certain problems with the sentencing order. This sentencing order objection requirement is mandatory even if the party had presented all appropriate arguments earlier during the sentencing hearing (as, indeed, this attorney had done).[3]

This strange occurrence results from the federal courts' struggle to interpret the Supreme Court's recent overhaul of the Federal Sentencing Guidelines, which have long served as the foundation of federal criminal sentences.[4] By deeming the Federal Sentencing Guidelines to be discretionary rather than mandatory,[5] the Supreme Court opened a Pandora's Box for appellate courts reviewing the now-subjective sentences.[6]

One of the many resulting procedural questions is the manner in which parties should preserve issues for appeal. A clear circuit split has emerged. Some circuit courts require only that a party argue for

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1. This account is based on a sentencing hearing observed by the author in July 2008 in the United States District Court for the Middle District of Tennessee, the Hon. Thomas A. Wiseman, Jr. presiding.

2. United States v. Vonner, 516 F.3d 382 (6th Cir. 2008) (en banc).

3. Many courts have labeled this requirement for a "post-sentence objection." *See, e.g.*, *id.* at 410 (Moore, J., dissenting); United States v. Mancera-Perez, 505 F.3d 1054, 1059 (10th Cir. 2007); United States v. Sepulveda-Contreras, 466 F.3d 166, 171 (1st Cir. 2006). However, the author believes that "sentencing order objection" is a more appropriate description because the requirement is for an objection to the sentencing order itself, not merely any objection that occurs after the sentence.

4. Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1119–20 (2008) (explaining that the Sentencing Reform Act of 1984 implemented the Sentencing Guidelines to restrict judges' "virtually unfettered discretion to set federal sentences").

5. United States v. Booker, 543 U.S. 220, 245 (2005).

6. Before the Guidelines became discretionary, federal sentencing review by appellate courts was greatly restricted by statute. Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 632 (1992).

the desired sentence during the sentencing hearing,[7] while other courts require an objection after the judge's sentencing order, regardless of whether the issue has already been raised.[8] The latter group is itself further divided as to which types of error must be noted in the objection.

Valid policy justifications accompany both sides of the circuit split. The circuits that require objections to sentencing orders have recognized that certain procedural problems with the sentence can be easily remedied by the trial court if brought to its attention in time, thus avoiding a lengthy appeal and remand.[9] Even if a party has already argued a point, an objection is a fail-safe way to ensure that the judge correctly considered it. On the other hand, courts that do not require sentencing order objections involving previously argued issues fear creating "a trap for [the] unwary," resulting in the loss of appellate rights for a party who is ignorant of the policy or simply does not immediately recognize a problem during the hearing.[10]

This Note argues that the requirement to object to a judge's sentencing order should be abolished for two fundamental reasons. First, the policy arguments against the requirement are stronger: requiring objections (1) promotes frivolous redundancy, (2) creates a procedural pitfall which could result in unfairly higher sentences, (3) works against judicial economy by leading to collateral claims of ineffective assistance of counsel, and (4) is ultimately unnecessary because prevailing parties already have incentive to perfect the record themselves. Second, and more importantly, the sentencing order objection requirement contradicts Federal Criminal Rules of Procedure 51(a) and (b), the provisions governing the preservation of claimed error.

Part I provides the context necessary to understand and evaluate the sentencing order objection requirement. It explores the history behind the Federal Sentencing Guidelines and the Supreme Court cases which have modified their application. Part I then explains the background to the circuit split in more detail, including a discussion of the relevant statutes, an explanation of the possible methods of review, and a description of precisely what kinds of error might require an objection. Part II describes the various positions that courts have taken in the circuit split.

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7. *See infra* Part III.A.
8. *See infra* Parts III.B, III.C.
9. United States v. Villafuerte, 502 F.3d 204, 208 (2d Cir. 2007).
10. United States v. Castro-Juarez, 425 F.3d 430, 433–34 (7th Cir. 2005).

Part III examines several sources of law to illustrate why the objection requirement is both unsound and counter to federal procedural rules. Specifically, this Part asserts that the requirement: (1) effectively constitutes an "exception,"[11] a technical formality long abandoned and expressly abolished by Federal Rule of Criminal Procedure 51(a); (2) contrasts with a policy determination made by Congress in amending Federal Rule of Evidence 103; (3) is inconsistent with the liberal provisions of Federal Rule of Appellate Procedure 3(a), which provides appellate filing requirements; (4) may not be validly promulgated through appellate court "supervisory authority";[12] and (5) is invalid and ultimately inefficient for both of the two reasonableness categories under which some circuits require the objection. Part IV advocates that Congress or the Supreme Court intervene to resolve the circuit split by unequivocally prohibiting circuit courts from mandating the sentencing order objection.

I. HISTORICAL AND LEGAL CONTEXT

The discussion surrounding the sentencing order objection requirement does not exist in a vacuum: it is but one facet of circuit courts' attempts to rebuild federal sentencing procedure after a recent overhaul by the Supreme Court. This Part will provide the context necessary to understand the problem's creation and the surrounding legal framework governing a solution. It will also discuss the risks posed to a party that fails to make a sentencing order objection in a jurisdiction in which it is required and explains the precise grounds on which the party must object.

A. History

The Supreme Court initiated the sentencing order objection debate through a series of decisions which struck down key parts of the federal sentencing statute on constitutional grounds.[13] Before

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11. "Exception" is defined as a "formal objection to a court's ruling by a party who wants to preserve an overruled objection or rejected proffer for appeal." BLACK'S LAW DICTIONARY 603 (8th ed. 2004).

12. Thomas v. Arn, 474 U.S. 140, 146 (1985) ("It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation.").

13. Although these cases did not actually create or change the nature of sentencing order objections, *see* United States v. Peltier, 505 F.3d 389, 391–92 (5th Cir. 2007) (arguing that *United States v. Booker* has not changed existing objection rules), the cases have created more

1984, sentences imposed by federal district court judges were limited only by statutory minimums and maximums; appellate court review was under the very deferential "clearly erroneous" standard.[14] Troubled by the wide sentencing disparities which resulted from the broad discretion of trial judges, Congress passed the Sentencing Reform Act of 1984 to create more uniformity in sentencing.[15] The Sentencing Reform Act led to the establishment of the Federal Sentencing Guidelines ("the Guidelines") in 1989, which "limited the district court's role in sentencing to an almost entirely mechanical task of reviewing the sentencing grid to locate the Commission's intended sentence for an individual defendant," based on the offense, the defendant's criminal history, and the judicial findings at sentencing.[16] Appellate courts initially reviewed Guidelines departures under three different standards, depending on what kind of issue was being appealed.[17] A 1996 Supreme Court decision rejected this tripart approach, instituting an abuse-of-discretion standard.[18] Congress established a de novo standard by statute in 2003.[19]

In 2000, the Supreme Court issued the first of several decisions which held that many legislative efforts to control judicial discretion in sentencing through rigid statutes violated the constitutional right to a jury trial.[20] Examining New Jersey's sentencing system, the Court held in *Apprendi v. New Jersey* that a defendant has the right to insist that a jury—not a judge—decide any fact that increases a sentence beyond the prescribed statutory maximum.[21] As a result, the Constitution barred an extended sentence based upon the trial judge's determination that the crime at issue was motivated by racial bias.[22] Two years later, the Supreme Court concluded that the defendant's rights had been violated by a state law which allowed the imposition of the death penalty after a judge sitting without a jury found an

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significance for such objections and provided additional considerations for how they can be analyzed.

14. *See, e.g.*, United States v. Hayes, 589 F.2d 811, 822–23 (5th Cir. 1979) (applying a "clearly erroneous" standard); Gregory v. United States, 585 F.2d 548, 550 (1st Cir. 1978) (same).

15. Harrison, *supra* note 4, at 1119–20.

16. *Id.* at 1120–21.

17. Questions of law were reviewed de novo, findings of fact were reviewed for clear error, and departures from the Guidelines were reviewed under an abuse-of-discretion standard. *Id.* at 1122.

18. *Id.* (citing Koon v United States, 518 U.S. 81 (1996)).

19. *Id.* at 1123.

20. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

21. *Id.* The Court expressly listed a single exception: "the fact of a prior conviction." *Id.*

22. *Id.* at 471, 490–91.

aggravating circumstance.[23] The Court also struck down another state sentencing scheme which allowed the trial judge to enhance a sentence beyond the maximum term permitted by state sentencing guidelines by finding the defendant had acted with "deliberate cruelty."[24]

In *United States v. Booker*, the Supreme Court extended these decisions on state sentencing laws to the federal sentencing system, noting that the state and federal sentencing procedures were essentially the same in the way they handled judicial findings of enhancement factors.[25] Because statutory maximum sentences could be exceeded based on judicial findings of fact rather than facts found by a jury, the Court held that the mandatory nature of the Guidelines violated the Sixth Amendment.[26] As a result, the Court determined that the Guidelines must be merely advisory: trial courts must still *consider* Guidelines ranges but may "tailor [a] sentence in light of other statutory concerns as well."[27] Although judges may continue to make findings of fact relevant to sentencing without a jury, the Court held that these determinations are "constitutionally inoffensive" if the sentence dictated by the Guidelines is advisory instead of mandatory.[28]

The *Booker* Court also addressed how appellate courts should review sentences under the new regime. For most of the Guidelines era, circuit courts had reviewed sentences under a "reasonableness" standard.[29] Two years before *Booker*, Congress established de novo review for sentences departing from the Guidelines in an attempt to make the Guidelines even more mandatory than they already were.[30] The central holding in *Booker*—that the Guidelines must be discretionary—nullified the policy behind Congress's change.[31] Thus, the Court concluded that a "reasonableness" standard for reviewing sentences would be most consistent with the existing framework.[32]

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23. Ring v. Arizona, 536 U.S. 584, 590 (2002).

