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The "Cowardly Counsel" Exception: Eliminating the Contemporaneous Objection Rule

I. INTRODUCTION

Consider the following scenario: A judge sentences a person who has been convicted of narcotics violations by a jury of their peers. The individual is an alien living in the United States. The judge, prior to sentencing, comments that he sentences many people who have alien status. The judge then refuses to give the person a downward departure from the sentencing guidelines as a result of this alien status. The judge, in explaining the reasoning for the sentence, states that the reason given for the sentence was to punish the individual but also to generally deter others from her native country from coming to the United States and pursuing the crimes committed by the individual. The judge then sentences the person within the four-year sentencing range for the type of crime committed. Defense counsel never objected at any time during sentencing and now wants to appeal, claiming plain error. Is this plain error? Will allowing an appeal for this type of error expand plain error too far? The court in *United States v. Leung*

did not think so when it held this exact fact pattern was plain error and allowed resentencing.[1]

The contemporaneous objection rule has an accepted purpose of making the other party, as well as the court, aware of objections at trial, where they can be more effectively ruled upon and judged on their merits.[2] This Comment seeks to elaborate on the true purpose of the contemporaneous objection rule as well as the plain error rule. Further, this Comment will address the expansion of the plain error rule beyond its intention, creating a new "cowardly counsel" exception.[3]

Part II of this Comment will explain background and history of the contemporaneous objection rule and the plain error rule. It will elaborate on the purpose of the contemporaneous objection rule, which is to bring up objections at trial where they can be dealt with more timely, and the purpose of the plain error rule, which is to prevent appeals on errors that could have been addressed more effectively at the trial court level.[4]

Part III of this Comment will explain the issue presented by *United States v. Leung*.[5] The issue seeks to explore whether cases like *Leung* create a new "cowardly counsel" exception to the contemporaneous objection rule and whether expansion of the plain error rule further allows attorneys a means of appealing without following procedures.[6]

Part IV will argue that (1) *Leung* expands the plain error rule too far,[7] (2) *Leung* stands in contrast to the way other courts have ruled on what constitutes plain error historically,[8] (3) the *Leung* decision should not have been reversed because it constitutes harmless error,[9] and (4) allowing exceptions like *Leung* will expand the plain error rule into a "cowardly counsel" exception.[10]

Finally, Part V of this Comment will present the conclusion that *Leung* unnecessarily expands the plain error exception to the contemporaneous

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1. United States v. Leung, 40 F.3d 577, 587 (2d Cir. 1994).
2. *See* United States v. Astling, 733 F.2d 1446, 1459 (11th Cir. 1984).
3. *See Leung*, 40 F.3d at 587.
4. United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972); *Astling*, 733 F.2d at 1459.
5. *Leung*, 40 F.3d at 587.
6. *Id.*; Kent Scheidegger, *The Cowardly Counsel Exception*, CRIME AND CONSEQUENCES (Dec. 23, 2010 11:17 AM), http://www.crimeandconsequences.com/crimblog/2010/12/the-cowardly-counsel-exception.html.
7. *Leung*, 40 F.3d 577.
8. *See id.*; United States v. Bowles, 574 F.2d 970 (8th Cir. 1978); United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990).
9. *Leung*, 40 F.3d 577; FED. R. CRIM. P. 52(a).
10. *Leung*, 40 F.3d at 580; Scheidegger, *supra* note 6.

objection rule beyond its intended purpose.[11] This expansion leads to an exception not implemented by the legislature or the Supreme Court.[12] This is an issue the Supreme Court should make a finite decision upon before the plain error rule is expanded beyond recognition.

II. BACKGROUND

A. THE CONTEMPORANEOUS OBJECTION RULE

"A party may preserve a claim of error by informing the court . . . of . . . the party's objection to the court's action."[13] Objecting to comments is a "condition precedent" to review these arguments on appeal.[14] Counsel must be given the opportunity to object at the trial level in order for this rule to be effective.[15] The purpose of the contemporaneous objection rule is to have parties object during trial, a time when the judge can more adequately rule on the issue.[16] Further, this rule helps effectuate judicial efficiency by preventing the delay of appeals when the issue could have been more effectively handled at the trial level.[17]

As a general rule, without a timely objection to a remark of the court at the trial level, the issue will not be preserved for appeal.[18] This is because the purpose of the appellate courts is to review errors in law caused by determinations made by the courts at the trial level.[19] However, there is an exception to this general rule: the plain error rule.[20]

B. THE PLAIN ERROR RULE

The plain error rule allows for an issue "that affects a substantial right," to be heard on appeal[21] even if the issue was not objected to at trial.[22] However, as codified, this rule merely restates common law set forth in *Wiborg v. United States*, and additional clarity is needed for its scope and

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11. *Leung*, 40 F.3d at 580.
12. *See* Scheidegger, *supra* note 6.
13. FED. R. CRIM. P. 51(b).
14. Edwards v. Patterson, 249 F. Supp. 311, 314 (D. Colo. 1965).
15. United States v. Mathis, 535 F.2d 1303, 1307 (D.C. Cir. 1976).
16. United States v. Astling, 733 F.2d 1446, 1460 (11th Cir. 1984).
17. United States v. Fix, 429 F.2d 619, 621 (9th Cir. 1970).
18. Singer v. United States, 380 U.S. 24, 38 (1965).
19. Smith v. United States, 265 F.2d 14, 18 (5th Cir. 1959).
20. FED. R. CRIM. P. 52(b).
21. *Id.*
22. *See* Wiborg v. United States, 163 U.S. 632, 658 (1896) (elaborating on the idea that "if a plain error was committed in a matter so absolutely vital to the defendants" the court could review it, despite a lack of objection).

application.[23] The essential hallmark of the plain error rule's application came in *United States v. Frady*, which pointed out that this plain error rule should be used as a means of balancing conflicting interests.[24] The interests to be balanced when considering a plain error rule exception are the interests in judicial efficiency, which ensure a fair trial "the first time around," and the interest in redressing obvious injustice.[25] In other words, in order for an error to be considered plain, it must "undermine the fundamental fairness of the trial and contribute to the miscarriage of justice."[26] This means that the appearance of justice is a factor to be considered in the context of the plain error rule, and the plain error rule is not to be applied exclusively to innocent people who have been convicted as a result of error.[27] The strength and volume of evidence against the defendant is a factor the appellate court considers when determining whether the error undermined the fundamental fairness of the trial.[28]

First, the claim of plain error on appeal must be viewed in the context of the entirety of the trial court record.[29] The Court in *United States v. Young* emphasized this point as essential because "each case necessarily turns on its own facts."[30] Second, there must exist an error in order to fall under the plain error rule.[31] *United States v. Olano* gave the example that someone who waives a right cannot turn around later and claim error because they knew their right and chose to waive it.[32] However, if a right that has not been waived is violated, despite a lack of assertion, that is error according to the Supreme Court.[33] Third, the said error must be plain.[34] In order to be plain, the error must be "'clear under the current law."[35] "When 'the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it.'"[36]

