NEW YORK COUNCIL OF DEFENSE LAWYERS

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VIA FEDERAL EXPRESS AND EMAIL

The Honorable Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
1 Columbus Circle, N.E.
Washington, DC 20544

Re: Comment on Proposed Amendment to Rule 12 of the Federal Rules of Criminal Procedure, Published for Comment in May 2011

Dear Mr. McCabe and the Members of the Committee:

Please accept this submission on behalf of the New York Council of Defense Lawyers ("NYCDL") in partial support of and partial opposition to the proposed amendment to Rule 12. The NYCDL is a not-for-profit professional association of approximately 240 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York. The NYCDL offers the Committee the perspective of practitioners who regularly handle some of the most complex and significant criminal matters in the federal courts.

While the proposed amendments would bring valuable clarity to many facets of Rule 12, the NYCDL is concerned that several of the claims that Rule 12(b)(3) would require to be brought before trial—namely, claims alleging double jeopardy, the expiration of the statute of limitations, multiplicity, duplicity, and constitutional violations—should not be so restricted. In addition, we believe the application of the "cause and prejudice" standard to motions that are covered under Rule 12(b)(3) and presented for the first time at trial or on direct appeal is unduly harsh and prejudicial to defendants. Accordingly, we urge the Committee to make further changes to the proposed Rule before considering its adoption.

We have divided this submission into four principal sections: (1) a brief history of Rule 12, up to and including the proposed amendment; (2) a discussion of the proposed changes that we believe will help clarify the Rule; (3) a discussion of those motions that we believe should be permitted even once trial has commenced; (4) a discussion of the inclusion of the "cause and prejudice" standard of review in the proposed Rule.

A. Background

Rule 12 was adopted in 1944, as part of the original Federal Rules of Criminal Procedure. As originally formulated, the Rule contemplated two different categories of pretrial motions. First, the Rule provided that "[a]ny defense or objection which is capable of determination without the trial of the general issue *may* be raised before trial by motion." *See* 1A Charles Alan Wright & Andrew D. Leipold, Federal Practice and Procedure: Federal Rules of Criminal Procedure § 190 n.2 (4th ed. 2008) (setting out original language of Rule 12(b)(1)) (emphasis added).[1] Second, the Rule provided that defenses and objections based on defects either "in the institution of the prosecution" or "in the indictment or information" (other than that the indictment or information failed to demonstrate the court had jurisdiction over the offense or that it failed to charge an offense) could be raised "*only* by motion before trial." *Id.* (setting out original language of Rule 12(b)(2)) (emphasis added).[2] Failure to present any claim in this second category in a pretrial motion "constitute[d] a waiver thereof," unless the court granted relief from the waiver for "cause shown." *Id.*

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[1] According to the original Advisory Committee Notes, included in the category of defenses and objections that a defendant was permitted, but not required, to present before trial were "such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, [and] failure of indictment or information to state an offense." Fed. R. Crim. P. 12, Notes of Adv. Comm. on Rules—1944.

[2] According to the original Advisory Committee Notes, included in the category of defenses and objections required to be raised before trial were "[i]llegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, [and] defects in indictment or information other than lack of jurisdiction or failure to state an offense." Fed. R. Crim. P. 12, Notes of Adv. Comm. on Rules—1944.

According to one member of the original Advisory Committee on Criminal Rules, formulating this rule "gave the Committee more trouble than any other rule in the book." *Id.* § 190 (quoting the Honorable G. Aaron Youngquist). In requiring that certain defenses and objections be brought prior to trial, the Committee sought to achieve a difficult balance between, on the one hand, promoting judicial efficiency and deterring dilatory tactics, and, on the other, protecting the interest of the accused, grounded firmly in the Sixth Amendment of the United States Constitution, to present such defenses and objections for judicial consideration. In light of the strength and importance of the accused's interest, the Committee member was entirely correct in labeling the curtailment of the accused's ability to present such defenses and objections "a very drastic rule." *Id.*

Since 1944, Rule 12 has been amended several times to include additional motions in the category that *must* be made prior to trial, including motions to suppress evidence, to sever charges or defendants, or for discovery. *See id.* § 190 n.2 (describing amendments). While these requirements may be justified by the interest in expeditiously and efficiently resolving criminal matters, they impose further limitations on the ability of the accused to mount a defense by prohibiting the filing of such motions once trial has commenced.