24. Blakely v. Washington, 542 U.S. 296, 303–04 (2004).

25. 543 U.S. 220, 230–33 (2005).

26. *Id.* at 233–34.

27. *Id.* at 245.

28. Ilya Beylin, Comment, Booker*'s Unnoticed Victim: The Importance of Providing Notice Prior to Sua Sponte Non-Guidelines Sentences*, 74 U. CHI. L. REV. 961, 962 (2007).

29. *Booker*, 543 U.S. at 261 (noting that a review for "unreasonable[ness]" was a "practical standard of review already familiar to appellate courts").

30. *Id.*

31. *Id.*

32. *Id.* at 261–62.

The recent Supreme Court interpretations of the Guidelines have created a number of problems for courts attempting to administer the new system.[33] In particular, judges and lawyers alike have struggled with whether a party must object to a sentencing order immediately after it is issued in order to avoid plain error review of the sentence upon appeal. "Right now, the post-*Booker* opinions are kind of all over the board," observed attorney Stephen Ross Johnson after the Sixth Circuit granted en banc review for his client's sentencing appeal.[34] With the decision, he remarked, "[t]hey could rock our whole world. They could just tweak our world."[35] Yet even lengthy appellate court opinions do not always resolve the matter. "Everyone is trying to figure out what they have to do now," lamented the same attorney after the Sixth Circuit ruled against his client.[36]

B. Relevant Statutes

Two laws directly govern the legal framework surrounding the sentencing order objection requirement: the Sentencing Reform Act of 1984, which establishes how the trial court should determine a sentence, and Criminal Rule 51(b), which addresses how a party should preserve an error made by the court. 18 U.S.C. § 3553, enacted as part of the Sentencing Reform Act, addresses the "Imposition of a Sentence" for a criminal defendant. Subsection (a) provides the substantive requirement that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with . . . the need for the sentence imposed." To make this determination, the judge is required to consider the so-called "§ 3553(a) factors," including considerations such as the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences

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33. The unsettled questions include such matters as whether a judge must provide notice to the parties before imposing a sentence outside the Guidelines range, whether and how to review sentences for abuse of discretion as to the "substantive reasonableness" of a sentence (assuming the issue has been properly preserved), and whether the new rules can be applied retroactively. Harrison, *supra* note 4, at 1138; Beylin, *supra* note 28, at 971; James R. Dillon, Note, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. VA. L. REV 1033, 1034 (2008); Christine M. Zeivel, Note, *Ex-Post*-Booker*: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT. L. REV. 395, 417–19 (2008).

34. *Tennessee Drug Dealer's Appeal Could Reshape Legal Landscape*, FT. WAYNE J. GAZETTE (Ind.), Oct. 26, 2006, at A5. The case, United States v. Vonner, 516 F.3d 382 (6th Cir. 2008) (en banc), is discussed frequently throughout this Note.

35. *Tennessee Drug Dealer's Appeal Could Reshape Legal Landscape*, *supra* note 34, at A5.

36. Pamela A. MacLean, *'Reasonableness' Splits Circuits: Sixth Circuit Widens Breach on Review Standard*, NAT'L L.J., Feb. 25, 2008, at 4.

available, and the Guidelines, among others.[37] Subsection (c) mandates the procedural requirement that the trial judge "state in open court the reasons for [his] imposition of the particular sentence" and explain the reason for either picking a particular point within the range or a point outside the range. The sentencing order objections discussed in this Note arise from alleged judicial violations of 18 U.S.C. § 3553.

For criminal trials, "Preserving a Claim of Error" is addressed in Criminal Rule 51(b):

> 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. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

This rule generally requires a party to raise an issue in the trial court in order to have the opportunity to argue on appeal that the trial court erred regarding that issue. The ultimate legal question posed by the sentencing order objection debate is whether "informing the court" requires a formal objection following the imposition of the sentence or merely presenting argument before or during the sentencing hearing.

C. Plain Error Versus Reasonableness

The significance of the sentencing order objection requirement ultimately hinges on the standard of review applied on appeal. There are two ways in which an appellate court can review a claim of error arising from sentencing: the "plain error" standard and the more generous "reasonableness" standard. Criminal Rule 52 provides that federal appellate courts may review an issue for plain error even when a party has not properly preserved the error by objecting in the appropriate manner.[38] This standard is often described as "stringent"[39] and "mandates reversal only in exceptional circumstances and only

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37. 18 U.S.C. § 3553(a) (2000).

38. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 407 (2006) (Stevens, J., dissenting); *accord* FED. R. CRIM. P. 52(b). However, plain error does not extend to waived errors, which involve the "intentional relinquishment or abandonment of a known right." United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

39. *In re* Sealed Case, 573 F.3d 844, 846 (D.C. Cir. 2009); United States v. Pereira, 465 F.3d 515, 520 (2d Cir. 2006); United States v. White, 405 F.3d 208, 226 (4th Cir. 2005); United States v. Higdon, 418 F.3d 1136, 1139 n.6 (11th Cir. 2005); United States v. Wood, 364 F.3d 704, 708 (6th Cir. 2004); Wennik v. Polygram Group Distribution, Inc., 304 F.3d 123, 130, 132 n.10 (1st Cir. 2002).

where the error is so plain that the trial judge and prosecutor were derelict in countenancing it."[40] At least one judge has opined that parties are "penalized" when the failure to object to a sentencing order subjects them to plain error review.[41]

In contrast, the review of properly preserved sentencing error is more liberal because appellate courts reviewing trial courts' selection of sentence must "ensure sentences are both reasoned and reasonable."[42] Questions of law are reviewed de novo and questions of fact are subject to clear error review.[43] Appellants prefer reasonableness review to plain error review given the considerably shorter hurdle to clear.[44]

Although always available on appeal—regardless of preservation of error—the plain error standard is far less desirable and can control the outcome of a case.[45] Therefore, when this Note discusses a "requirement" to object, it refers to an action needed to achieve reasonableness review.

D. Categories of Reasonableness

Courts may consider the overall reasonableness of a sentence on "procedural" and "substantive" grounds. The distinction is particularly significant when a court requires a sentencing order objection for only one of these forms.[46] Procedural reasonableness is based on "the *method* by which the sentence was calculated." This includes considerations such as whether the Guidelines were misapplied or if the court "did not adequately explain the sentence with reference to the [§ 3553(a) factors]."[47] Substantive reasonableness

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40. United States v. Gardiner, 463 F.3d 445, 459 (6th Cir. 2006) (quoting United States v. Carroll, 26 F.3d 1380, 1383 (6th Cir. 1994)).

41. Unites States v. Vonner, 516 F.3d 382, 398 (6th Cir. 2008) (en banc) (Clay, J., dissenting).

42. Anna Elizabeth Papa, *A New Era of Federal Sentencing: The Guidelines Provide District Court Judges a Cloak, But is* Gall *Their Dagger?*, 43 GA. L. REV. 263, 277 (2008) (quoting Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 142 (2006), http://www.thepocketpart.org/2006/07/berman.html).

43. United States v. Fuller, 426 F.3d 556, 562 (2d Cir. 2005); United States v. Creech, 408 F.3d 264, 270 n.2 (5th Cir. 2005).

44. Most of the cases regarding sentencing order objections discussed in this Note revolve primarily around which standard should be used, not whether the appellant meets that standard.

45. *See infra* Part III.C.

46. *See infra* Part II (discussing courts which both do and do not distinguish the forms of reasonableness).

47. United States v. Torres-Duenas, 461 F.3d 1178, 1182 (10th Cir. 2006).

is based on whether the sentence is unreasonably harsh or lenient based on § 3553(a)'s requirement that a sentence be "sufficient, but not greater than necessary."[48]

Jurists disagree as to whether procedural and substantive reasonableness are divisible or are only two facets of overall reasonableness.[49] Among Justices who have spoken directly on the matter, Justice Scalia apparently believes that appellate courts should review the reasonableness of sentencing rulings on purely procedural grounds.[50] Justice Stevens, on the other hand, wrote that *Booker* "plainly contemplated that reasonableness review would [also] contain a substantive component."[51] As a rudimentary example of when substantive reasonableness might come into play, Stevens noted that "a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable."[52]

Circuit courts have split on whether reasonableness should be divided into procedural and substantive components. The Sixth,[53] Eighth,[54] Ninth,[55] and Tenth[56] Circuits require sentencing order objections only for procedural reasonableness, while other courts maintain the same requirements for either form (whether they do or do not require objections).[57] Part III.E will argue that courts should not require sentencing order objections for either category of reasonableness.

II. THE CIRCUIT SPLIT

This Part examines the various positions and arguments of the circuit courts. Circuits are grouped into categories where sentencing order objections (A) are not required, (B) are required, (C) are required

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48. *Id.* at 1183.

49. *See* Harrison, *supra* note 4, at 1138.

50. Rita v. United States, 551 U.S. 338, 382–83 (2007) (Scalia, J., concurring in part and concurring in the judgment).

51. *Id.* at 365 (Stevens, J., concurring) (citing United States v. Booker, 543 U.S. 220, 260–64 (2005)).