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23. *Id.*; Jeffrey L. Lowry, *Plain Error Rule—Clarifying Plain Error Analysis Under Rule 52(b) of the Federal Rules of Criminal Procedure*, 84 J. CRIM. L. & CRIMINOLOGY 1066, 1067 (1994).
24. United States v. Frady, 456 U.S. 152, 164 (1982).
25. *Id.* at 163.
26. United States v. Young, 470 U.S. 1, 17 (1985).
27. CHARLES ALAN WRIGHT ET AL., 3B FED. PRAC. AND PROC. CRIM. § 856 (3d ed. 2011).
28. *Young*, 470 U.S. at 16.
29. *Id.*
30. *Id.* (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 240 (1940)).
31. United States v. Olano, 507 U.S. 725, 733 (1993).
32. *Id.*
33. *Id.*
34. United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006).
35. *Id.* (citing United States v. Chau, 426 F.3d 1318, 1322 (11th Cir. 2005)).
36. *Id.* (citing *Chau*, 426 F.3d at 1322).

Fourth, the error must be clear under the current legal framework at the time of the trial.[37] This sub-rule relates back to the first point that the error must be considered in light of the full trial court record.[38] Finally, the error must affect substantial rights.[39] As the Court in *Young* pointed out, this usually means that the outcome would have been different had the objection been made and ruled on appropriately.[40] The defendant, raising the issue on appeal, has the burden of proving that this error was prejudicial.[41] The defendant must point out specific instances of prejudice in order to meet the burden of production that there was prejudice in fact in the judicial proceeding.[42] This is the point on which the outcome of most cases where the defendant claims plain error turns.[43]

Another important facet of the plain error rule is that it is not mandatory.[44] It was the intention of Congress and the practical application of the court that the plain error rule should be used "at the sound discretion" of the reviewing court.[45] Requiring courts to apply the plain error rule would go against the public policy in favor of ending litigation after all the issues have been tried.[46] This raises the question, when should the court exercise its discretion and apply the plain error rule? The Court in *Olano* clearly articulated that the plain error rule should be applied if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[47] This statement may seem unclear, but the court in *Olano* went on to explain that this does not mean the guilt or innocence of the defendant per se.[48] The plain error rule, on the whole, is a high standard and, as a result, is not the most desirable situation for appellate counsel to be in on review.[49]

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37. *Id.* at 1253.
38. *See* United States v. Young, 470 U.S. 1, 17 (1985).
39. *Id.*; FED. R. CRIM. P. 52(b); United States v. Olano, 507 U.S. 725, 735 (1993).
40. *Young*, 470 U.S. at 21.
41. *Id.*
42. *Id.*
43. CHARLES ALAN WRIGHT ET AL., 3B FED. PRAC. AND PROC. CRIM. § 856 (3rd ed. 2011).
44. *Olano*, 507 U.S. at 735.
45. *Id.* at 736.
46. United States v. Atkinson, 297 U.S. 157, 160 (1936).
47. *Olano*, 507 U.S. at 735 (citing *Atkinson*, 297 U.S. at 160).
48. *Id.* at 737.
49. Benjamin K. Raybin, *"Objection: Your honor Is Being Unreasonable!"—Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235, 244 (2010).

C. THE HARMLESS ERROR RULE

A harmless error is "[a]ny error, defect, irregularity, or variance that does not affect substantial rights."[50] The harmlessness of the error is determined on a case-by-case basis by reviewing the effect of the error made on the verdict by the jury.[51] Despite the fact that these errors are referred to as harmless, any error at the trial level should be avoided in order to preserve the integrity of the judicial process.[52]

Application of this rule is highly result-oriented, meaning the decision as to whether it was harmless error rests on the question: Did the error affect the defendant adversely?[53] The burden of proof rests on the government to prove that the error caused no harm to the defendant.[54] The "primary question is what effect the error had, or reasonably may have had, upon the jury's decision."[55] The main factor is the impact of the error on the jury.[56] If the error did not influence the jury, the error should be considered harmless by the appellate court.[57] To determine the impact on the jury, the reviewing court must consider two factors.[58] First, the reviewing court should consider what the error meant to the jury in light of the entire record of the trial.[59] Second, the reviewing court must consider the jury's reactions to this error, not compared to the judge's personal reaction to the error but compared to how others may react to this error at trial.[60] "The effect of an error is to be gauged by the 'probable impact of the (statements) on the minds of an average jury.'"[61] In order to find the error harmless, the court must determine, beyond a reasonable doubt, that the alleged error had no contribution to the determination of the defendant's guilt.[62]

If the judge determines that either (1) the error had no effect on the jury's decision or (2) the effect was only slight, then there is harmless error.[63] For example, it has been held that a judge's extraneous comments about

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50. FED. R. CRIM. P. 52(a).
51. United States v. Ong, 541 F.2d 331, 339 (2d Cir. 1976).
52. United States v. Bosch, 505 F.2d 78, 83 (5th Cir. 1974) (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *Atkinson*, 297 U.S. 157; United States v. Vaughn, 443 F.2d 92 (2d Cir. 1917)).
53. United States v. Dougherty, 473 F.2d 1113, 1128-29 (D.C. Cir. 1972).
54. Cox v. Florida, 966 So. 2d 337, 350 (2007).
55. United States v. Brown, 692 F.2d 345, 350 (5th Cir. 1982).
56. Kotteakos v. United States, 328 U.S. 750, 764 (1946).
57. United States v. Foster, 939 F.2d 445, 450 (7th Cir. 1991).
58. *Kotteakos*, 328 U.S. at 764.
59. *Id.*
60. *Id.*
61. United States v. Glasser, 443 F.2d 994, 1003 (2d Cir. 1971) (citing Harrington v. California, 395 U.S. 250, 254 (1964)).
62. United States v. Bishop, 492 F.2d 1361 (8th Cir. 1974).
63. *Kotteakos*, 328 U.S. at 765.