The proposed amendment to Rule 12 continues in this vein. Following a proposal by the Department of Justice, the amendment would require criminal defendants to raise on pretrial motion the defense of failure to state an offense, which was previously available to defendants at any point during the trial, appeal, or on collateral attack. *See* Proposed Rule 12(b)(3). Under the proposed Rule 12(b)(3), only motions challenging the court's subject-matter jurisdiction would remain in the category of claims that a defendant may, but is not required to, bring before trial. Under the category of claims alleging either defects "in the institution of the prosecution" or "in the indictment or information" that a defendant *must* present before trial, the proposed Rule would add a non-exhaustive list of defenses, objections, and requests that, significantly, includes at least two defenses—double jeopardy and the expiration of the statute of limitations—that defendants originally were not required to present before trial. *See id.* Finally, the proposed amendment provides that appellate courts will review attempts to raise mandatory claims under Rule 12(b)(3) for the first time on appeal under the "cause and prejudice" standard. *See* Proposed Rule 12(c). At least some appellate decisions have applied the more permissive "plain error" standard to these motions.[3]

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[3] *See, e.g., United States v. Baker*, 538 F.3d 324, 328-29 (5th Cir. 2008); *United States v. Jones*, 530 F.3d 1292, 1297-98 & n.1 (10th Cir. 2008); *United States v. Saint Pierre*, 488 F.3d 76, 79 n.2 (1st Cir. 2007); *United States v. Young*, 350 F.3d 1302, 1305 (11th Cir. 2003); *United States v. Gore*, 154 F.3d 34, 41-42 (2d Cir. 1998); *United States v. Buchanon*, 72 F.3d 1217, 1226-27 (6th Cir. 1995); *United States v. Brown*, 16 F.3d 423, 427 (D.C. Cir. 1994); *see also* 1A Wright & Leipold § 193 (noting that some appellate courts apply plain error standard). As the Advisory Committee Report notes, however, other appellate decisions already apply the "cause and prejudice" standard or a combination of the "cause and prejudice" and "plain error" standards. *See* Criminal Rules Advisory Committee, May 2011 Report to Standing Committee 11, 36-42 & nn.11-13, 50-65 (rev. June 2011). Still other decisions find claims raised for the first time on appeal barred entirely, as discussed below. *See infra* note 7 and accompanying text.

In addition to imposing further restrictions on the accused's ability to present claims covered under Rule 12(b)(3), the proposed amendment would clarify several other aspects of Rule 12. For instance, while providing a non-exclusive list of defenses, objections, and requests that must be made in a pretrial motion under Rule 12(b)(3), the proposed amendment clarifies that the Rule's preclusive effect applies only to motions whose basis is "reasonably available" prior to trial.[4] *See id.* Further, the proposed amendment provides that untimely filing of such a motion generally may be excused if the party shows "cause and prejudice" for the untimely filing.[5] *See* Proposed Rule 12(c). Finally, the proposed amendment eschews the current language in Rule 12 that a party "waives" any untimely Rule 12(b)(3) motion in favor of language clarifying that appellate courts may review untimely claims where "cause and prejudice" are demonstrated. *See id.*

B. Proposed Changes Providing Valuable Clarification of Rule 12

We support several changes the Advisory Committee has proposed to clarify Rule 12. Chief among them is the clarification that only those claims covered under Rule 12(b)(3) whose basis "is then reasonably available" must be made before trial.[6] As the Advisory Committee notes, this language will help ensure that "a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(2)." Proposed Amendment, Adv. Comm. Note for Subdivision (b)(3); *cf.* 28 U.S.C. § 1867 (requiring claims to be raised promptly after they are "discovered or could have been discovered by the exercise of due diligence"). We are hopeful that the courts will follow the suggestion implicit in the recognition that only those claims *reasonably* available to defendants prior to trial must be brought via pretrial motion by giving some latitude to defense counsel presenting later-discovered defenses and objections at trial. Rather than engage in Monday-morning quarterbacking, the courts should be cognizant of the realities facing counsel in preparing for trial with all possible dispatch and in good faith.

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[4] As the Advisory Committee Report notes, although the current version of the Rule does not provide any explicit exception for motions whose basis is not available prior to trial, some decisions interpret Rule 12's preclusive effect as inapplicable to such motions, while other decisions treat unavailability as "good cause" that may excuse their otherwise untimely filing. *See* May 2011 Report to Standing Committee 26-27 & nn.36-37 (collecting cases).

[5] Under the proposed amendment, if the defense or objection is failure to state an offense or double jeopardy, the party must show prejudice only. *See* Proposed Rule 12(c).

[6] Similar language was included in the original version of Rule 12 but dropped out in subsequent amendments. *See* 1A Wright & Leipold § 190 n.2 (noting original rule required defendant to bring all "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment or information . . . by motion before trial. The motion shall include all such defenses and objections then available to the defendant.").

Similarly, while we believe that application of the "cause and prejudice" standard to untimely motions presented for the first time at trial or on direct appeal is unduly harsh and prejudicial to defendants, we nonetheless support the clarification in the proposed amendment that appellate courts may consider Rule 12(b)(3) claims presented for the first time on appeal. Many appellate decisions have held—relying on the language in the existing rule that a party "waives" any Rule 12(b)(3) motion that is untimely filed—that a failure to present such claims before trial presents an absolute bar to appellate review.[7] The proposed amendment—in our view, appropriately—eliminates the confusing reference to waiver and makes clear that appellate courts may indeed consider these claims.