52. *Id.* Of course, some Bostonians may disagree with this assessment.

53. United States v. Vonner, 516 F.3d 382, 390 (6th Cir. 2008) (en banc).

54. United States v. Wiley, 509 F.3d 474, 477 (8th Cir. 2007).

55. United States v. Autery, 555 F.3d 864, 868–71 (9th Cir. 2009) (discussing the "crucial—but often-overlooked—distinction between procedural error and substantive reasonableness").

56. United States v. Torres-Duenas, 461 F.3d 1178, 1183 (10th Cir. 2006).

57. *Compare* United States v. Castro-Juarez, 425 F.3d 430, 433–34 (7th Cir. 2005) (not requiring objection to either form), *with* United States v. Villafuerte, 502 F.3d 204, 208 (2d Cir. 2007) (requiring objection to both forms).

only for procedural reasonableness, and (D) lack an established rule. This Note will advocate the position of courts not requiring objections when a party has already presented its arguments to the trial court.

A. Circuits in Which Sentencing Order Objections Are Not Required

Four circuits do not require sentencing order objections to preserve previously raised issues for appeal: the Third, Fourth, Seventh, and D.C. Circuits.[58] In the leading case of *United States v. Castro-Juarez*, the Seventh Circuit found that requiring objections would "create a trap for unwary defendants and saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case."[59] The court recognized that sentencing order argument concerning the reasonableness of a sentence may be useful in some situations.[60] However, the court ultimately held that a rule *requiring* an objection regarding § 3553(a) factors already presented would fail to "further the sentencing process in any meaningful way."[61] Also recognizing the lack of purpose for requiring redundant argument, the Fourth Circuit declined to require a party to make "a futile objection at the end of the sentencing colloquy" once it had "vigorously argu[ed] for a sentence [and] made unmistakably clear its position."[62]

The D.C. Circuit, quoting *Castro-Juarez*'s "trap for [the] unwary" policy rationale, took a rule-based approach: "Reasonableness . . . is the standard of *appellate* review, not an objection that must be raised upon the pronouncement of a sentence."[63] In other words, there is no basis for requiring a trial court to function essentially as an appellate court by reviewing its own sentence under the appellate standard. Without providing its reasoning, the Third Circuit, sitting en banc, simply declared in a footnote, "An objection to the reasonableness of the final sentence will be preserved if, during sentencing proceedings, the defendant properly raised a meritorious factual or legal issue."[64]

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58. United States v. Grier, 475 F.3d 556, 571 n.11 (3d Cir. 2007) (en banc); United States v. Curry, 461 F.3d 452, 459 (4th Cir. 2006); *Castro-Juarez*, 425 F.3d at 433–34; United States v. Bras, 483 F.3d 103, 113 (D.C. Cir. 2007).

59. 425 F.3d at 433–34.

60. *Id.* at 434.

61. *Id.*

62. *Curry*, 461 F.3d at 459.

63. *Bras*, 483 F.3d at 113 (citing United States v. Booker, 543 U.S. 220, 262 (2005)).

64. United States v. Grier, 475 F.3d 556, 571 n.11 (3d Cir. 2007). In an unpublished opinion, a three-judge panel distinguished *Grier*, refusing to remand a sentence where the trial

B. Circuits in Which Objections Are Required for Procedural and Substantive Reasonableness

The Second and Fifth Circuits require sentencing order objections to preserve an issue for appeal even if the party has already raised the matter during the sentencing hearing.[65] With respect to substantive reasonableness, the Second Circuit noted that parties should be fully aware of a judge's responsibility to consider the § 3553(a) factors and the Guidelines, and that objecting to the failure to do so is "neither difficult nor onerous."[66] The Second Circuit's rationale is based on judicial economy: the "requirement alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand."[67] As for procedural reasonableness, the court listed several justifications for requiring objections: the ease of determining whether there has been a violation, the public interest in resolving sentencing error promptly, the ability of the district court to better articulate its reasons for sentencing during the first hearing than long afterwards, and the "incentives for the parties to help the district court meet its obligations."[68]

The Fifth Circuit, in addition to citing judicial economy, noted that "the rule requiring objection to error [is] one of the most familiar procedural rubrics in the administration of justice."[69] The court rejected the Seventh Circuit's arguments in *Castro-Juarez*, arguing that nothing about *Booker* created an exception for objections in sentencing and that the "trap for the unwary" logic could be extended to virtually any type of error.[70]

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judge did not specifically refer to the § 3553(a) factors because of the "unusual" situation in which the defendant had asked for the sentence he actually received. United States v. Chatman, 243 F. App'x 736, 737 (3d Cir. 2007).

65. United States v. Villafuerte, 502 F.3d 204, 208, 211 (2d Cir. 2007); United States v. Peltier, 505 F.3d 389, 391–92 (5th Cir. 2007).

66. *Villafuerte*, 502 F.3d at 208.

67. *Id.*

68. *Id.* at 211.

69. *Peltier*, 505 F.3d at 391–92 (internal quotation marks omitted). Although the court applied plain error review to the alleged substantive and procedural reasonableness errors, *id.* at 392–94, it is unclear whether the court's policy arguments were intended to apply to both forms of reasonableness or only to substantive reasonableness.

70. *Id.* at 391.

C. Circuits Requiring Objections Only for Procedural Reasonableness

The Sixth, Eighth, Ninth, and Tenth Circuits have held expressly that sentencing order objections are required for objections based on procedural, but not substantive, reasonableness.[71] In *United States v. Torres-Duenas*, the Tenth Circuit held that "when the defendant fails to object to the method by which the sentence was determined . . . we review only for plain error. But when the claim is merely that the sentence is unreasonably long, we do not require the defendant to object in order to preserve the issue."[72] The Eighth Circuit adopted the same approach.[73] Unfortunately, neither court provided any explanation as to why this distinction was made.[74]

The Ninth Circuit established rules for sentencing order objections in two separate cases. First, in *United States v. Sylvester Norman Knows His Gun, III*, the court held that an objection at sentencing was required to avoid plain error review for procedural reasonableness but did not provide its reasoning.[75] Three years later, the court addressed objections for substantive reasonableness in *United States v. Autery*.[76] Reviewing the circuit split and analyzing the respective policy arguments, the Ninth Circuit followed the reasoning of *Castro-Juarez* and held that a party need not object to the substantive reasonableness of a sentence to avoid plain error review if the party previously argued against the sentence imposed.[77] Unlike a matter of procedural error, which may be an easily corrected mistake, a substantive reasonableness challenge after sentencing "would be

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71. United States v. Vonner, 516 F.3d 382, 390 (6th Cir. 2008) (en banc); United States v. Wiley, 509 F.3d 474, 477 (8th Cir. 2007); United States v. Autery, 555 F.3d 864, 868–71 (9th Cir. 2009); United States v. Torres-Duenas, 461 F.3d 1178, 1183 (10th Cir. 2006).

72. 461 F.3d at 1182–83 (citations omitted). *But see* United States v. Mancera-Perez, 505 F.3d 1054, 1058–59 (10th Cir. 2007) (holding that a party is not excused from objecting on substantive reasonableness grounds when it fails to argue an issue either before or during sentencing hearing).

73. United States v. Burnette, 518 F.3d 942, 946 (8th Cir. 2008) (citing United States v. Pirani, 406 F.3d 543, 550 (8th Cir. 2005) (en banc)) (holding that party must object to procedural error); United States v. Wiley, 509 F.3d 474, 476–77 (8th Cir. 2007) (citing *Torres-Duenas*, 461 F.3d at 1182–83) (holding that party need not object to substantive reasonableness).

74. The Eighth Circuit did, however, quote *Castro-Juarez* to explain its reasoning for not requiring objection to substantive reasonableness error. *Wiley*, 509 F.3d at 477. Further, the Eighth Circuit indicated that it would be unfair to require an objection at sentencing when a party does not have notice of the court's intention to depart from the Guidelines until the actual pronouncement of the final sentence. *Id.* at 476–77.

75. 438 F.3d 913, 918 (9th Cir. 2006).

76. 555 F.3d 864, 868–71 (9th Cir. 2009).

77. *Id.* at 870–71 (quoting United States v. Castro-Juarez, 425 F.3d 430, 434 (7th Cir. 2005)).

both redundant and futile" because "the parties have already fully argued the relevant issues."[78]

In *United States v. Vonner*, an en banc Sixth Circuit held that parties must raise sentencing order objections for procedural—but not substantive—reasonableness[79] and offered a thorough discussion in a lengthy majority opinion and three dissenting opinions. The majority opinion articulated a policy argument which advocated the efficiency of requiring objections.[80] However, the decision was primarily grounded upon a rule-based approach. Citing Criminal Rule 51(b), the court wrote that parties have a duty to object "[a]t a sentencing hearing, as at every other phase of a criminal proceeding."[81] The court reasoned that a pre-sentence argument on § 3553(a) factors is distinct from a post-sentence argument on how the court considered those factors. Under this view, it would actually be impossible for a party to "raise objections already made" after the sentence because, of course, only the sentence could trigger an objection to the sentence.[82] Thus, while the failure to make a sentencing order objection "did not undermine [the defendant's] right to appeal issues he had 'previously raised,' it did undermine his right to challenge the adequacy of the court's explanation for the sentence."[83]

The *Vonner* court noted that "the district court's job is to impose a sentence 'sufficient, but not greater than necessary' to comply with the § 3553(a) factors, not to impose a 'reasonable' sentence."[84] After all, Criminal Rule 51(b) does not require a party to register a complaint that the proposed sentence is "unreasonable"—the appellate standard of review. However, this "does not excuse counsel from the obligation to raise all arguments concerning the appropriate procedures at sentencing and the bases for a lower or higher sentence."[85] Thus, a party *does* have to object on the grounds of

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78. *Id.*

79. 516 F.3d 382, 390 (6th Cir. 2008). Although the majority opinion failed to clearly articulate that substantive reasonableness objections need not be preserved by an objection, Judge Clay's dissent noted the court "seems" to apply the rule only to procedural challenges. *Id.* at 398 (Clay, J., dissenting). Citing *Vonner*, the Sixth Circuit later confirmed Judge Clay's interpretation. United States v. Houston, 529 F.3d 743, 755 (6th Cir. 2008); United States v. Penson, 526 F.3d 331, 337 (6th Cir. 2008).