America's youth in general are harmless error and not so prejudicial as to be a grounds for appeal.[64] If this error is a departure from an accepted Constitutional norm or is specifically not allowed by Congress, the error is more than harmless.[65] Further, if the court cannot answer both of these questions without hesitation, the error had to have affected rights substantial enough to permit reversible error.[66]

D. *UNITED STATES V. LEUNG*

In *United States v. Leung*, the defendant was a Chinese alien living in the United States.[67] Leung was charged after an investigation by the Drug Enforcement Administration (DEA).[68] A former co-conspirator began cooperating with the DEA after being charged for narcotics violations connected to the distribution of heroin.[69] Leung owned a Taoist temple in Manhattan when the DEA implemented their sting.[70] After a two-week long jury trial, Leung was convicted of the narcotics charges.[71] It is from statements made at this trial that this Comment stems.[72]

Leung brought five different grounds for appeal: (1) the post-indictment grand jury subpoenas, (2) the in camera review of the impeachment materials related to Leung's co-defendant, (3) the omitted portions of the telephone transcripts in the jury room, (4) the sufficiency of the evidence, and (5) the sentencing.[73] In regards to Leung's sentencing, the defendant alleged that comments made by the judge at sentencing appeared to mean that Leung's ethnic origin was somehow a factor in the length of the sentence imposed.[74]

At this point in Leung's trial, the jury had already determined Leung's guilt, and the judge was sentencing Leung.[75] The judge, addressing Leung's request for a downward departure from the sentencing guidelines and before actually administering a sentence, stated:

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64. United States v. Perchalla, 407 F.2d 821, 822 (4th Cir. 1969).
65. *Kotteakos*, 328 U.S. at 765 (1946) (citing Bruno v. United States 308 U.S. 287, 294 (1939)).
66. *Id.* at 766.
67. United States v. Leung, 40 F.3d 577, 585 (2d Cir. 1994).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *See Leung*, 40 F.3d at 585.
73. *Id.*
74. *Id.*
75. *Id.*

> Indeed frequently when I sentence folks who are not American citizens—she is a Canadian citizen who comes from mainland China—frequently when I sentence non-American citizens I make the observation which may to [sic] seem cynical but it is not intended to be cynical, it is intended to be factual: We have enough home-grown criminals in the United States without importing them. And I don't see this as a case if [sic] for downward departure in any manner, shape or form. And I decline to downwardly depart.[76]

After sentencing Leung, the judge explained why he chose the sentence term he had by stating:

> The purpose of my sentence here is to punish the defendant and to generally deter others, particularly others in the Asiatic community because this case received a certain amount of publicity in the Asiatic community, and I want the word to go out from this courtroom that we don't permit dealing in heroin and it is against president [sic] law, it is against the customs of the United States, and if people want to come to the United States they had better abide by our laws. That's the reason for the sentence, punishment and general deterrence.[77]

The sentence imposed by the judge was within the four-year range allowed under the sentencing statute.[78]

Leung contended, on appeal, that these statements by the judge showed evidence of an ethnic bias at sentencing and were grounds for reversible error.[79] The government, in response to Leung's appeal, argued that Leung forfeited her right to an appeal by failing to object at the time the comments were made at trial.[80] The government also argued that the purpose of the judge, to deter people from other countries from coming to the United States to deal in narcotics, was appropriate, and the comments were appropriate as a result.[81]

The court reasoned that many times in the history of the legal system, the court has allowed defendants to raise appeals on issues they could not

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76. *Id.* at 585.
77. *Leung*, 40 F.3d at 585.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* (citing United States v. Malik, 680 F.2d 1162, 1166 (7th Cir. 1982)).

have reasonably been expected to contemporaneously object to at trial.[82] The court reasoned that the judge, despite harboring no bias toward Leung, should not have mentioned ethnicity when selecting the sentence as a means to deter others and stated that ethnicity is not a legitimate consideration.[83] The court also stated that the consideration of Leung's race could "play no adverse role in the administration of justice."[84]

The court further elaborated that even the appearance that a sentence could have been racially motivated is ground for resentencing.[85] The court used a "reasonable observer" standard in determining whether the remarks made by the judge could be inferred, however incorrectly, to mean that the judge considered Leung's race at sentencing.[86] The court stated that these comments by the judge "differ from mere passing references" to Leung's immigration status or nationality.[87]

The court in *Leung* at no point during the appeal doubted that the trial judge harbored no bias toward Leung and even stated that the judge could fairly sentence Leung on remand.[88] However, the court concluded that the "appearance of justice" would be better if Leung was resentenced by a different judge.[89] Overall, the court emphasized the appearance of injustice in the trial and deemphasized the actual justice that was handed down by the trial judge to the convicted Leung.[90]

E. *UNITED STATES V. RODRIGUEZ*

In *United States v. Rodriguez*, the defendant was a Cuban refugee living in the United States as a legal resident.[91] Rodriguez and her partner developed a scheme to defraud Medicare by buying existing medical equipment companies and submitting fraudulent claims to Medicare.[92] The defendant and her partner then began a phony check cashing scheme as a means of using the money from the Medicare checks for Rodriguez's personal use.[93] As the scheme progressed, one of the stand-in owners Rodri-

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82. *Leung*, 40 F.3d at 586 (citing United States v. Jacobson, 15 F.3d 19, 23 (2d Cir. 1994); United States v. Alba, 933 F.2d 1117, 1120 (2d Cir. 1991)).
83. *Id.* at 587.
84. *Id.* (citing United States v. Edwardo-Franco, 855 F.2d 1002, 1005-06 (2d Cir. 1989); United States v. Borrero-Isaza, 887 F.2d 1349, 1355-56 (9th Cir. 1989)).
85. *Id.*
86. *Leung*, 40 F.3d at 587.
87. *Id.*
88. *Id.*
89. *Id.*
90. *See id.*
91. United States v. Rodriguez, 627 F.3d 1372, 1374 (11th Cir. 2010).
92. *Id.* at 1375.
93. *Id.*

guez used to mask her true ownership of the medical supply companies began cooperating with the police.[94] Rodriguez attempted to bribe the informant to lie to the grand jury, but the informant testified and Rodriguez was indicted on ten counts.[95]

Rodriguez accepted a plea agreement, and at sentencing, the government requested a forty percent reduction in sentence in accordance with the plea agreement.[96] The government emphasized Rodriguez's cooperation with the government in connection with the plea but also pointed out the severity of her crime.[97] Prior to sentencing Rodriguez, the judge stated:

> All right. This is really a disturbing case. She comes to this country as a Cuban refugee seeking freedom from the [C]ommunist rule and the first thing she does is she rips off the Government for $19 million on a program that's designed to help people who have physical disabilities, and to me that's shocking. That's shocking.[98]

The judge then commented on the "generous[ness]" of the government's proposed sentence for Rodriguez.[99] However, the judge ultimately sentenced Rodriguez to the requested amount, within the terms of the plea agreement.[100] Following the sentencing, the judge asked, "[n]ow that sentence has been imposed, does the defendant or her counsel object to the Court's findings of fact or the manner in which the sentence was pronounced?"[101] Neither Rodriguez nor her attorney objected.[102]

On appeal, Rodriguez argued that, pursuant to *United States v. Leung*, the court should reverse her sentence as a result of the appearance of bias in the judge's sentencing.[103] However, the government argued that the proper means of review was the stringent standard of the plain error rule.[104]

The court flatly stated that the law is well settled that if the defendant fails to move for recusal of a judge on the grounds of bias, the appellate court should review using the plain error standard.[105] The court reasoned

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94. *Id.*
95. *Id.*
96. *Rodriguez*, 627 F.3d at 1376.
97. *Id.*
98. *Id.* (alteration in original).
99. *Id.*
100. *Id.*
101. *Rodriguez*, 627 F.3d at 1376.
102. *Id.*
103. *Id.* (citing United States v. Leung, 40 F.3d 577 (2d Cir. 1994); United States v. Kaba, 480 F.3d 152 (2d Cir. 2007)).
104. *Id.*
105. *Id.* at 1379 (citing United States v. Berger, 375 F.3d 1223, 1227 (11th Cir. 2004)).