C. Motions That Should Be Permitted Once Trial Has Begun

While we support the additional clarity the changes discussed above would bring to Rule 12, we are nonetheless concerned that Rule 12(b)(3) would require defendants to litigate claims alleging double jeopardy, the expiration of the statute of limitations, multiplicity, duplicity, and constitutional violations before trial.

i. Double Jeopardy and Statute of Limitations

As described above, the proposed Rule 12(b)(3) would add a non-exhaustive list of defenses, objections, and requests alleging either defects "in the institution of the prosecution" or "in the indictment or information" that a defendant must present before trial. According to the Advisory Committee, the proposed list includes "the common claims that courts have found to be included" under Rule 12(b)(3). *See* May 2011 Report to Standing Committee 25. Contrary to this assertion, however, we believe that the inclusion of at least two of the claims in the proposed list—double jeopardy and the expiration of the statute of limitations—may effect a substantive and unjustified change to criminal practice.

Under the original Rule 12, both of these claims were explicitly identified under the category of defenses and objections that a defendant *may*, but is not required to, bring before trial. *See* Fed. R. Crim. P. 12, Notes of Adv. Comm. on Rules—1944 (including in category of defenses and objections that a defendant is permitted, but not required, to present before trial, "such matters as *former jeopardy*, *former conviction*, *former*

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[7] *See, e.g.*, *United States v. Whorley*, 550 F.3d 326, 337 (4th Cir. 2008); *United States v. Oslund*, 453 F.3d 1048, 1057-58 (8th Cir. 2006); *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006); *Unites States v. Brooks*, 438 F.3d 1231, 1239-40 (10th Cir. 2006); *United States v. Hansen*, 434 F.3d 92, 104 (1st Cir. 2006); *United States v. Abboud*, 438 F.3d 554, 567-68 (6th Cir. 2006); *United States v. Hewlett*, 395 F.3d 458, 460-61 (D.C. Cir. 2005); *United States v. Chavez-Valencia*, 116 F.3d 127, 129-33 (5th Cir. 1997); *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994); *United States v. Ulloa*, 882 F.2d 41, 43 (2d Cir. 1989); *see also* 1A Wright & Leipold § 193 ("The effect of a waiver on the defendant's ability to have the issue reviewed on appeal is not entirely predictable. Some appellate courts will consider the waived claim . . . . Other courts have said that a waiver under Rule 12 will result in the claim not being considered at all.") (internal footnote omitted).

acquittal, statute of limitations, immunity, lack of jurisdiction, [and] failure of indictment or information to state an offense") (emphasis added); *see also United States v. Vonn*, 535 U.S. 55, 64 n.6 ("In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule . . . ."). Moreover, contrary to the Advisory Committee's assertion that courts have commonly required these claims to be presented before trial, numerous decisions indicate that claims alleging double jeopardy[8] or the expiration of the statute of limitations[9] may be presented even after trial has commenced (or are silent as to by what point in the trial proceedings such claims must be raised).

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[8] *See, e.g.*, *United States v. Chacko*, 169 F.3d 140, 145-46 (2d Cir. 1999) (relying on Advisory Committee notes in holding that double jeopardy objections are not required to be made before trial under Rule 12); *United States v. Jarvis*, 7 F.3d 404, 408-09 (4th Cir. 1993) (holding that defenses such as former jeopardy "must be raised at some time in the proceedings before the district court"); *United States v. Becker*, 892 F.2d 265, 267-68 (3d Cir. 1989) (noting that a defendant can raise a double jeopardy claim "before or during" trial); *McClain v. Brown*, 587 F.2d 389, 391 (8th Cir. 1978) (noting that former jeopardy must be affirmatively pleaded before trial court without specifying any restrictions on timing of motion); *United States v. Scott*, 464 F.2d 832, 833 (D.C. Cir. 1972) ("The constitutional immunity from double jeopardy is a personal right which, if not affirmatively pleaded by the defendant at the time of trial, will be regarded as waived."); *United States v. Buonomo*, 441 F.2d 922, 924 (7th Cir. 1971) ("Constitutional immunity from double jeopardy is a personal right which if not affirmatively pleaded at the time of trial will be regarded as waived."); *Grogan v. United States*, 394 F.2d 287, 289 (5th Cir. 1967) (holding that double jeopardy defense "should have been affirmatively raised at some point in the proceedings in the district court"); *Barker v. Ohio*, 328 F.2d 582, 584 (6th Cir. 1964) (noting that double jeopardy defense "can be and should be made at the trial, and if not so raised, it is waived"); *see also* 1A Wright & Leipold § 193 (noting that "courts often permit motions [in the category of defenses including former jeopardy] to be raised at the trial itself" and collecting supporting cases). *But see United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006) (requiring double jeopardy objections to be raised before trial).