80. *Vonner*, 516 F.3d at 390 (rule "gives counsel a chance to ask the sentencing judge for clarifications about the proposed sentence it just announced").

81. *Id.* at 385.

82. *Id.* at 390.

83. *Id.* at 386 (quoting United States v. Bostic, 371 F.3d 865, 872–73 (6th Cir. 2004)).

84. *Id.* at 391 (quoting United States v. Booker, 543 U.S. 220, 264 (2005)).

85. *Id.*

procedural reasonableness. In his *Vonner* dissent, Judge Clay resolved the apparent disparity—that a party need not object to reasonableness but must object to the procedural errors in the sentencing order—by asserting that the majority failed to recognize that procedural and substantive reasonableness are two aspects of overall reasonableness which appellate courts review on appeal.[86] Under Judge Clay's view, these two aspects may be separately considered but not divided entirely, making an objection requirement to only one form of reasonableness a misapplication of the doctrine.[87]

The legal circumstances surrounding *Vonner* were different from similar cases in other circuits due to the Sixth Circuit's particular sentencing hearing requirements stemming from its holding in *United States v. Bostic*.[88] Under the so-called "*Bostic* Question,"[89] district courts within the circuit are required, after announcing the sentence, to "ask the parties whether they have any objections to the sentence . . . that have not been previously raised."[90] This policy "gives counsel a chance to ask the sentencing judge for clarifications about the proposed sentence it just announced."[91] Further, the policy enables the court to avoid the escape clause in Criminal Rule 51(b) that a party may not be prejudiced for failing to object if the party "does not have an opportunity to object." The Sixth Circuit's distinction between pre- and post-sentence objections is thus more concrete—and traps for the unwary are perhaps ameliorated—because district court judges provide a warning that an objection may be appropriate.[92] However, *Bostic* does not directly address the sentencing order objection requirement as discussed in this Note because the *Bostic* Question was created in response to a party who failed to present a § 3553(a) argument at any time during the sentencing hearing.[93] In *Vonner*, the party had argued for a lesser

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86. *Id.* at 398 (Clay, J., dissenting).

87. *Id.; see also* United States v. Simmons, 587 F.3d 348, 369 (6th Cir. 2009) (Clay, J., dissenting) (noting the close relationship of a substantive argument raised during the hearing to the procedural error of a district court failing to adequately discuss the argument).

88. 371 F.3d 865 (6th Cir. 2004). The Eleventh Circuit adopted a similar rule. United States v. Jones, 899 F.2d 1097, 1102 (11th Cir. 1990), *cert. denied*, 498 U.S. 906 (1990), *overruled on other grounds by* United States v. Morrill, 984 F.2d 1136, 1137 (11th Cir. 1993).

89. *Vonner*, 516 F.3d at 390 (referencing the "Bostic question").

90. United States v. Bostic, 371 F.3d 865, 872 (6th Cir. 2004).

91. *Vonner*, 516 F.3d at 390.

92. *Id.* at 386.

93. 371 F.3d at 870–72.

sentence during the hearing but simply did not object to the judge's sentencing order prior to the conclusion of the proceeding.[94]

D. Circuits Internally Divided on Sentencing Objection Rules

The sentencing order objection debate remains unsettled in the First and Eleventh Circuits. The First Circuit has conflicting opinions with little discussion on the matter,[95] although one decision, *United States v. Gallant*, provided an explanation for its opposition to the objection requirement.[96] In *Gallant*, the court offered a policy justification—the need for finality—noting that "few trial judges would warm to a rule which requires continued argument after the court gives its sentence."[97] That court also noted that, unlike many other procedural requirements, there is no Criminal Rule giving advance notice to counsel of an obligation to make sentencing order objections.[98] To the contrary, Criminal Rule 32 provides that the court should entertain argument from both defendant's counsel and the government "before imposing sentence."[99]

Eleventh Circuit decisions are divided into several unpublished opinions that either require sentencing order objections in order to avoid plain error review,[100] do not require sentencing order objections,[101] or consider the issue but expressly decline to establish a rule.[102]

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94. 516 F.3d at 384.

95. *Compare* United States v. Garrasteguy, 559 F.3d 34, 37 n.3 (1st Cir. 2009) (renewal of argument after sentencing not required), *and* United States v. Gibbons, 553 F.3d 40, 46 n.3 (1st Cir. 2009) (citing United States v. Gallant, 306 F.3d 1181, 1188–89 (1st Cir. 2002)) (same), *with* United States v. Almenas, 553 F.3d 27, 36 (1st Cir. 2009) (plain error when defendant failed to object to court's explanation of sentence), *and* United States v. Gonzalez-Castillo, 562 F.3d 80, 82 (1st Cir. 2009) (plain error review when defendant failed to object to judge's unsupported statement during sentencing).

96. 306 F.3d at 1188–89.

97. *Id.*

98. *Id.* at 1189.

99. *Id.*

100. United States v. Simone, No. 09-10642, 2009 WL 2168944, at *1 (11th Cir. July 22, 2009) (per curiam) (objection required for procedural reasonableness); United States v. Hill, 308 F. App'x 440, 441 (11th Cir. 2009) (per curiam) (same); United States v. Palis, 305 F. App'x 558, 561 (11th Cir. 2008) (per curiam) (objection required for procedural and substantive reasonableness).

101. United States v. Aenlle, 327 F. App'x 152, 155 (11th Cir. 2009) (per curiam) ("[S]o as long as a party states its objection to the sentence at some point during the sentencing hearing, its failure to repeat the objection at the conclusion of the imposition of sentence will not result in a waiver of that objection."); United States v. Castellanos, No. 08-11418, 2009 WL 179616, at *1–2 (11th Cir. Jan. 27, 2009) (per curiam) (holding that an argument made before, but not after,

III. REJECTING THE SENTENCING ORDER OBJECTION REQUIREMENT

This Part presents five reasons why a party should not have to object to the manner in which a sentence is issued in order to appeal the reasonableness of that sentence. First, the requirement essentially brings back the "exception" rule, which was expressly abolished by the rules of procedure several decades ago. Second, the requirement directly conflicts with a policy determination made by Congress in amending a similar evidentiary rule, Evidence Rule 103. Third, the requirement is inconsistent with federal appellate policy, as indicated by the liberal provision for appeals as of right in Appellate Rule 3(a). Fourth, the requirement violates limits on the use of appellate supervisory powers over district courts. Finally, the sentencing order objection requirement is invalid and inefficient for both procedural reasonableness and substantive reasonableness concerns.

A. "Exception" to the Rule

The approach of requiring objections to a sentencing order is functionally a resurrection of a common law tradition formally abandoned long ago. Until 1944, objections alone were insufficient to preserve claims of error in criminal cases.[103] Lawyers were also required to preserve an issue in a "bill of exceptions" by promptly taking an "exception" to a ruling overruling the objection.[104] This was done by "remarking 'Exception,' 'Note my exception, please,' or other words to that effect, following an adverse ruling by the court."[105] The purpose of the bill of exceptions was to preserve the relevant portions

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the sentencing order is not subject to plain error review, although arguments never made during the sentencing hearing *are* subject to plain error review).

102. United States v. Blanco, 327 F. App'x 139, 148 n.10 (11th Cir. 2009) (per curiam) (declining to announce rule for procedural reasonableness); United States v. Long, No. 06-13332, 2008 WL 4997057, at *14 n.11 (11th Cir. Nov. 25, 2008) (per curiam) (same); United States v. Lake, 285 F. App'x 735, 736 n.2 (11th Cir. 2008) (per curiam) (declining to announce rule for substantive reasonableness); United States v. Moulton, No. 08-13895, 2009 WL 1587795, at *2 n.3 (11th Cir. June 9, 2009) (per curiam) (declining to announce rule for substantive or procedural reasonableness); United States v. Williams, No. 06-15962, 2007 WL 3118326, at *1 (11th Cir. Oct. 25, 2007) (per curiam) (same); *see also* United States v. Sotolongo, No. 09-10427, 2009 WL 2634027, at *2 n.2 (11th Cir. Aug. 28, 2009) (per curiam) (noting "in passing" that the circuit "ordinarily reviews objections to sentencing issues not raised in the district court for plain error" but that the defendant's argument failed under both reasonableness and plain error review).

103. *See* FED. R. CRIM. P. 51(a) (abolishing exception in criminal trials).