that to allow objections where there is only the appearance of bias and no actual bias existed would be inconsistent with the existing rule of law.[106] The court further explained that to allow this type of exception to the contemporaneous objection rule would go against its intention completely.[107] The court emphasized the objectives of deterring "sandbagging" of issues for the appeal, promoting the finality of criminal trials, and development of a full and comprehensive record at trial.[108]

The court emphasized that allowing counsel to not object at trial and bring the issue up for the first time on appeal allows for counsel to "keep the issue in her pocket" with the potential for a resentence on appeal.[109] The court also pointed out that allowing counsel to forego objection does not allow the trial judge to clear up a potential issue at the trial level, tampering with judicial efficiency.[110] Finally, the court emphasized the point that to allow an attorney to not object at the trial level because they feel it would harm the client is demeaning to the judge and the judge's role in the courtroom.[111] The court concluded that, since Rodriguez failed to meet the standard of the plain error rule, there was no cause for reversal of the sentence.[112]

III. THE ISSUE

There are two essential issues this Comment seeks to address. The first is whether the holding in *Leung* constitutes an example of the correct application of the plain error standard of review or the harmless error standard of review.[113] Also, a result of the determination of that issue, whether the court correctly remanded the case to the trial court level for resentencing or whether that was unnecessary given the facts surrounding the judge's statements.[114]

As created in *Leung*, the second issue is whether this so-called "cowardly counsel" exception comports with the long-standing purpose and goals of the plain error rule.[115] The "cowardly counsel" exception means

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106. *Rodriguez*, 627 F.3d at 1379.
107. *Id.*
108. *Id.* (citing United States v. Pielago, 135 F.3d 703 (11th Cir. 1998); Wainwright v. Sykes, 433 U.S. 72 (1977); United States v. Sorondo, 845 F.2d 945 (11th Cir. 1988)).
109. *Id.*
110. *Id.*
111. *Rodriguez*, 627 F.3d at 1379.
112. *Id.*
113. United States v. Leung, 40 F.3d 577 (2d Cir. 1994).
114. *Id.* at 586-87.
115. *See id.*; *Rodriguez*, 627 F.3d 1372; United States v. Frady, 456 U.S. 152, 164 (1982).

that counsel does not have to contemporaneously object at sentencing.[116] This exception, if allowed, would permit counsel to not object at trial to statements by the judge that create the appearance of a racial bias, despite no actual bias being present.[117] The question this Comment seeks to determine is whether this exception would completely undermine the established stringency of the plain error rule.

IV. ARGUMENTS

A. UNNECESSARILY EXPANDS THE PLAIN ERROR RULE

The plain error standard is very high as a result of the need to preserve the purposes of the contemporaneous objection rule.[118] Courts have consistently limited their application to "exceptional situations involving serious deficiencies which affect the fairness, integrity, or public reputation of the judicial proceedings."[119] The purpose for this stringent standard and limited application is to promote judicial efficiency and prevent counsel from preserving issues for appeal that could have been easily remedied at trial.[120] The overall outcome is that a plain error standard of review is undesirable for appeals purposes because it is such a difficult burden to overcome.[121]

Unlike this stringent standard, the "cowardly counsel" exception allows for counsel to fail to contemporaneously object at sentencing.[122] This exception allows counsel to appeal from a ruling that shows the appearance of racial bias without actually establishing any injustice to the defendant predicated on the alleged racial bias.[123] This means it does not comport with the plain error rule's requirement of a specific showing of prejudice.[124] Further, it does not require any showing of actual racial bias, only that a reasonable person hearing the statements could impute racial bias on the court.[125] Again, deviating from the specific and particular instances of prejudice the plain error rule seems to demand to be effective.[126]

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116. *Rodriguez*, 627 F.3d at 1377.
117. *Id.*
118. Raybin, *supra* note 49, at 242-43.
119. United States v. Jacquillon, 469 F.2d 380, 386 (5th Cir. 1972) (citing United States v. Socony-Vacuum, 310 U.S. 150 (1940)).
120. *Id.* (citing Bearden v. United States, 403 F.2d 782 (5th Cir. 1968); Kyle v. United States, 402 F.2d 443 (5th Cir. 1968)).
121. Raybin, *supra* note 49, at 243.
122. *See* United States v. Leung, 40 F.3d 577 (2d Cir. 1994).
123. *See id.*; United States v. Rodriguez, 627 F.3d 1372 (11th Cir. 2010).
124. United States v. Olano, 507 U.S. 725, 735 (1993).
125. *See Leung*, 40 F.3d at 586-87; *see also Rodriguez*, 627 F.3d at 1380-81.
126. *See Olano*, 507 U.S. at 735.

Although not all circuits recognize a requirement to object at sentencing, failing to do so subjects the defendant to a less deferential standard of review in order to encourage objections.[127] The "cowardly counsel" exception undermines this purpose.[128] The exception does not encourage objection at trial, it allows for counsel to skirt this requirement as long as the judge makes a passing reference to the defendant's race.[129] This exception's purpose is to allow for the appearance of justice to be untainted.[130] However, in achieving this purpose, it allows trial counsel to hide potential issues until appeal, undermining the need for the initial trial and making the appeal the main event in the case.[131]

This is contrary to the predominant underlying purpose of the plain error rule, which is to promote justice through judicial efficiency.[132] The "cowardly counsel" exception would allow appeals based on the appearance of an impropriety to the defendant without the showing of specific prejudice demanded by the plain error rule.[133] This means the "cowardly counsel" exception is not a high standard to meet, which would increase the volume of appeals drastically.

The "cowardly counsel" exception is overly expansive in its application. While, in theory, it is preventing injustice done to criminals on the basis of race,[134] in practice, it is merely creating a judicial inefficiency. Allowing appeals without a showing of actual injustice goes against one of the main tenets of the plain error rule and creates an expansion of it that the courts never intended.[135]

It can be argued, as it was in *Leung*, that any mention of race should be error plain enough to constitute a remand to the trial court for resentencing.[136] However, its application is too broad. Looking to the facts of *Leung*, the judge made the comment after the defendant had been sentenced and the sentence was within the range prescribed by the Federal Sentencing Guide-

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127. Raybin, *supra* note 49, at 243.

128. *See Rodriguez*, 627 F.3d at 1379.

129. *See Leung*, 40 F.3d 577.

130. *See id.* at 586-87 ("We think there is a sufficient risk that a reasonable observer, hearing or reading the quoted remarks, might infer, however incorrectly, that Leung's ethnicity and alien status played a role in determining her sentence.").

131. *See* United States v. Astling, 733 F.2d 1446, 1460 (11th Cir. 1984).

132. *See* United States v. Frady, 456 U.S. 152, 163 (1982) ("[The Plain Error Rule] was intended to afford a means for the prompt redress of miscarriages of justice.").