[9] *See, e.g.*, *United States v. Craft*, 105 F.3d 1123, 1127 (6th Cir. 1997) ("The statute of limitations is an affirmative defense that may be waived . . . if not raised at or before trial."); *United States v. Ross*, 77 F.3d 1525, 1536-37 (7th Cir. 1996) (observing that Advisory Committee note to Rule 12 "explains that failure to raise a statute of limitations argument in a *pre*trial motion will not result in waiver"); *United States v. Arky*, 938 F.2d 579, 582 (5th Cir. 1991) ("We now hold that the defendant must affirmatively assert a limitations defense at trial to preserve it for appeal."); *United States v. DeTar*, 832 F.2d 1110, 1114 (9th Cir. 1987) (noting that statute of limitations is "an affirmative defense, which is waived in this circuit if it is not asserted before or at trial"); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) ("It is well settled that the statute of limitations is an affirmative defense which is waived unless raised at trial."); *United States v. Karlin*, 785 F.2d 90, 92 (3d Cir. 1986) ("We hold that in criminal cases the statute of limitations . . . is an affirmative defense that will be considered waived if not raised in the district court before or at trial."); *United States v. Walsh*, 700 F.2d 846, 855-56 (2d Cir. 1983) (holding that appellants could not bring statute of limitations claim for first time on appeal when, "while appellants could have asserted the defense for the first time at trial after pleading not guilty, they did not"); *United States v. Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982); *United States v. Wild*, 551 F.2d 418, 423-24 (D.C. Cir. 1977); *see also* 1A Wright & Leipold § 193 (noting that statute of limitations claims "may now be raised by a motion to dismiss, or may be raised at trial at the latest" and collecting supporting cases). *But see United States v. Ramirez*, 324 F.3d 1225, 1227-28 (11th Cir. 2003) (holding defendants waived statute of limitations defense by failing to raise claim before trial).

Aside from the apparently erroneous assertion that the inclusion of these claims reflects current practice, the Advisory Committee has offered no other justification for mandating that these claims be brought in a pretrial motion. Nor can we see any. As previously noted, the justification for requiring certain claims to be brought before trial is to promote judicial efficiency and deter dilatory tactics. However, given that a successful double jeopardy or statute of limitations claim will result in the dismissal of the charge with prejudice, it is almost always to the defendant's benefit to raise such a claim before trial begins, and so no further incentive is required. Indeed, it is difficult to envision a defense counsel intentionally waiting to raise such a defense, if it is clear on the face of the indictment. *See* 3 Wayne R. LaFave *et al.*, Criminal Procedure § 11.10(c) (3d ed. 2007) ("A possible strategic justification is more difficult to hypothesize . . . where counsel failed to raise a claim of apparent merit which would have resulted in dismissal of the charges with prejudice—such as double jeopardy . . . or the statute of limitations."); *cf. United States v. Regan*, 528 F.2d 1262, 1269 (2d Cir. 1975) ("[A] defendant would have to be foolish not to raise a known claim of former jeopardy that would be sufficient to secure dismissal of the entire proceeding . . . .").[10]

Even if a double jeopardy or statute of limitations claim is deferred until trial, once jeopardy has attached, the government suffers no prejudice from the late filing, as neither of these grounds could be cured by seeking a superseding indictment from the grand jury. Thus, to the extent the preclusive effect of Rule 12 is intended to deter dilatory tactics or "sandbagging" by the defense, this concern is inapplicable. Nor is the conservation of judicial resources well served by barring such claims when a successful claim would result in the immediate termination of the criminal proceedings.[11] In sum, given that defendants already have every incentive to bring meritorious claims before trial, and given the lack of prejudice to the government or drain on judicial resources caused by a later-filed claim, there seems no good reason to apply Rule 12's preclusive effect here.

In light of the manifest intention of the Rule's drafters that statute of limitations and double jeopardy claims not be required to be raised before trial, the considerable

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[10] Of course, defense counsel might chose to forego moving against an untimely count in order to secure a more advantageous plea deal on other charged counts. *See* Gabriel L. Chin, Double Jeopardy Violations as "Plain Error" Under Federal Rule of Criminal Procedure 52(b), 21 Pepp. L. Rev. 1161, 1176 n.92 (1994) (making this argument). In this situation, however, an otherwise valid claim presumably could be waived.

[11] Conversely, under the proposed amendment, judicial resources will have to be expended examining whether the grounds for a later-filed motion were reasonably available prior to trial. Although double jeopardy and statute of limitations motions will frequently be unavailable before trial—where, for example, there is a factual dispute as to whether a charged offense continued into the period of limitations—the government will have an incentive to oppose such motions, creating additional and unnecessary litigation. Moreover, by requiring defendants in such situations to demonstrate that the grounds for the motion were unavailable before trial, the proposed Rule appears to shift the burden of proof to defendants, who should not be required to show that the government, having brought an indictment and presumably aware of its burden with respect to the statute of limitations, will be unable to prove that the charges were brought on a timely basis.

jurisprudence indicating that such claims may be made even after trial commences, and the lack of apparent justification for altering the status quo, we strongly urge the Committee to reject this aspect of the proposed amendment. Double jeopardy and statute of limitations claims should not be required to be brought before trial under Rule 12, but rather should continue to be permitted after trial has commenced. If not raised at trial, such claims should be reviewed on appeal for plain error under Federal Rule of Criminal Procedure 52(b).