104. ALBERT H. PUTNEY, 10 POPULAR LAW LIBRARY § 133 (1908).

105. ROBERT E. KEETON, TRIAL TACTICS AND METHODS § 4.12, at 190–91 (2d ed. 1973).

of the trial in order to create a record for the appellate court to review.[106]

When verbatim transcripts became available for modern judicial proceedings, the formalistic "exception" requirement was no longer necessary for appellate courts to effectively review cases.[107] Accordingly, Congress abolished the "exception" requirement for civil cases in 1937 by approving Federal Rule of Civil Procedure 46, which states in present form: "A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."[108] Seven years later, Congress approved a similar provision in Criminal Rule 51(a): "Exceptions to rulings or orders of the court are unnecessary." Criminal Rule 51(b) mirrors the second sentence of the civil rule. The Advisory Committee Notes state: "This rule is practically identical [to the civil rule] . . . . It relates to a matter of trial practice which should be the same in civil and criminal cases."[109]

The abolishment of "exceptions" extends directly to other situations where requiring an objection would be redundant. In fact, even an *initial* objection may not be required once a party and the court have made their positions clear. Professors Wright, King, and Klein advise: "If the problem has been brought to the attention of the court, and the court has indicated in no uncertain terms what its views are, to require an objection would exalt form over substance."[110] The substance of the case, after all, ought to be the primary

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106. PUTNEY, *supra* note 104, § 134.

107. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 6.15, at 84 (2d ed. 2006). Recordings of all proceedings in federal court were first required by the Court Reporter Act of 1944. 28 U.S.C. § 753(b) (2006).

108. FED R. CIV. P. 46 advisory committee's note; *see also* Gunnar H. Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 MINN. L. REV. 672, 681 (1952) ("All that counsel needs to do during the trial is to make his objection to any ruling or order of the court, or to make known to the court the action that he desires the court to take and in all instances to state his grounds therefor."). Although exceptions are no longer required, attorneys sometimes continue the practice out of habit or to avoid "the appearance of acquiescence." KEETON, *supra* note 105, § 4.12, at 191.

109. FED R. CRIM. P. 51 advisory committee's note. In an early opinion addressing the new criminal procedural rule, a Pennsylvania district court remarked after overruling the defendant's motion that "exception has been noted at request of counsel, although in my opinion the same is unnecessary in view of the provisions of [Fed. R. Crim. P. 51]." United States v. Katz, 78 F. Supp 21, 24 n.1 (M.D. Penn. 1948).

110. 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 842 (3d ed. 2004); *accord* FED. R. CRIM. P. 51(a) (explaining that "[e]xceptions to rulings or orders of the court are unnecessary").

consideration for whether—and to what extent—a defendant should be punished.[111]

The Third, Seventh, and Ninth Circuits agreed that objections are unnecessary when a party's intent has already been made clear, quoting the above "form over substance" language and citing the criminal rule abolishing "exceptions" for support. The Third Circuit held that when "the district court clearly understood that [the defendant] was asserting these arguments . . . there was no need for [the defendant] to take the additional step of repackaging the government's statement as his own formal objection to preserve his right to appeal."[112] The Seventh Circuit held that "[b]ecause both [the defendant's] position and the trial judge's ruling were clear, [the defendant] preserved the issue sufficiently for review," despite not making an objection.[113] A defendant in the Ninth Circuit was not required to object after closing arguments on a matter that had already been raised and resolved before the trial.[114] Several other circuits have similarly held that a formal objection would constitute an "exception" when a party's position is already evident.[115] Courts have also applied the civil counterpart of the criminal "exception" rule to hold that formal objections are unnecessary under similar circumstances in civil cases.[116]

In *United States v. Ortiz*, the Seventh Circuit extended this rationale—that formal objections are unnecessary when a party's

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111. *See* 18 U.S.C. § 3553(a)(1) (2006) (stating that the first factor courts are directed to consider when imposing a sentence is "the nature and circumstances of the offense").

112. United States v. Melendez, 55 F.3d 130, 133 (3d Cir. 1995).

113. United States v. Pirovolos, 844 F.2d 415, 424 n.8 (7th Cir. 1988).

114. Evalt v. United States, 359 F.2d 534, 545 (9th Cir. 1966).

115. *See, e.g.*, United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10th Cir. 1993) ("[R]equiring the renewal of objections after a definitive ruling may be a needless provocation to the trial judge . . . ."); Gov't of Virgin Islands v. Joseph, 964 F.2d 1380, 1384–85 (3rd Cir. 1992) (holding that re-raising an issue resolved definitively before trial would constitute an exception); United States v. Morgan, 581 F.2d 933, 939 n.16 (D.C. Cir. 1978) (refusing to require further objection when "counsel made amply clear to the trial judge the action which he desired the court to take"); *see also* United States v. Flenoid, 415 F.3d 974, 976 (8th Cir. 2005) (holding that "a motion *in limine* is an objection" and need not be re-raised).

116. *See, e.g.*, Stone v. Morris, 546 F.2d 730, 736 (7th Cir. 1976) (holding that a formal objection to a ruling excluding the plaintiff from the trial of his claim was unnecessary when "the court and the other litigants know what action [the] party desires the court to take); United States v. Barndollar & Crosbie, Inc., 166 F.2d 793, 796 (10th Cir. 1948) (holding that, although a party must "make known to the court the action he desires taken," an objection was not necessary because "the complaint and the statement of counsel made early in the trial, left no room for oversight or doubt that the very essence of the action was to enforce a lien"); *accord* FED. R. CIV. P. 46; *cf.* McComb v. Goldblatt Bros., 166 F.2d 387, 389 (7th Cir. 1948) (holding that a party could not appeal a procedural issue to which he had not objected in the district court and had in fact "acquiesced in the procedure").

intent is clear—by expressly equating sentencing order objections with the obsolete "exception."[117] In *Ortiz*, the court held that the defendant's previous objection to the pre-sentence report and subsequent argument was sufficient to preserve the issue raised for appeal.[118] The fact that the defendant did not continue to object after the judge had ruled on the pre-sentence report did not constitute waiver.[119] The court determined that a decision to the contrary would effectively require a party to take an "exception," and "the clear language of Criminal Rule 51(a) states that there is no need to do so."[120] In *United States v. Paul*, the Seventh Circuit again dealt with the issue in a case in which the defendant did not object to the court's sentence and seemingly assented to it by remarking, "Okay."[121] Because he had previously argued against the sentence, however, the court held that the defendant had not forfeited his objection: "Once a court has conclusively ruled on a matter, it is unnecessary for counsel to repeat his objection in order to preserve it for appeal" because doing so would constitute an "exception."[122]

As the Seventh Circuit recognized, the sentencing order objection requirement is functionally identical to an "exception" because it imposes a procedural requirement in response to an adverse ruling in order to preserve an issue for appeal. The only difference is the purpose: sentencing order objections are intended to reduce error in the trial court, whereas the bill of exceptions was intended to assist appellate courts by providing a better record of the dispute. Because the bill of exceptions was a necessary evil in the days before verbatim recordings, common law courts found it reasonable to distribute the burden to both parties to conduct post-ruling actions. The sentencing order objection requirement, however, addresses only the singlehanded and avoidable mistakes of the trial judge, making it unfair to impose the same burden on a party as in the case of the

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117. 431 F.3d 1035, 1039 (7th Cir. 2005).

118. *Id.*

119. *Id.* at 1038.

120. *Id.* at 1039; *see also* United States v. Bartlett, 567 F.3d 901, 910 (7th Cir. 2009), *petition for cert. filed*, (U.S. Sept. 3, 2009) (No. 09–302) ("[T]he rules do not require a litigant to complain about a judicial choice after it has been made. Such a complaint is properly called, not an objection, but an exception.").

121. United States v. Paul, 542 F.3d 596, 599 (7th Cir. 2008).

122. *Id.* (citing FED. R. CRIM. P. 51(a) and United States v. Ortiz, 431 F.3d 1035, 1039 (7th Cir. 2005)); *cf.* United States v. Mancera-Perez, 505 F.3d 1054, 1058–59 (7th Cir. 2007) (holding that a defendant is not excused from objecting to substantive reasonableness when he fails to argue an issue at all before or during sentencing hearing and assents to the sentence).

"exception." It is the responsibility of the judge—not the parties—to ensure that the sentencing order is properly issued.[123]

By effectively constituting an "exception," the sentencing order objection requirement violates Criminal Rule 51(a). The requirement further contradicts Criminal Rule 51(b), which also governs preserving error for appeal, for two similar reasons. First, Rule 51(b) expressly allows a party to preserve an issue by "informing" the court of the action requested in some fashion, not simply by a formal objection. Just as courts consider a strict objection requirement to be "form over substance" when a party has already made its position clear during a trial, the same should be true at sentencing hearings.[124] Second, Rule 51(b) allows such notice to be provided when the order is "sought"—before the judge has ruled—instead of only after the court has issued the order.[125] The sentencing order objection requirement explicitly violates this principle by forcing a party to object after the judge has ruled instead of permitting the party to simply present its position during the argument portion of the hearing. Rule 51(b) is equally incompatible with the sentencing order objection requirement as an "exception" requirement.

B. Renewing the Objection to Renewing Objections

The controversy surrounding the sentencing order objection requirement is reminiscent of a similar problem regarding Evidence Rule 103. Before Congress intervened in 2000, the circuits were split as to whether evidentiary objections overruled in limine must be renewed when the evidence was actually offered at trial.[126] Equating renewal with the "exception," Congress modified Rule 103 to specify that, once the court has made a definitive ruling in limine, further argument is not required to preserve a claim of error. The Advisory Committee Notes describe a second objection as "more a formalism

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123. *See* United States v. Simmons, 587 F.3d 348, 371 (Clay, J., dissenting) ("It makes no sense, and is fundamentally unfair, to place the burden for creating an adequate record for appeal on criminal defendants rather than district court judges.").