133. *See Leung*, 40 F.3d 577; United States v. Olano, 507 U.S. 725 (1993).

134. *See Leung*, 40 F.3d at 586 (stating that "even the appearance" of racial bias will be sufficient to warrant a resentencing).

135. *See Olano*, 507 U.S. at 732 (stating that the error must be "putative or real" in order to be reviewed by the appellate court).

136. *Leung*, 40 F.3d at 586-87.

lines.[137] Arguably, there was no error to the defendant; the only error was to the appearance of justice to bystanders. This is not the error the court and the legislature intended to correct with the plain error rule.[138] This is evidenced by the fact that the plain error rule requires specific instances of prejudice to be identified and the actual substantive rights of the defendant to be violated.[139] Further, this exception does not flow from the stream of logic the plain error rule stands for, which is to promote the purposes of the contemporaneous objection rule by requiring an extraordinary circumstance of injustice to have occurred.[140]

The plain error rule, like the contemporaneous objection rule itself, stands for the purpose that justice must be served, but the severity and finality of the trial must be maintained.[141] Whereas, the "cowardly counsel" exception arguably stands for the purpose that the appearance of justice is what must be defended, regardless of whether or not there is any actual harm to the defendant.[142] This need for an actual harm to the defendant is inherent in the application of the plain error rule as an exception to the contemporaneous objection rule and to remove this element is to go against the stringency the rule was intended to have.[143]

B. THE HOLDING IN *LEUNG* RUNS CONTRARY TO HOLDINGS IN OTHER CIRCUITS

The holding in *Leung*, stating it is grounds for rehearing if the judge mentions race absent a showing of any harm to the defendant, is unique to that case and seems to run contrary to other circuits.[144] For example, in *United States v. Doe*, the prosecutor solicited testimony regarding the effect of the Jamaican population on the drug trade.[145] The prosecution further solicited testimony from their witness that there was a general modus operandi for Jamaican drug dealers, lumping the defendant into that generalization.[146] Finally, the prosecutor frequently referred to "Jamaicans" during

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137. *Id.* at 585.

138. *See Olano*, 507 U.S. at 732 (stating that the error must be "putative or real" in order to be reviewed by the appellate court).

139. *Id.* at 734-35.

140. *See id.*

141. *See id.*

142. *Leung*, 40 F.3d at 586 (stating that "even the appearance" of racial bias will be sufficient to warrant a resentencing).

143. *See Olano*, 507 U.S. at 732 (stating that the error must be "putative or real" in order to be reviewed by the appellate court).

144. *Leung*, 40 F.3d at 586-87.

145. United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990).

146. *Id.*

his references to the defendant as well as statements that the "Jamaicans had 'taken over' the local drug traffic."[147]

> And what is happening in Washington, D.C. is that Jamaicans are coming in, they're taking over the retail sale of crack in Washington, D.C. It's a lucrative trade. The money, the crack, the cocaine that is coming into the city is being taken over by people just like this—just like this. They're moving in on the trade. They're going to make a lot of money on it . . . .[148]

The defense never objected to these statements by the prosecutor, nor did they object to the statements by the witness.[149]

Prior to its discussion of plain error, the court detailed that the mentioning of race crosses the line into error "when the argument shifts its emphasis from evidence to emotion."[150] Here, the court was referring to the fact that the prosecutor was lumping the defendants into a category of people that had recently received negative publicity in order to influence the jury.[151] The court went on to apply the plain error rule, noting it is essential when the jury may have given weight to these comments in their deliberations.[152] The court also noted that, while there was evidence against the defendants, it was not overwhelming, which added to the prospect that the jury considered the prosecutor's remarks in their deliberation process.[153] The court found that there was, in fact, an error that constituted plain error as a result of the remarks and the lack of overwhelming evidence.[154]

Doe stands in stark contrast to *Leung*. The racial comments made in *Leung* had no possible way of prejudicing the jury since the jury had finished deliberations and rendered a verdict at the time the comments were made.[155] Further, despite the fact that they were made at the time of sentencing, the court in *Leung* made a specific finding that, in fact, the trial judge harbored no bias toward the defendant, and the defendant was sentenced within the prescribed statutory range.[156] Therefore, the comments of the judge could not have had any specific prejudicial effect on Leung. Fi-

147. *Id.* at 18.
148. *Id.* at 24 (alteration in original).
149. *Id.*
150. *Doe*, 903 F.2d at 25.
151. *Id.* at 24.
152. *Id.* at 28.
153. *Id.*
154. *Id.*
155. United States v. Leung, 40 F.3d 577, 585 (2d Cir. 1994).
156. *Id.* at 586.

nally, the evidence against Leung was overwhelming.[157] The DEA investigation against Leung spanned the better part of four years, and the execution of the DEA's search warrant turned up physical evidence and records of Leung's money laundering.[158]

Another example is from the Sixth Circuit in *United States v. Wilson*.[159] In *Wilson*, the prosecution struck the only African American juror from the pool of perspective jurors.[160] The court then conducted a *Batson* hearing in which the prosecutor articulated the legitimate reason the prospective juror was struck was that the juror had three family members that had served prison sentences for criminal convictions.[161] The defendant did not object to the way the *Batson* hearing was conducted, nor did he object to the prosecution's articulated reason for dismissing the prospective juror.[162]

On appeal, the defendant claimed it was plain error for the judge not to rule that the race-neutral reasoning proffered by the prosecution was a pretext for discrimination.[163] However, in reviewing the appeal, the court rested on the fact that there was no showing of racial bias on the part of the judge.[164] Ultimately, without more of a showing of actual racial prejudice, there was no harm that rose to the level of plain error.[165]

Again, this stands in contrast to the court's reasoning in *Leung*. In *Leung*, the court did not require any specific, objective showings of racism against the defendant.[166] In fact, the court only required that an outsider, looking in on the court's actions, could potentially impute a racist intent.[167] Further, the court in *Leung* specifically found that there was no racial bias harbored by the judge.[168] In both *Leung* and *Wilson*, there was no explicit showing of harm to the defendant, however, the outcomes are entirely the opposite.[169]

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157. *See id.* at 581.
158. *Id.*
159. United States v. Wilson, 11 Fed. App'x 474 (6th Cir. 2001).
160. *Id.* at 475.
161. *Id.* at 475-76.
162. *Id.*
163. *Id.*
164. *Wilson*, 11 Fed. App'x at 478 (stating that the court relied on an objective explanation for the strike and not a subjective judgment on the characteristics of the potential juror).
165. *Id.*
166. United States v. Leung, 40 F.3d 577, 586 (2d Cir. 1994).
167. *Id.*
168. *Id.*
169. *Id.*; *Wilson*, 11 Fed. App'x at 478.