At the very least, if the Committee retains the proposed list of motions that must be brought before trial, the untimely presentation of a statute of limitations claim should be excusable upon a showing of prejudice only (as is the case under the proposed amendment for claims of double jeopardy and failure to state an offense), without requiring an accompanying showing of cause for the untimeliness. As described above, it is difficult to imagine a strategic reason for intentionally delaying making such a motion. *See* 3 LaFave *et al.* § 11.10(c). Indeed, courts often have held that the failure to raise either a double jeopardy or statute of limitations claim will constitute ineffective assistance of counsel. *See* Chin, *supra* note 10, at 1180 & n.11 (collecting cases holding failure to raise double jeopardy claim constitutes ineffective assistance of counsel); *United States v. Coutentos*, 651 F.3d 809, 816-18 (8th Cir. 2011) (holding failure to raise statute of limitations defense constituted ineffective assistance of counsel); *United States v. Hansel*, 70 F.3d 6, 7-8 (2d Cir. 1995) (same). Given that ineffective assistance will constitute "good cause" excusing untimely filing of a motion under Rule 12, *see* 24 Moore's Federal Practice, Federal Rules of Criminal Procedure § 612.06 (3d ed. 2011), it seems appropriate to presume that cause exists when an attorney fails to raise a statute of limitations claim, and thus the sole issue to be considered is whether the defendant was prejudiced by the failure to make the motion on a timely basis.

ii. Multiplicity and Duplicity

Unlike double jeopardy and statute of limitations, claims of duplicity and multiplicity are generally required to be raised prior to trial. *See* 1A Wright & Leipold §§ 145, 193 & nn.7, 39-40 (collecting cases). However, as set forth below, in many Circuits, resolution of such motions is deferred until after the record is fully developed at trial. We believe that as long as trial courts are directed to address issues of multiplicity and duplicity either at trial or at sentencing, defendants should not be punished for failing to raise them pretrial.

Under Rule 12, motions that allege "a defect in the indictment" and that can be resolved "without a trial on the merits" must be brought before trial. *See* Proposed Rule 12(b)(3). Motions raising multiplicity claims, however, may satisfy neither of these conditions. *See* Chin, *supra* note 10, at 1197-1202 (making this argument). For one, multiplicity does not constitute a defect in the indictment. To the contrary, multiplicity in the indictment, although discouraged, remains permitted under the Federal Rules of Criminal Procedure. *See* 1A Wright & Leipold § 142 (noting that "[i]t remains permissible to charge a single offense in several counts" although "the rules are intended

to discourage that practice"). Second, such motions often may not be susceptible to resolution before trial. As the Supreme Court has noted, whether charged acts constitute multiple offenses often "may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225 (1952); *see also United States v. Griffin*, 765 F.2d 677, 681 (7th Cir. 1985) ("Multiplicity problems may appear in various forms and may not be apparent until after the government presents evidence at trial."). Even when it is evident that an indictment is multiplicitous, whether the indictment will cause the defendant to be convicted multiple times or receive multiple sentences for the same offense—the principal danger posed by multiplicity, *see* 1A Wright & Leipold § 145—may only be ascertained at the conclusion of trial. For this reason, even where the grounds for a multiplicity claim are evident before trial, courts often determine that resolution of the claim should be delayed until the jury is charged or after a verdict has been returned. *See id.* The determination, in other words, is that the motion cannot be resolved without a trial on the merits.

That courts have the discretion to cure a multiplicity issue during or after trial also weighs in favor of not mandating that multiplicity objections be raised pretrial. As mentioned above, the principal danger posed by multiplicity is that a defendant may be convicted multiple times or receive multiple sentences for the same offense. *See id.* Neither risk is realized until the conclusion of trial. For this reason, a multiplicity problem does not necessitate pretrial dismissal of the indictment. *See id.* (noting that a "[d]efendant can move to have the prosecution elect one of the counts and to have the other counts dismissed, but even this is discretionary with the court"). Rather, multiplicity is typically cured by the court issuing an appropriate jury instruction, *see, e.g.*, *United States v. Bolt*, 776 F.2d 1463, 1467 (10th Cir. 1985); *United States v. Robinson*, 651 F.2d 1188, 1195 (6th Cir. 1981), or, if the jury returns guilty verdicts on multiplicitous counts, entering judgment on only one, *see Ball v. United States*, 470 U.S. 856, 865 (1985). Given that multiplicity problems may be cured during or even after trial using these remedies, it makes sense to allow defendants to make multiplicity claims even after trial has commenced. *See* Chin, *supra* note 10, at 1202 (reasoning that a pretrial motion to remedy multiplicity problems may be "premature and unnecessary"); *cf.* 1A Wright & Leipold § 193 n.39 (arguing that if a claim can be cured by government at any time before submission to jury, a defendant should be allowed to raise the claim at trial). Indeed, the Supreme Court has suggested that such claims should be permitted. *See Universal C.I.T. Credit Corp.*, 344 U.S. at 225 (noting that "at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense").