124. *See* United States v. Melendez, 55 F.3d 130, 133 (3d Cir. 1995); United States v. Pirovolos, 844 F.2d 415, 424 n.8 (7th Cir. 1988); Evalt v. United States, 359 F.2d 534, 545 (9th Cir. 1966).

125. *See* United States v. Curry, 461 F.3d 452, 459 (4th Cir. 2006) (emphasizing the phrase "or sought" in FED. R. CRIM. P. 51(b) to explain why an issue may be preserved before the sentence is issued, thus making a sentencing order objection unnecessary).

126. *Compare* Collins v. Wayne Corp., 621 F.2d 777, 782 (5th Cir. 1980) (renewal required), *with* Rosenfeld v. Basquait, 78 F.3d 84, 89 (2d Cir. 1996) (renewal not required).

than a necessity" because such a renewal would constitute an "exception."[127]

Congress's decision to not require a renewed evidentiary objection suggests that Congress disfavors obligating redundant actions before the court. There is little functional difference between the renewals of arguments after a judge has ruled on a motion in limine and after a judge has issued a sentencing order. Accordingly, congressional intent supports those courts that have held that sentencing order objections are not required in order to preserve issues for appeals.

C. "Appeal As of Right" Gone Wrong

All jurisdictions establish rules for how cases arising therein may be appealed. The Federal Rules of Appellate Procedure, like the rest of the federal rules, are designed to minimize procedural hurdles so as to promote resolution of issues on their merits.[128] Keeping with this principle, a sentencing order objection requirement should be presumed to be disfavored absent further direction from Congress.

Appellate Rule 3(a), similar to the majority of states, requires only that a party file a timely notice of appeal to initiate the appellate process.[129] In contrast, some states require some additional form of post-judgment activity in order to obtain an appeal. The Tennessee state rule, for example, requires that issues appealed from jury trials must first have been raised in a motion for a new trial with the trial court.[130] The purpose of Tennessee's mandatory procedural rule is "so that the trial judge might be given an opportunity to consider or to

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127. FED. R. EVID. 103 advisory committee's note.

128. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 479 (2008) ("The 'liberal ethos' of the Federal Rules refers to the underlying policy toward which the rules as a whole incline: the facilitation of litigant access in the interest of reaching merits-based resolutions of cases." (citing Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986))).

129. *See* FED. R. APP. P. 3(a) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal."); *see also* 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3949.1 (4th ed. 2008) ("The filing of the notice of appeal with the district clerk and within the time allowed by Rule 4 is the critical requirement for appealing as of right from a district court judgment or order.").

130. TENN. R. APP. P. 3(e); *see also* State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial); Donald F. Paine, *10 Significant Differences Between State and Federal Civil Procedure*, 38 TENN. B.J. 27, 29 (2002) (stating that a motion for a new trial is optional in federal court but mandatory following a state jury verdict in order to appeal).

reconsider alleged errors"[131]—the very justification of federal circuit courts requiring sentencing order objections. Defendants in California who plead guilty must file a statement with the trial court presenting reasonable grounds for challenging the legality of the sentencing proceeding in order to appeal.[132] Nebraska requires the government to present any claimed errors to the trial court within twenty days of the final order in order to seek appellate review.[133] In Maine, the government must receive permission from the attorney general before appealing a criminal case.[134]

In contrast to states which mandate additional post-judgment activity in order to appeal, the Advisory Committee Notes to Appellate Rule 3(a) indicate a deliberate decision *not* to require any procedural actions to appeal other than merely providing notice to appeal.[135] First, the Notes specifically indicate that the rule "requir[es] nothing other than the filing of a notice of appeal."[136] Second, the Notes explain that Congress saw no need to specifically preclude any abolished common law procedures in the body of Appellate Rule 3(a)—including assignments of error—because they are "assumed to be sufficiently obsolete."[137] Even the lone step provided in Appellate Rule 3(a) is not always strictly enforced: courts have liberally construed the "notice of appeal" requirement so as not to prevent review "on the merits . . . on the basis of mere technicalities" so long as "an overriding intent to appeal may be reasonably inferred."[138]

Circuit courts may not make more stringent litigation requirements than provided by the federal rules. For example, the Supreme Court struck down the Fifth Circuit's "heightened pleading

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131. McCormic v. Smith, 659 S.W.2d 804, 806 (Tenn. 1983).

132. CAL. PENAL CODE § 1237.5 (West 2004); *cf.* FLA. STAT. ANN. § 924.06(3) (West 2001) (prohibiting direct appeal from a guilty plea absent an "express reservation").

133. State v. Baird, 472 N.W.2d 203, 204–05 (Neb. 1991); *accord* NEB. REV. STAT. § 29-2315.01 (2008).

134. ME. R. APP. P. 2(a)(4).

135. For a collection of sources discussing the weight that should be afforded to Advisory Committee Notes, see *Burns v. Boyden*, 133 P.3d 370, 377 n.6 (Utah 2006).

136. FED. R. APP. P. 3 advisory committee's note.

137. *Id.*

138. Jones v. Chaney & James Constr. Co., 399 F.2d 84, 86 (5th Cir. 1968) (internal quotation marks omitted); *see also* K.H. Outdoor, LLC v. City of Trussville, 465 F.3d 1256, 1260 (11th Cir. 2006) (liberally construing the rule to allow appeal "where it is clear that the overriding intent was effectively to appeal"); Shea v. Smith, 966 F.2d 127, 129 (3d Cir. 1992) (liberally construing the rule); *In re* TransAmerican Natural Gas Corp., 978 F.2d 1409, 1414 (5th Cir. 1992) (liberally construing the rule to allow appeal "if the intent to appeal a particular judgment can be fairly inferred, and if the appellee is not prejudiced or misled by the mistake" (quoting Friou v. Phillips Petroleum Co., 948 F.2d 972, 974 (5th Cir. 1991))).

standard" for civil claims because it exceeded the liberal "short and plain statement" requirement of Federal Rule of Civil Procedure 8(a)(2).[139] A stricter approach, the Court wrote, "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[140] The sentencing order objection requirement is even more problematic because it not only makes the process more difficult but also adds the entirely new burden of an affirmative responsibility to object.

Of course, whether a party receives an appeal as of right is a different issue than whether a party receives a favorable standard of review when appealing a sentence. However, the significance may be exactly the same. If a sentence is unreasonable but not plainly erroneous, the standard of review is just as dispositive as whether the appeal can proceed in the first place.[141] Although states desiring post-judgment actions to promote efficiency explicitly lay out the desired steps in statutes,[142] no clear guidance is provided in the federal rules to instruct attorneys whether they must object to a sentence at the end of the hearing.[143] The resulting ambiguity as to whether Criminal Rule 51(b) encompasses sentencing order objections should be resolved to reflect Congress's explicit statement on a nearly identical issue.

D. Supervisory Authoritarians

Federal appellate courts may promulgate their own local rules of procedure via their "supervisory authority" over district courts within the jurisdiction. This power may not be exercised when the rule is inconsistent with the law or the Constitution, regardless of how

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139. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

140. *Id.* The Supreme Court has also struck down judicially-created rules which violated statutes independent of rules of procedure. *See, e.g.*, Jones v. Brock, 549 U.S. 199, 216–17 (2007) (pleading of "exhaustion" for claims under the Prison Litigation Reform Act); Crawford-El v. Britton, 523 U.S. 574, 595–97 (1998) (proof of "improper motive" for certain constitutional claims); Gomez v. Toledo, 446 U.S. 635, 640 (1980) (allegation of bad faith when suing a public official whose position might entitle him to immunity if he acted in good faith).

141. For example, in *United States v. Houston*, 529 F.3d 743, 753–54 (6th Cir. 2008), the majority rejected a procedural reasonableness challenge to a sentence under a plain error standard while the dissent, applying reasonableness review, concluded the sentence should be vacated. *Id.* at 762 (Clay, J., dissenting).

142. *See supra* notes 130–134 and accompanying text.

143. United States v. Sepulveda-Contreras, 466 F.3d 166, 171 (1st Cir. 2006) ("[U]nlike other areas, there is no Federal Rule of Criminal Procedure giving advance notice to counsel of a requirement to make post-sentence objections." (quoting United States v. Gallant, 306 F.3d 1181, 1189 (1st Cir. 2002))).

strong any policy arguments in its favor may be.[144] For example, in *United States v. Payner*, the Supreme Court struck down the Sixth Circuit's exercise of its supervisory authority to suppress evidence illegally obtained from third parties.[145] The basis of this decision was that the Court had already established on constitutional grounds that exclusion was not merited under such circumstances.[146]

The Supreme Court upheld the use of supervisory authority to require a specific type of objection in *Thomas v. Arn*.[147] The Sixth Circuit had mandated that a party make a pointed objection in the district court to a magistrate's recommendation on pretrial matters in order to appeal.[148] Because Congress had established magistrates to assist district court judges with their increasing caseload by resolving many preliminary matters, the Court found that automatic de novo review over all matters already considered by the magistrate would eviscerate the purpose of having magistrates in the first place.[149]

The Sixth[150] and Eleventh[151] Circuits have legitimately asserted their supervisory powers in one area of the sentencing order objection context. These courts require district judges to ask the parties at the conclusion of the sentencing hearing whether they have any objections to the sentence which they have not previously raised ("the Question").[152] Just as in *Thomas*, the Question requirement is

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144. *See* Thomas v. Arn, 474 U.S. 140, 146, 148 (1985) ("Courts of appeals have supervisory powers that permit . . . the promulgation of procedural rules governing the management of litigation. . . . Even a sensible and efficient use of the supervisory power, however, is invalid if it conflicts with constitutional or statutory provisions. A contrary result would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." (internal quotation marks omitted)).