Finally, the Eleventh Circuit in *United States v. Rodriguez* addressed this issue head on in a case with shockingly similar facts to *Leung*.[170] The facts of *Rodriguez* are laid out in Part II.E of this Comment. However, like in *Leung*, the judge made a comment mentioning the defendant's race prior to sentencing.[171] However, in *Rodriguez*, the court sentenced the defendant below the range prescribed by the offense level in the sentencing guidelines per the government's request.[172] The defense did not object to the remark nor the sentence imposed, even after the judge explicitly asked counsel.[173]

The court, articulating its reasoning for denying the application of the standard of plain error review, emphasized the fact that there was no actual harm to the defendant because the comments were made after the jury had determined the defendant's guilt and the defendant was sentenced within the allowable range.[174] The court explained that the mere appearance of bias has never been enough to satisfy the rule of law.[175] The court also pointed out what seemed to be implicit from the holdings in *Doe* and *Wilson*, that the plain error standard is intended to be strict and to broaden it promotes judicial inefficiency and detracts from the seriousness of the trial.[176]

This stark contrast in the way the court circumvented the stringency of the plain error rule in *Leung* shows that the holding violates the court's and the legislature's intent in creating it as an exception to the contemporaneous objection rule.[177] The fact that the court never found any actual harm to the defendant, no potential for there to even be harm to the defendant, and, in fact, found the opposite, goes against these circuits' legal analyses regarding what constitutes plain error.[178] The court in *Leung* created a new outlet for attorneys, a means around the stringency of the plain error rule anytime race is mentioned, even if there is no actual harm.[179] This violates an essential tenant of plain error as an exception to the requirement of contemporaneous objection, as evidenced in *Doe* and *Wilson*, and is not the way the other circuits interpret the meaning of plain error.[180]

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170. *Compare* United States v. Rodriguez, 627 F.3d 1372 (11th Cir. 2010), *with Leung*, 40 F.3d at 580-81.

171. *Rodriguez*, 627 F.3d at 1374; *see Leung*, 40 F.3d at 585.

172. *Rodriguez*, 627 F.3d at 1376.

173. *Id.*

174. *See id.*

175. *Id.* at 1379.

176. *Id.*

177. *See* United States v. Wilson, 11 Fed. App'x 474, 478 (6th Cir. 2001); *see also* United States v. Leung, 40 F.3d 577, 586-87 (2d Cir. 1994); United States v. Doe, 903 F.2d 16, 28 (D.C. Cir. 1990).

178. *Leung*, 40 F.3d at 586-87.

179. *See* id.

180. *See Doe*, 903 F.2d at 28; *see also Wilson*, 11 Fed. App'x at 478.

It could be argued that, despite the fact that the courts have not traditionally found this to be the way to interpret the plain error rule, it is proper to preserve the sanctity of the justice system.[181] This rule may assure people that are members of a traditionally marginalized group charged with crimes that "they need not fear that one of their number is being treated adversely because of his or her membership in that group . . . ."[182] Arguably, this safeguard against any appearance of racial impropriety is necessary in today's society where racial inadequacies in the judicial system are still widely accepted as a reality.[183] This method of automatically rehearing sentencing if there is any implication of racial impropriety would promote the elimination of racism in the courtroom and be a step forward for the equality of the criminal justice system.

While this argument seems legitimate and admirable on its face, there are some holes in its application. First, this exception applies when the issue of race is mentioned at sentencing.[184] This means it fails to eliminate the potential for racism from the body of people actually determining the guilt of the defendant, the jury. Also, while disparate sentences based on race are an issue, the major focus of racism in the criminal justice system is on the racial targeting by the police and the differences in treatment for similar drug offenses.[185] Further, the sentencing guidelines provide a range of sentences that the judge can choose from, drastically reducing the availability for the imputation of race into a sentence.[186] There is also a specific series of affirmative steps the judge must take in order to successfully deviate from this prescribed range, and failure to complete any of these steps satisfactorily gives a defendant an independent basis for appeal.[187]

Another issue with this argument's exterior is the fact that it goes against the intention of the plain error rule. The plain error rule is intended to correct actual errors that are harmful to the administration of justice and provided a tangible harm to the defendant.[188] However, the court in *Leung* did not require specific incidents of prejudice, rather a broad potential for prejudice.[189] Further, in order to promote judicial economy, the plain error

181. *See* United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007) (stating that it was the court's "apparent suggestion" that the sentence was related to the defendant's national origin that was sufficient to impute motive by the public).

182. *Id.* at 159.

183. *How Is the Criminal Justice System Racist?*, DEFENDING JUSTICE, http://www.defendingjustice.org/pdfs/factsheets/10-Fact%20Sheet%20-%20System%20as%20Racist.pdf (last updated May 2005) [hereinafter DEFENDING JUSTICE].

184. *See Leung*, 40 F.3d at 586-87; *see also Kaba*, 480 F.3d at 156.

185. DEFENDING JUSTICE, *supra* note 183.

186. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2004).

187. *See* Apprendi v. New Jersey, 530 U.S. 466, 491 (2000).

188. *See* Jeffrey L. Lowry, *supra* note 23, at 1067.

189. *See Leung*, 40 F.3d at 586.

standard is intentionally difficult to meet.[190] This is essential to preserving the integrity of the trial process and preserving the purposes of the contemporaneous objection rule.[191]

This exception at sentencing would open the appeals process to anyone, despite the fact that they were sentenced fairly, as long as the judge made an offhand comment regarding race.[192] This is not what the Supreme Court intended when they made the standard of plain error so difficult to achieve.[193] Since this invented "cowardly counsel" exception goes against the manifest weight of case law and the intent inferred by the framers of this standard, it cannot be said to be a natural and valuable extension of the plain error rule.

C. THE COURT IN *LEUNG* SHOULD HAVE APPLIED THE HARMLESS ERROR STANDARD

The factual basis laid out in *Leung* seems to lend itself more naturally to an analysis for harmless error than for plain error, as the court did.[194] The Supreme Court has recognized only one instance in which racial considerations cannot ever be harmless error: purely racial exclusions from a petit jury.[195] Despite that inquiry, our current standard of American jurisprudence has adopted a strong presumption in favor of harmless error and application of its analysis to findings at the trial level.[196] This means that in only a rare and exceptional few cases is anything but the harmless error standard applied.[197]

One of the determinations to make when distinguishing between when to apply the harmless error standard and when to apply the plain error standard is whether the errors are trial errors or structural errors.[198] "Structural defects are 'defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards.'"[199] These errors remove the fundamental fairness that a trial is intended to accord to a defendant and eliminate the reliable finding of guilt or innocence.[200]

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190. *See id.* at 586 n. 2.
191. *See* United States v. Astling, 733 F.2d 1446, 1460 (11th Cir. 1984).
192. *See Leung*, 40 F.3d at 586-87; *see also* United States v. Kaba, 480 F.3d 152, 156 (2d Cir. 2007).
193. *See* Jeffrey L. Lowry, *supra* note 23, at 1067.
194. *See Leung*, 40 F.3d at 584-85.
195. Rose v. Clark, 478 U.S. 570, 587 (1986) (Burger, J., concurring).
196. *Id.* at 588.
197. *See id.*
198. Arizona v. Fulminante, 499 U.S. 279, 290-91 (1991).
199. Lewis v. Pinchak, 348 F.3d 355, 357 (3d Cir. 2003) (quoting *Fulminante*, 499 U.S. at 309.).
200. *Lewis*, 348 F.3d at 357.