Similar reasons support allowing defendants to bring duplicity claims even after trial has begun. As is the case for multiplicity claims, whether charged acts could have been stated as separate offenses (thereby rendering duplicitous the count in which they are combined) frequently may not be evident until trial. *Cf. United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) (noting that duplicity objection will not be waived "if it is not until the proceeding is underway and the government's evidence is presented that a

court can reach the conclusion that an indictment is impermissibly duplicitous"); *United States v. Buchmeier*, 255 F.3d 415, 421 (7th Cir. 2001) (noting that indictment will not be duplicitous where charged acts "comprise a continuing course of conduct that constitutes a single offense"). Moreover, several courts have held that, for a cognizable duplicity issue to arise, the indictment must not only contain allegations that could have been stated as separate offenses, but must also risk prejudice to the defendant or implicate the policy considerations that underlie the duplicity doctrine. *See, e.g.*, *United States v. Root*, 585 F.3d 145, 155 (3d Cir. 2009) ("If the doctrine of duplicity is to be more than an exercise in mere formalism, it must be invoked only when an indictment affects the policy considerations that underlie that doctrine.") (internal quotations omitted); *Sturdivant*, 244 F.3d at 75 (noting an indictment will be "impermissibly duplicitous where: 1) it combines two or more distinct crimes into one count . . . and 2) the defendant is prejudiced thereby"). However, like those posed by multiplicity, the principal dangers posed by duplicity—that a jury may convict on duplicitous offences without reaching a unanimous verdict or may be prevented from convicting on one offense but not on another—are not realized until the conclusion of trial. *See* 1A Wright & Leipold § 142. Consequently, while the fact that an indictment is duplicitous may be evident before trial, duplicity claims nonetheless may not be capable of resolution without a trial on the merits.

In addition, duplicity, like multiplicity, may be cured during or even after trial. As stated above, the principal dangers posed by duplicity are not realized until the conclusion of trial. Accordingly, a finding of duplicity normally does not require pretrial dismissal of an indictment. *See id.* §§ 142, 145 (noting that duplicity is not fatal to an indictment or information). Rather, duplicity may be cured by requiring the government to elect which offense it intends to pursue at trial, as long as the evidence offered is limited to this offense. *See id.* § 145. It may also be cured at trial by a jury instruction, *Sturdivant*, 244 F.3d at 79, or special verdict, *see United States v. Huber*, 603 F.3d 387, 394 (2d Cir. 1979), designed to ensure that the jury is unanimous on each offense charged in the duplicitous count. Even if a defendant is convicted on a duplicitous count, the court may still cure the duplicity problem by sentencing the defendant as if he had been convicted of only the offense bearing the lesser penalty. *See Sturdivant*, 244 F.3d at 80. Because duplicity may be cured during or even after trial using these remedies, defendants should not be restricted to alleging duplicity prior to trial. *See* 1A Wright & Leipold § 193 n.39 (reasoning that, "[s]ince duplicity . . . can be cured by requiring the government to elect at any time before submission to the jury," unlike most of the defects Rule 12 requires be brought before trial, "a defendant should be permitted to raise the point for the first time at trial").[12]

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[12] Perhaps for this reason, *see* 1A Wright & Leipold § 193 n.39, while the majority of decisions require duplicity claims to be brought before trial, at least a few courts have indicated that claims alleging duplicity may be raised at trial. *See United States v. Anderson*, 605 F.3d 404, 414 (6th Cir. 2010) (noting that duplicity claims implicating the right to a unanimous jury verdict may be raised mid-trial); *United States v. Droms*, 566 F.2d 361, 363 (2d Cir. 1977) ("An objection to duplicity is waived if not raised before trial or, at the least, before verdict."); *Mitchell v. United States*, 434 F.2d 230, 230 (9th Cir. 1970) ("It is the rule in this Circuit that failure to object to duplicity either prior to or during trial, constitutes a waiver of that

For these reasons, we urge the Committee to consider removing duplicity and multiplicity from the list of claims that must be brought before trial and allowing these claims to be presented after trial has commenced. Otherwise, courts may see no reason to cure even serious duplicity or multiplicity problems raised during trial if claims identifying them may simply be dismissed as untimely. At the very least, the Committee should clarify that multiplicity and duplicity problems often may not be capable of being resolved before a trial on the merits. Significantly, this step would make clear that, even if a defendant does not challenge a multiplicitous or duplicitous indictment before trial, he may still challenge duplicity or multiplicity issues relating to his conviction or sentence. While several courts already have adopted this view[13] (particularly for multiplicity claims[14]), others have evinced confusion as to whether such claims may be waived if a challenge is not raised before trial.[15]

iii. Constitutional Violations

We also would urge the Committee to consider altering the standard for excusing the untimely presentation of Rule 12(b)(3) claims alleging constitutional violations, so