145. 447 U.S. 727, 735–36 (1980); *see also* United States v. Williams, 504 U.S. 36, 53 (1992) (striking down circuit court's supervisory authority over grand juries, in contradiction of constitutional "common law").

146. *Payner*, 447 U.S. at 735–36 (citing Rakas v. Illinois, 439 U.S. 128, 137 (1978); Alderman v. United States, 394 U.S. 165, 174–75 (1969)).

147. 474 U.S. at 141–42.

148. *Id.* at 144.

149. *Id.* at 151–53.

150. *See* United States v. Bostic, 371 F.3d 865, 872 (6th Cir. 2004) (announcing a "new procedural rule" in requiring district courts to ask parties upon conclusion of the sentencing hearing whether they have any objections to the sentence not previously made). *But see id.* at 877–78 (Ryan, J., concurring) (arguing that "the Question" was an invalid use of supervisory authority).

151. United States v. Jones, 899 F.2d 1097, 1102–03 (11th Cir. 1990), *cert. denied*, 498 U.S. 906 (1990), *overruled on other grounds by* United States v. Morrill, 984 F.2d 1136, 1137 (11th Cir. 1993). *But see id.* at 1103 (Edmondson, J., concurring) (arguing that the Question was an invalid use of supervisory authority).

152. *Cf.* United States v. Hardeman, 933 F.2d 278, 283 (5th Cir. 1991) (declining to adopt *Jones* "absent an explicit statutory command").

directly supported by statute: Criminal Rule 51(b) contemplates the possibility that a party will not have the chance to object to a ruling and provides that, in such a case, the failure to make an objection will not later prejudice that party.[153] When the Question is asked, the appellate court can be certain that a party did not lack the opportunity to object to an issue without the "difficulty of parsing a transcript."[154] Moreover, the Question does not create an extra hurdle for the parties but simply helps guarantee the rights the statute is designed to protect. The burden is on the trial judge—not the parties—to correctly follow the Question procedure.[155]

The sentencing order objection requirement imposed on the parties, however, exceeds the supervisory authority of appellate courts. Rather than promoting any statutory policies, the requirement actually violates Criminal Rule 51.[156] Courts may not disregard the limitation of the laws they are charged with enforcing regardless of how "sensible and efficient" the intended policy may be.[157] Further, the potential for prejudice to a party is great because a failure to follow the procedural requirements may result in forfeiture of significant appellate rights.[158]

E. Categorically Unreasonable

Like most circuit courts, this Note has referred to sentencing "reasonableness" generally without specifying which category—substantive or procedural—is specifically being considered. However, circuits should not be able to require objections to either form.

A sentencing order objection requirement for *substantive* reasonableness (that a sentence is too long or short) is the least likely to result in any remedial action by the trial judge and the most likely

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153. FED. R. CRIM. P. 51(b) ("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.").

154. *Bostic*, 371 F.3d at 872 n.6. Indeed, the reason the Sixth Circuit created the rule in *Bostic* was because the court had difficulty determining whether the prosecutor had a chance to present his arguments at sentencing. *See id.* at 870–72 (analyzing the prosecutor's statements to determine whether he had the opportunity to object).

155. *Id.* at 872 ("If the district court fails to provide the parties with this opportunity, they will not have forfeited their objections and thus will not be required to demonstrate plain error on appeal.").

156. *See supra* Part III.A (discussing the violation of FED. R. CRIM. P. 51(a)–(b)).

157. Thomas v. Arn, 474 U.S. 140, 148 (1985) (quoting United States v. Payner, 447 U.S. 727, 737 (1980)).

158. *See supra* Part I.C (discussing the distinction between plain error and reasonableness review); *supra* note 141 and accompanying text (explaining that the standard of review may be dispositive of an appeal's success).

to violate the rules of procedure. In terms of utility, "requiring the parties to restate their views after sentencing would be both redundant and futile."[159] To make a substantive objection is "essentially ask[ing] for reconsideration,"[160] but there is little reason for a judge to change her mind if a party has already presented all of his arguments before and during the sentencing hearing. As indicated by the title of this Note, an attorney would literally be forced to complain to the judge that the court's judgment is unreasonable. As for a circuit's ability to legitimately exercise its supervisory authority, district courts are directed to impose a sentence that is "sufficient, but not greater than necessary."[161] Yet the Supreme Court made clear in *Booker* and its progeny that *appellate courts* should "review sentencing decisions for unreasonableness."[162] Thus, asking a district court to review itself using the appellate standard turns the system on its head.

Moreover, it seems unfair and inappropriate to force attorneys to accuse a judge of using poor judgment in his or her own courtroom. As the First Circuit remarked, "[F]ew trial judges would warm to a rule which requires continued argument after the court gives its sentence."[163] It was for this reason that—shortly after the "exception" was abolished—U.S. District Court Judge Nordbye urged lawyers to be wary of "futile" complaints on rulings, even when the lawyer possesses "utter disagreement and sometimes . . . contempt of the court's lack of understanding."[164] Avoidance of such confrontation also justified Congress's decision to establish an automatic objection to a judge acting as a witness: an attorney should not be required to practice before a judge "likely to feel that his integrity had been attacked by the objector."[165] There is certainly a potential for a vigorous sentencing order objection to anger, or at least annoy, the judge.

Requiring *procedural* reasonableness objections (that a judge miscalculated or did not adequately explain the sentence) has at least

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159. United States v. Autery, 555 F.3d 864, 871 (9th Cir. 2009).

160. United States v. Wiley, 509 F.3d 474, 476–77 (8th Cir. 2007).

161. 18 U.S.C. § 3553(a) (2006).

162. United States v. Booker, 543 U.S. 220, 264 (2005); *see also* United States v. Vonner, 516 F.3d 382, 389 (6th Cir. 2008) (en banc) (stating that "reasonableness is the standard of *appellate* review"); United States v. Bras, 483 F.3d 103, 113 (D.C. Cir. 2007) (stating that "[r]easonableness . . . is the standard of *appellate* review").

163. United States v. Sepulveda-Contreras, 466 F.3d 166, 171 (1st Cir. 2006) (quoting United States v. Gallant, 306 F.3d 1181, 1188–89 (1st Cir. 2002)).

164. Nordbye, *supra* note 108, at 681.

165. FED. R. EVID. 605 advisory committee's note.

some merit. From a policy standpoint, there may well be occasions where this form of objection could actually make a positive contribution to judicial economy. For example, a party may notice that the judge has made a minor mistake and get the judge to correct it before the hearing is adjourned. A district judge is required by statute to provide "the reasons for its imposition of the particular sentence,"[166] meaning that a party may appeal a sentence because the judge failed to *explain* the factors resulting in the sentencing decision, not necessarily because the judge failed to actually contemplate the appropriate factors. For example, the dispute in *Vonner* arose because the judge merely said he had "considered" the appropriate § 3553(a) factors without specifically addressing them; even the majority opinion conceded that "[n]o one would call this explanation ideal."[167] By simply requesting that the district court provide the necessary explanation, a possible appeal and remand could be avoided in some cases.

However, although an objection to procedural reasonableness could promote judicial economy in a particular case, a rule requiring objections to sentencing orders could result in the opposite effect in the aggregate. By creating a new procedure for attorneys to follow, courts also create a new way in which attorneys can render ineffective assistance of counsel. The failure of a lawyer to object or raise an issue at sentencing may already allow a defendant to obtain a new sentencing hearing.[168] Where an objection to the sentencing order is also required, an attorney's neglect to do so may result in a court having to decide in a separate appeal whether "counsel's representation fell below an objective standard of reasonableness" and whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[169] Thus, reducing grounds for direct appeal may well produce more litigation on collateral review—hardly a net savings in judicial economy in the long run. The delay in sentence finality is an even greater concern to the defendant left in limbo as to whether his

166. 18 U.S.C. § 3553(c) (2006); *see also* Rita v. United States, 551 U.S. 338, 356 (2007) (stating that judges must "set forth their reasons" for imposing a sentence"); Gall v. United States, 552 U.S. 38, 50 (2007) (stating that judges must "adequately explain the chosen sentence").

167. United States v.Vonner, 516 F.3d 382, 386 (6th Cir. 2008) (en banc).

168. Tilcock v. Budge, 538 F.3d 1138, 1146 (9th Cir. 2008) (failing to protest non-qualifying convictions being used under a habitual criminal statute); United States v. Otero, 502 F.3d 331, 336 (3d Cir. 2007) (failing to object to an improper enhancement in the Presentence Report); United States v. Sims, 218 F. App'x 751, 753 (10th Cir. 2007) (same).

169. Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).

sentence will be lengthened or shortened. Moreover, a party should not be held responsible for ensuring that the judge follows his own statutory procedural duties in imposing a sentence.[170]

Requiring objections to only one form of reasonableness[171] may be problematic when there is overlap between procedural and substantive error. For example, the Sixth Circuit noted that "[a] challenge to a court's decision to impose a consecutive or a concurrent sentence is not easily classified as 'substantive' or 'procedural.' "[172] It is not obvious whether circuits with mixed requirements should mandate objections to such overlapping claimed errors. Although one court held that it would be "inappropriate and patently unfair" to apply the sentencing order objection requirement in this context,[173] another strongly suggested that it would do so.[174] Even if a circuit is willing to excuse the failure to object to error it finds to encompass both forms of reasonableness, a party would nonetheless be prejudiced if a court concludes that the claimed error is, in fact, purely procedural. In light of the lingering confusion and inconsistencies within circuits regarding reasonableness categories for certain kinds of error,[175] a mixed objection requirement is an even greater trap for the unwary than a requirement to object to all claimed error.

Ultimately, these pragmatic and policy considerations are secondary to binding statutes and rules already in place. Requiring a

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170. 18 U.S.C. § 3553(c) (2000) ("*The court* . . . shall state in open court the reasons for its imposition of the particular sentence . . . .") (emphasis added); s*ee also* United States v. Simmons, 587 F.3d 348, 371 (Clay, J., dissenting) ("It makes no sense, and is fundamentally unfair, to place the burden for creating an adequate record for appeal on criminal defendants rather than district court judges.").

171. *See supra* Part III.C (discussing circuits requiring objections to procedural, but not substantive, error).

172. United States v. Berry, 565 F.3d 332, 342 (6th Cir. 2009) ("This is so because an evaluation of the substantive reasonableness of a decision to impose a consecutive sentence depends heavily upon an evaluation of the procedural reasonableness."); *see also* United States v. Herrera-Zuniga, 571 F.3d 568, 579–80 (6th Cir. 2009) (noting "lingering confusion" about which form of reasonableness encompasses a challenge to the district court's rejection of the base offense level prescribed under the Guidelines); United States v. Friedman, 554 F.3d 1301, 1308 n.10 (noting that, although the district court's failure to explain a sentence ordinarily constitutes procedural error, "the undeniably sparse record in this case certainly bears on the question whether [defendant's] sentence is substantively reasonable").

173. *Herrera-Zuniga*, 571 F.3d at 580.

174. United States v. Sayad, 589 F.3d 1110, 1117 n.2 (10th Cir. 2009) (citing *id.*) ("This court need not decide whether similar leniency is appropriate in this case because the district court committed no procedural error. Nevertheless, when presented with a sentencing error that arguably overlaps both reasonableness categories, the better practice is certainly to contemporaneously object to that error.").

175. *Herrera-Zuniga*, 571 F.3d at 579–80.

party to functionally take "exception" to a judge's sentencing decision—even for procedural reasons—violates Criminal Rule 51(a).

IV. OBJECTIONS SHOULD NOT BE REQUIRED

Thus far, this Note has identified that the sentencing order objection requirement conflicts with the statutory language of several federal rules of procedure. Although Congress is free to amend these rules to mandate (or at least allow) the requirement, several policy rationales dictate that Congress should instead clarify that sentencing order objections are optional.

The sentencing order objection requirement has its advantages. Some errors can be remedied by the sentencing judge simply adding a few sentences to the ruling with a more complete explanation for the basis of the decision.[176] In such cases, an objection may result in the judge fixing the potential problem during the hearing with little cost.[177] However, requiring the objection can create a trap for unwary defendants. The resulting extra step in the sentencing process will become trivial and formulaic once attorneys develop the precautionary habit of objecting to each and every sentence as a matter of course.[178] The redundancy of a procedural objection which parrots previously raised arguments seems unproductive when "the court and the other litigants know what action [the] party desire[d] the court to take."[179]

Ultimately, the courts and Congress are left to balance the dangers and benefits of the sentencing order objection requirement. On one hand, the rule will result in some defendants and prosecutors inadvertently forfeiting the right to fully appeal a sentence. On the other hand, judicial economy will sometimes be promoted when judges are prodded by counsel to fix certain mistakes on their own, thus eliminating the need for appeal and remand. Considering that a mandatory rule is likely to give rise to more claims of ineffective

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176. 18 U.S.C. § 3553(c) (2006) (requiring the judge to state the reasons for imposing a particular sentence).

177. *See* United States v. Villafuerte, 502 F.3d 204, 208 (2d Cir. 2007) (noting that a sentencing order objection "alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties").

178. United States v. Castro-Juarez, 425 F.3d 430, 433–34 (7th Cir. 2005). In fact, such mechanical objections are occurring. When one attorney simply said, "Your Honor, I object just for the record for the procedural, substantive aspects," a divided Sixth Circuit panel held that objections require greater specificity in order to satisfy the goals of the requirement. United States v. Simmons, 587 F.3d 348, 358 (6th Cir. 2009). *But see id.* at 369 (Clay, J., dissenting) (arguing that the district court should have realized that the procedural objection pertained to the substantive arguments presented earlier during the hearing).

179. Stone v. Morris, 546 F.2d 730, 736 (7th Cir. 1976).

assistance of counsel, however, the judicial economy factor may actually weigh *against* the sentencing order objection requirement.

Abolishing the sentencing order objection requirement would not prevent correction of an easily remedied sentencing order in the trial court. Along with the losing party, the prevailing party also has the opportunity and the motivation to object to an inadequate sentencing order. *Both* parties "have the right to an explicit ruling and a statement of the grounds therefore."[180] It is simply good lawyering for "the winning party [to] protect[] a record for appeal [by] taking the necessary action to deprive the other side of a legal issue that might be asserted as grounds for reversal on appeal."[181] A party satisfied with a sentence—but unsatisfied with the procedure in which it was issued—may "preserve victory by seeing to it that the findings and conclusions are properly [issued] and support the judgment."[182] The successful party has strong incentive to protect the record: avoidance of the time and costs of an unnecessary appeal and the risk of the appellate court making an unfavorable change to the sentence.[183] Thus, a sentencing order objection requirement is not essential for achieving productive objections because they may always be volunteered by the other side. By splitting the burden to perfect the sentencing order equally between the judge, the prosecutor, and the defendant, judicial economy goals can still be achieved without risking punishment to an unwary party.

The Supreme Court has failed to show any interest in the sentencing order objection issue thus far, denying certiorari to en banc cases both requiring and not requiring sentencing order objections.[184] However, the divided circuits provide a compelling reason for the Court to intervene should Congress fail to do so. As Justice Scalia states, "[T]he main purpose of [the Supreme Court's] certiorari

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180. J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS, & ETHICS 184 (3d ed. 2002).

181. Ellis J. Horvitz, *Protecting Your Record on Appeal*, *in* THE LITIGATION MANUAL: A PRIMER FOR TRIAL LAWYERS 235, 235 (John G. Koeltl ed., 1983).

182. *Id.* at 237.

183. The First Circuit demonstrated this principal when vacating a sentence after neither party objected to a district judge's erroneous statement about the defendant during the sentencing order. United States v. González-Castillo, 562 F.3d 80, 82 n.2 (1st Cir. 2009) ("Notwithstanding the failure of González's attorney to raise the error, we note that the government also contributed to the error by failing to call the matter to the attention of the sentencing court.").

184. Vonner v. United States, 129 S.Ct. 68 (2008) (denying certiorari for en banc case requiring sentencing order objections); Grier v. United States, 128 S.Ct. 106 (2007) (denying certiorari for en banc case not requiring sentencing order objections).

jurisdiction [is] to eliminate circuit splits."[185] Although states should be allowed to experiment with different laws and procedures to find an optimal approach, federal courts should not.[186] To allow otherwise would permit "the moral equivalent of an equal protection violation"[187] in light of the single jurisdiction of the federal judiciary.

CONCLUSION

It is difficult to fault circuit courts for using their supervisory authority to promote judicial economy. A bright-line rule forcing a party to object at the conclusion of a sentencing hearing may well result in a preemptive strike against procedural error at the district court level before appellate resources are utilized. However, this gain is not worth the significant cost of sacrificing the rights of a party who is either unaware of the mandatory rule or does not immediately recognize a technical problem with the sentence in the heat of courtroom battle. Although some circuit judges may view the debate as a purely academic matter, the stakes could not be higher for the ever-increasing number of federal prisoners whose sentences are often measured in decades with no possibility of parole.[188]

The sentencing order objection requirement does not foster the interests of justice. More importantly, the objection requirement directly contradicts the policy behind several statutes and the plain language of the federal rules of procedure. Accordingly, Congress or the Supreme Court should act to resolve the circuit split by expressly establishing that, to preserve an issue for appeal, a party need only raise that issue once during the sentencing hearing.

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185. Nunez v. United States, 128 S.Ct. 2990, 2991 (2008) (Scalia, J., dissenting).

186. Aaron H. Caplan, *Malthus and the Court of Appeals: Another Former Clerk Looks at the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 957, 966 (1998). *But see* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 265 (2004) (deciding to "await further experience with [the disputed rule's] applications in the lower courts" before issuing exercising supervisory authority).

187. Caplan, *supra* note 186, at 966.

188. Of course, it is not just a defendant who may be harmed by the sentencing order objection requirement: the government may also wish to receive appellate review over the reasonableness of a sentence it considers too lenient. *See, e.g.*, United States v. Autery, 555 F.3d 864, 867 (9th Cir. 2009) (government appealing a sentence that was below the Guidelines range after not objecting in trial court); United States v. Curry, 461 F.3d 452, 459 (4th Cir. 2006) (same).

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