Structural errors can be said to be found in a small class of cases, like one in which one race is removed from the grand jury process.[201] Courts have found structural errors in cases where there is:

> (1) a total deprivation of the right to counsel; (2) lack of an impartial trial judge; (3) unlawful exclusion of grand jurors on the basis of race; (4) denial of the right to self-representation at trial; (5) denial of the right to a public trial; and (6) an erroneous reasonable doubt instruction to the jury.[202]

This contrasts to trial errors. "A trial error . . . is an 'error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.'"[203] Essentially, it is an error the jury can weigh in light of the other evidence presented at trial.[204] The natural trial process is said to correct these errors, rendering them predominantly harmless.[205]

Arguably, the facts in *Leung* lend themselves to neither of these determinations.[206] There was no structural error because there was no factual basis that falls into any of the six classes of cases described in *Lewis*.[207] There was also no error that removed the fundamental fairness of the trial because the trial was over at that point.[208] Further, there was no trial error. The alleged error occurred at sentencing, after the trial had already taken place.[209] Therefore, there was nothing for the jury to hear or weigh in comparison to the other evidence presented at the trial.[210]

What does this mean for the analysis of *Leung*? It means we need to look at the intent of the doctrine of harmless error to find out where this case should land. Harmless errors are traditionally those that did not "'ha[ve] substantial and injurious effect or influence in determining the jury's verdict.'"[211] Therefore, it can be gathered that a harmless error is an

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201. *Id.* (quoting Johnson v. United States, 520 U.S. 461, 468-69 (1997)).
202. *Id.* (quoting *Johnson*, 520 U.S. at 468-69).
203. *Id.* (quoting *Fulminante*, 499 U.S. at 307-08).
204. *See id.*
205. *See id.*; *Fulminante*, 499 U.S. at 309.
206. *See* United States v. Leung, 40 F.3d 577 (2d Cir. 1994).
207. *Lewis*, 348 F.3d at 357 (quoting *Johnson*, 520 U.S. at 468-69).
208. *Leung*, 40 F.3d 577.
209. *Id.* at 579-80.
210. *See Lewis*, 348 F.3d at 357 (citing Arizona v. Fulminante, 499 U.S. 279 (1991)).
211. Wilson v. Mitchell, 498 F.3d 491, 502 (6th Cir. 2007) (quoting Brecht v. Abrahamson, 507 U.S. 619, 627 (1993)).

error that causes no tangible harm to the defendant because it does not affect the verdict.[212]

This is the precise situation in *Leung*.[213] There could not have been tangible harm to Leung because the verdict had already been rendered at the time the racial comments were made.[214] Further, because the judge sentenced within the range prescribed by the guidelines, there was no tangible harm to Leung; he received the same sentence he would have received from a judge who chose not to make racial comments.[215] Finally, on appeal, the circuit court specifically found that the judge harbored no bias toward Leung.[216] Therefore, there could not have been a tangible harm created to Leung by something that did not exist. Hence, the standard of harmless error should have been applied by the appellate court on review, and the sentencing should not have been remanded back to the trial court.

It can be argued that this is plain error because the appearance of racial impropriety undermines the fundamental fairness of the trial, as mentioned in *Young*.[217] Further, racial comments like the ones made in *Leung* affect the "fairness, integrity [and] public reputation of judicial proceedings."[218] Therefore, there is strong theoretical support for the court to rule that this is plain error in fact. This is the same argument the court in *Leung* made by pointing out the reasonable person standard they used on review.[219]

However, this reasoning is flawed because the factual situation is missing other essential elements that constitute plain error. Namely, the error did not affect substantial rights.[220] The comments made by the judge did not affect Leung's liberty interests because he was given the sentence prescribed by the sentencing guidelines, given his crime.[221] The court never questioned the length of the sentence as interfering with Leung's liberty interests, and it was never an argument acknowledged in the appeal.[222]

It also did not affect Leung's right to a fair trial because, at the time the comments were made, his trial was over and the jury had already made their determination on guilt.[223] Further, there was no question of the correctness of the jury's verdict as a result of the overwhelming evidence

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212. *See Wilson*, 498 F.3d at 502 (citing *Brecht*, 507 U.S. 619).
213. *See Leung*, 40 F.3d 577.
214. *Id.*
215. *Id.*
216. *Id.*
217. United States v. Young, 470 U.S. 1, 17 (1985).
218. United States v. Olano, 507 U.S. 725, 736 (1993) (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)).
219. *Leung*, 40 F.3d at 586-87.
220. *Olano*, 507 U.S. at 735.
221. *Leung*, 40 F.3d at 585-86.
222. *Id.*
223. *Id.*

against Leung.[224] These comments, while inappropriate, did not affect any substantive right of Leung's and did not cause him any actual harm. Therefore, these comments are harmless error and should not have been grounds for reversal on appeal.

D. THE HOLDING IN *LEUNG* CREATES A "COWARDLY COUNSEL" EXCEPTION TO THE CONTEMPORANEOUS OBJECTION RULE

"[T]he role of an appellate judge should . . . be limited to a determination of whether the error influenced the jury, and hence contaminated the verdict . . . ."[225] The court in *Leung*, in explaining that the error occurred at sentencing, circumvented this analysis.[226] The comments could not have affected the determination of the jury because the jury had already made their determination of Leung's guilt.[227] This is not how the legislature intended the appellate courts to review for finding of plain error while maintaining the explicit purposes of the contemporaneous objection rule.[228]

The Supreme Court has shown, through prior holdings, that the plain error standard of review is high and there are specific factors that must be shown in order to warrant a finding of plain error.[229] The court in *Leung* only made vague references to the policy reasons for reversing the trial court's decisions and did not follow the structure of previous Supreme Court decisions.[230] In fact, the court never referenced either the plain error or harmless error standards in the opinion, despite granting an exception to the contemporaneous objection rule.[231] Therefore, since the court in *Leung* did not apply the standard used in plain error and did not apply the harmless error standard, there must be another exception to the contemporaneous objection rule the court applied. The court created the "cowardly counsel" exception.[232]

Under this new "cowardly counsel" exception to the contemporaneous objection rule, there is not obvious need for zealous representation of one's client.[233] It allows attorneys to idly and passively ignore a judge's com-

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224. *Id.*

225. Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1171 (1995).

226. *Leung*, 40 F.3d 577.

227. *See id.*

228. Edwards, *supra* note 225.

229. *See, e.g.*, United States v. Olano, 507 U.S. 725, 733 (1993); United States v. Young, 470 U.S. 1, 17 (1985); United States v. Atkinson, 297 U.S. 157, 160 (1936).