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objection."); *United States v. Costner*, 359 F.2d 969, 974 (6th Cir. 1966) ("Failure . . . to raise the question prior to trial and verdict waive[s] the vice of duplicity."); *United States v. Laverick*, 348 F.2d 708, 714 (3d Cir. 1965) (allowing duplicity claim raised for first time on appeal but noting "an indictment should be construed broadly in favor of the Government after a verdict has been rendered thereon"); *Franklin v. United States*, 330 F.2d 205, 207 (D.C. Cir. 1963) ("[D]efendants having failed to attach the indictment in limine, or even during the trial, the duplicity and misjoinder were cured by the verdict."); *Witt v. United States*, 196 F.2d 285, 286 (9th Cir. 1952) (holding duplicity claim waived where appellant "interposed no objection to [the charge] either prior to or during the trial"); *see also* 1A Wright & Leipold § 145 (noting that some courts describe duplicity as waived if not raised prior to verdict).

[13] *See, e.g.*, *United States v. Marino*, 682 F.2d 449, 454 n.3 (3d Cir. 1982); *United States v. Bradsby*, 628 F.2d 901, 905-06 (5th Cir. 1980); *Launius v. United States*, 575 F.2d 770, 772 (9th Cir. 1978); *United States v. Rosenbarger*, 536 F.2d 715, 721-22 (6th Cir. 1976); *see also* 1A Wright & Leipold § 145 & nn.15-16 (noting that challenge to multiple sentences or convictions need not be raised pretrial and collecting cases).

[14] Although raised less often, the same reasoning applies for duplicity problems relating to a conviction or sentence. *Cf. United States v. Kakos*, 483 F.3d 441, 444 (6th Cir. 2007) ("[T]he alleged harm to the defendant's substantive rights resulting from a duplicitous indictment can be raised at trial or on appeal, notwithstanding the defendant's failure to make a pretrial motion. . . . [D]efendant's objections to the indictment made after trial has begun are properly addressed not to the indictment itself but to the harm stemming from the duplicitous indictment.").

[15] *See, e.g.*, *United States v. Abboud*, 438 F.3d 554, 566-67 (6th Cir. 2006) (noting intra-circuit conflict on whether defendant who fails to raise multiplicity claim relating to indictment also waives claims that he was subjected to multiplicitous convictions or sentences); *United States v. Mastrangelo*, 733 F.2d 793, 800 (11th Cir. 1994) (holding failure to object to multiplicitous indictment barred appeal on grounds that defendant received multiplicitous convictions); *United States v. Griffin*, 765 F.2d 677, 680-82 (7th Cir. 1985) (misconstruing cases holding that defendant is not required to bring challenge to multiplicitous convictions or sentences before trial).

that the treatment of these claims is aligned with that proposed for claims of double jeopardy and failure to state an offense.

The Advisory Committee has argued that "a more generous standard of relief" is appropriate for untimely claims for failure to state an offense because such claims may "implicate important constitutional rights of a defendant." May 2011 Report to Standing Committee 17. Its justification for applying the same standard to untimely double jeopardy claims also rests on the fact that such claims involve important constitutional concerns. *See id.* at 21 ("The Advisory Committee concluded that the standard of showing prejudice alone was appropriate for violations of the fundamental right not to be twice placed in jeopardy or punished more than once for the same offense."). While we believe that double jeopardy claims should not be restricted to pretrial motions for the reasons discussed above, if such a requirement is to be imposed, the potential sacrifice of constitutional rights strongly supports a more generous standard of relief for these claims. If the failure to raise a claim of double jeopardy or failure to state an offense before trial will prevent its being raised later, it is reasonable to presume that a competent attorney would not fail to raise such a claim. Under this presumption, the proposed Rule appropriately requires only a showing of prejudice, but not an accompanying showing of cause, to excuse a failure to present a claim of double jeopardy or failure to state an offense.

If the fact that claims of double jeopardy and failure to state an offense may implicate important constitutional rights warrants more generous treatment of such claims, then the same should be true for other constitutional claims. The Supreme Court has held repeatedly that courts "must indulge every reasonable presumption against the loss of constitutional rights." *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (citing *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)); *accord North Carolina v. Butler*, 441 U.S. 369, 373 (1979). In light of the presumption against waiving constitutional claims, it seems appropriate to excuse untimely filing of such claims upon a showing of prejudice, without demanding an accompanying showing of cause, at least absent some clearer sign that there has been an "'intentional relinquishment or abandonment'" of the claim. *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Zerbst*, 304 U.S. at 464). Without this step, meritorious but untimely constitutional claims will be—except in exceptional circumstances—lost to defendants, given the extremely high bar the "cause and prejudice" standard presents.