230. *Leung*, 40 F.3d 577; *Olano*, 507 U.S. at 733; *Young*, 470 U.S. at 17; *Atkinson*, 297 U.S. at 160.

231. *Leung*, 40 F.3d 577.

232. United States v. Rodriguez, 627 F.3d 1372 (11th Cir. 2010); Scheidegger, *supra* note 6.

233. *See Rodriguez*, 627 F.3d 1372.

ments, only to later use them as the entire basis for appeal.[234] It allows an attorney to sandbag a potential issue and later reveal it, blindsiding the opposing counsel.[235] Therefore, it also undermines the ability of opposing counsel to adequately represent their client, the state.

Further, it undermines the duty of trial counsel to zealously represent their client in order to prevent the necessity of an appeal. It does this by essentially rewarding counsel's fear of objection at the trial level. Allowing counsel to ignore these issues at the trial level and reveal them later at the appellate level gives the passive attorney a leg up on opposing counsel in the long run.

The "cowardly counsel" exception does not allow the trial court to correct potential errors at that level and forces the appellate court to rule on an incomplete trial record. By not allowing the trial court to correct issues and subsequently bringing them to light on appeal, the trial record is incomplete. Therefore, the appellate court will be unable to perform their primary function, which is to correct errors in law.[236] Again, the "cowardly counsel" exception undermines the need for a trial, making the appeal the real event and the trial a mere formality on the road to an ultimate decision.[237]

The "cowardly counsel" exception also essentially destroys the need for the contemporaneous objection rule. The purpose of the contemporaneous objection rule was to make the trial the primary place to adjudicate issues and to make all potential issues known to both parties so as to keep the trial process transparent.[238] Therefore, this "cowardly counsel" exception crafted by the Second Circuit circumvents the need for the contemporaneous objection rule, rendering it useless. It makes the appeal the real event, where all the issues from the trial process come into the light and are finally ruled upon based on an incomplete trial record. It undermines not only the trial process but the appeals process as well.

It can be argued that this is not an entirely new exception to the contemporaneous objection rule; it merely flows naturally out of the theory of the plain error rule.[239] The racial impropriety shown by the court in *Leung* is sufficient to warrant a showing of plain error because it calls into question the fair administration of justice the public expects from the judicial process.[240] Further, it affected Leung's substantive right to be free from

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234. *See id.*

235. *See id.*

236. Edwards, *supra* note 225, at 1171.

237. United States v. Olano, 507 U.S. 725, 735 (1993).

238. United States v. Astling, 733 F.2d 1446, 1460 (11th Cir. 1984); United States v. Fix, 429 F.2d 619, 621 (9th Cir. 1970).

239. *Olano*, 507 U.S. at 735 (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)); United States v. Young, 470 U.S. 1, 17 (1985).

240. *See Olano*, 507 U.S. at 735 (citing *Atkinson*, 297 U.S. at 160).

racial discrimination in the judicial process.[241] Therefore, this is actually a plain error analysis although it is not clearly articulated.[242]

However, as explained in *Rodriguez*, "appearance by itself is not enough to require resentencing."[243] There needs to be actual, tangible harm to the defendant, which was simply not present in *Leung*.[244] Further, the alleged plain error could not have been plain because it was based, not off of precedent of a law or the Supreme Court, but off of the Second Circuit's own reasoning.[245] Therefore, not only does the court not follow the highly structured analysis most courts use when applying the plain error standard, the case is actually void of any plain error that needs to be reviewed. Therefore, the court is creating its own, new exception: the "cowardly counsel" exception. Thus, the Second Circuit, in creating this exception, is undermining the purpose of the contemporaneous objection rule and the necessary stringency of the plain error standard of review on appeal.

V. CONCLUSION

The contemporaneous objection rule has valid and necessary purposes in the modern judicial process: judicial economy and the need for a ruling at the time the judge is in the best position to make the determination.[246] The plain error rule acts as a way of circumventing that requirement in extraordinary cases—when the trial counsel failed to object to something that caused the defendant such great harm that the appellate court needs to circumvent that barrier.[247] Although the plain error standard is high, this is necessary to preserve the purposes of the contemporaneous objection rule and to maintain the integrity of the judicial process.[248]

The plain error standard gives examples of when there is not enough of an issue for the appellate court to circumvent the purposes of the contemporaneous objection rule and hand down a new verdict.[249] Harmless errors, while frowned upon, did not cause damage to the defendant and,

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241. *See id.*

242. *See* United States v. Leung, 40 F.3d 577 (2d Cir. 1994).

243. United States v. Rodriguez, 627 F.3d 1372, 1381 (11th Cir. 2010).

244. *Olano*, 507 U.S. at 735; *Leung*, 40 F.3d 577.

245. United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006) (citing United States v. Chau, 426 F.3d 1318, 1322 (11th Cir. 2005) (quoting United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003))); *Leung*, 40 F.3d 577.

246. *See* United States v. Fix, 429 F.2d 619, 621 (9th Cir. 1970); United States v. Astling, 733 F.2d 1446, 1460 (11th Cir. 1984).

247. *See Olano*, 507 U.S. at 735 (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)).

248. Raybin, *supra* note 49, at 244.

249. United States v. Ong, 541 F.2d 331, 339 (2d Cir. 1976).

therefore, should not be the basis for the appellate court to reverse the trial court's determination.[250]

The "cowardly counsel" exception stands in contrast to both of these standards of review in that it does not promote the purposes of the contemporaneous objection rule. It allows the appellate court to review even the mere appearance that an impropriety has happened, without a showing of actual harm to the defendant.[251] This compromises judicial economy by opening the doors to appeals that would normally not have merit enough to warrant an appellate review.[252]

The "cowardly counsel" exception also allows counsel to sandbag an issue, saving it for revelation at the appellate level.[253] This makes the appellate process more difficult because it makes the trial record incomplete by not allowing the trial judge to rule on the objection.[254] It also inhibits opposing counsel's ability to advocate for their client and increases court costs for both parties.[255] Again, this undermines judicial economy. By taking the determination away from the trial judge, it allows appeals, that may not be necessary, to go forward as a result of counsel's failure to timely object.

Overall, this "cowardly counsel" exception runs in contrast to both the purposes of the contemporaneous objection rule and to the necessary stringency of the plain error standard. Therefore, this Comment suggests the Supreme Court take action to set precedent contrary to *Leung*. It is necessary to prevent this exception from taking root into our current American jurisprudence, as it will cause not only confusion for appellate courts but may continue to flourish into a new trial strategy. Overall, the consequences of allowing this "cowardly counsel" exception to take root outweigh any potential benefit. The exception is not correcting any actual error or correcting any actual harm to defendants. Therefore, it is not performing a valid function in the law and should not be allowed to continue to undermine the valuable purposes of the contemporaneous objection rule.

ELIZABETH A. GEORGE*

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250. *See id.*
251. *See* United States v. Rodriguez, 627 F.3d 1372 (11th Cir. 2010).
252. *See id.*
253. *Id.*
254. *Id.*
255. *See id.*

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