D. Proposed Application of the "Cause and Prejudice" Standard

As the Advisory Committee notes, Rule 12 has always contemplated that, if certain claims are not presented before trial, defendants may be prevented from later presenting them, absent a showing of "good cause" for failing to do so. *See* May 2011 Report to Standing Committee 7; *see also* 1A Wright & Leipold § 190 ("The notion that the failure to raise certain objections and claims will result in a waiver has been part of Rule 12 since its adoption, as has the notion that courts could for cause grant relief from the waiver."), Although the Rule itself does not specify what constitutes "good cause,"

nor require a showing of prejudice as part of this inquiry, in support of the inclusion of the "cause and prejudice" standard in proposed Rule 12(c), the Advisory Committee has noted that several Supreme Court cases have suggested that the "good cause" standard be interpreted identically to the standard applicable on collateral review, *see Wainwright v. Sykes*, 433 U.S. 72, 84 (1986); *Davis v. United States*, 411 U.S. 233, 241-42 (1973), and as requiring a showing of both cause and prejudice, *see Murray v. Carrier*, 477 U.S. 478, 494 (1986); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 364 (1963).[16] As the Advisory Committee notes, however, notwithstanding these cases, many lower courts require only a showing of cause, and not prejudice, for claims covered under Rule 12 that are presented for the first time at trial, *see* May 2011 Report to Standing Committee 10 & n.9 (collecting illustrative cases), and a showing of plain error when such claims are presented for the first time on direct appeal, *see* cases cited *supra* note 3.

"Cause and prejudice" is, of course, an exceptionally difficult standard for a defendant to meet. *Cf. United States v. Frady*, 456 U.S. 152, 166 (1982) (noting that demonstrating cause and prejudice is "a significantly higher hurdle" than demonstrating plain error). We believe that the application of this standard to claims presented for the first time at trial or on direct appeal is unduly harsh and prejudicial to defendants. Instead, for claims presented for the first time at trial, defendants should be required, as Rule 12 suggests, only to demonstrate "cause"—which we believe appropriately should be a far less demanding showing than that required on collateral attack—but not prejudice. For claims presented for the first time on appeal, defendants should be required to demonstrate only plain error. This treatment would be perfectly adequate to promote judicial efficiency and deter dilatory tactics, while more adequately effectuating defendants' interests in presenting a defense. The "cause and prejudice" standard should be reserved for claims raised for the first time on collateral review, when the interests in conserving judicial resources and protecting the finality of judgments are far more important.

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[16] Significantly, the discussion of the appropriate standard of review to be applied at trial and on direct appeal under Rule 12 appears only in dicta in nearly all of these cases. The sole exception appears to be *Shotwell*, in which the Supreme Court held only that it was *permissible* for a court to take prejudice into account on direct appeal in determining whether good cause existed to excuse an untimely filing. *See Shotwell Mfg.*, 371 U.S. at 364 (holding "it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12]"). In *Davis*, the Court reasoned that Rule 12's "cause" standard should apply on collateral review, but added nothing to *Shotwell*'s discussion of how the standard should be interpreted at trial or on direct appeal. *See* 411 U.S. at 241-42. Only in dicta in later cases has the Court described these two cases as standing for the proposition that Rule 12 requires the "cause and prejudice" standard to be applied at trial and on direct appeal, as it is on collateral review. *See, e.g.*, *Carrier*, 477 U.S. at 494 (noting that Rule 12 "as interpreted in [*Davis* and *Shotwell*] treat[s] prejudice as a component of the inquiry into where there was cause for noncompliance with [Rule 12]"); *Wainwright*, 433 U.S. at 84 (describing *Davis* as interpreting Rule 12 to require that untimely claims "be barred on habeas, as on direct appeal, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation").

In its report, the Advisory Committee notes its willingness to "trim" the proposed list of claims that must be brought prior to trial "on the basis of public comments." *See* May 2011 Report to Standing Committee 25. While we support several of the clarifications the Advisory Committee has proposed, we remain deeply concerned that the proposed list would include several claims that should be permitted even if not raised before trial. Not only is the expansion of the list of mandatory pretrial motions unwarranted, the application of the "cause and prejudice" standard to motions covered under Rule 12(b)(3) and presented for the first time at trial or on direct appeal is unduly harsh and prejudicial to defendants. Under the proposed Rule, the application of this standard will pose an often insurmountable obstacle to the untimely filing of even meritorious claims. In our view, the interests of justice would be better served if defendants are not unnecessarily prejudiced by unjustified extensions of this exacting standard. For this reason, we urge the Committee to make further changes to the proposed Rule before considering its adoption.

Respectfully yours,

Audrey Strauss
President, NYCDL

Jeremy H. Temkin (AS)
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Chair, NYCDL Ethics, Rules,
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